
TAKING “JUSTICE AND FAIRNESS” SERIOUSLY: DISTRIBUTIVE
JUSTICE AND THE TAKINGS CLAUSE

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Taking “Justice and Fairness” Seriously

In the absence of justice, what is sovereignty but organized
brigandage?

St. Augustine¹

The Fifth Amendment to the U.S. Constitution provides, in part, that private property shall not “be taken for public use without just compensation.” This is the so-called “Takings Clause,” and, since the Supreme Court’s 1922 opinion in *Pennsylvania Coal v. Mahon*, it has served as a limitation on government regulatory actions that go “too far” in restricting the use of property. Defining “how far is too far” is the central objective of Supreme Court takings jurisprudence, but the Court’s analysis is recognized by all to be (as it is most politely phrased) “a muddle.”²

Perhaps the most important reason for this “muddle” is the failure of the Court to articulate a coherent conceptual basis for the Takings Clause. A variety of themes that have been advanced to describe the basis of the Takings Clause. For some, the Takings Clause represents a critical component of personal liberty that bars the government from interfering with some almost absolute right to property. For others, it is merely a codification on the government’s authority to appropriate title through eminent domain.

One important theme arises from the otherwise unremarkable case of *Armstrong v. United States*. In that opinion, Justice Black advanced the dogmatic conclusion that the Takings Clause “was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”³ This conception of the Takings Clause has been cited in numerous cases since *Armstrong*. In *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, for example, Justice Stevens devoted much of his opinion to an analysis of whether principles of “justice and fairness” justified temporary restrictions on construction under the Takings Clause.

This conception of “justice and fairness” embodied in *Armstrong*

1. St. Augustine, *The City of God*, 88 (Image Press, 1958).

2. See Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. Cal. L. Rev. 561 (1984)

3. *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Black’s opinion refers to “fairness and justice,” but the Supreme Court routinely cites the proposition as “justice and fairness.” See, e.g., *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978). Who am I to differ; I go with “justice and fairness.”

The court has also, in a number of cases since *Armstrong*, cited to similar dogmatic language in the 1893 case, *Monongahela Navigation Co. v. U.S.*, 148 U.S. 312, 325 (1893) in which the Court stated that the Fifth Amendment “prevents the public from loading upon one individual more than his just share of the burdens of government....” The principle is, however, generally traced to *Armstrong*. See William Michael Treanor, *The Armstrong Principle, the Narratives of Takings, and Compensation Statutes*, 38 Wm. & Mary L. Rev. 1151 (1997);

raises one of the central concerns of moral philosophy – an issue that has captured the attention of philosophers from Aristotle to *Star Trek’s* Mr. Spock - when do the needs of the many outweigh the needs of the few?⁴ In Aristotelian terms, this is the issue of “distributive justice” or the ethical analysis of the distribution of benefits and burdens in society.⁵

An issue of philosophy to academics, this issue of distributive justice has now been converted by the Court in to an issue of constitutional law. Although the Supreme Court, since *Armstrong*, has described the Takings Clause as reflecting a concern for distributive justice, it has never explained the historical or legal basis for this view. Perhaps worse, the Court has not directly addressed the consequences of incorporating principles of distributive justice into the Fifth Amendment.

The purpose of this essay is to consider some of the implications of incorporating a principle of distributive justice into the Fifth Amendment.⁶ It begins with an analysis of the origins of Fifth Amendment regulatory Takings analysis and the basis (or lack of one) for the inclusion of a principle of distributive justice. Next it briefly discusses the concept of distributive justice reflected in the *Armstrong* principles of “justice and fairness.” Finally, it addresses four key implications of incorporating a conception of distributive justice into the takings clause. First, a focus on distributive justice is a move away from an assessment of government regulation of private property based on individual “rights.” Second, the traditional takings factors previously advanced by the Court can be seen in a new way if analyzed in light of principles of distributive justice. Third, a focus on distributive justice may open new sources for evaluating takings. Finally, a concern for distributive justice raises troubling questions about the legitimacy of decisions grounded, not in history or neutral principles, but in an unelected judiciary’s views of principles of justice and fairness. A grounding of the Takings Clause in these

4. See generally *Star Trek II: The Wrath of Khan* (1982).

5. See *infra* notes 27-41 and accompanying text for a discussion of the concept of distributive justice. Fairness, at least since Aristotle, has been seen as involving a number of distinct applications. Thus, distributive justice can be seen as analytically distinct from retributive and compensatory justice.

6. The objectives of this essay are thus modest. It is not my intent to derive a “takings test” based on principles of distributive justice or to evaluate the outcome of any dispute in those terms. Rather, it is to raise some of the serious implications that follow from incorporation a principle of distributive justice into the Takings Clause.

There is a growing literature that on the role of “justice and fairness” in takings analysis. Perhaps the most influential article in the field is Professor Michelman’s classic, *Property, Utility and Fairness: Comments on the Ethical Foundations of “Just Compensation*, 80 Harv. L.Rev. 1165 (1967). Other scholars have taken up the challenge of interpreting the requirements of the Takings Clause in light of the Supreme Court’s reference to “justice and fairness.” See, e.g., Hanoch Dagan, *Takings and Distributive Justice*, 85 Va. L.Rev. 741 (1999); Treanor, *supra* note 3; Leigh Raymond, Comment, *The Ethics of Compensation: Takings, Utility, and Justice*, 23 Ecology L.Q. 577 (1996).

ethical principles may suggest an extremely limited role for the Court in finding a regulatory taking.

I. SEARCHING FOR THE MEANING OF THE TAKINGS CLAUSE: HISTORY, POWER AND DISTRIBUTIVE JUSTICE

Although many see the Takings Clause as a central statement of fundamental liberty, the Takings Clause has two dirty little secrets. First, there is virtually no historical evidence on the intent that lay behind the adoption of the Taking Clause in the Fifth Amendment. Second, it was not until 1922 that the Supreme Court, in what was an extraordinary act of judicial activism, claimed that the Takings Clause acted to limit government regulatory authority.

A. THE HISTORICAL BASIS OF THE TAKINGS CLAUSE

Although there were ideas current in the seventeenth and eighteenth centuries (and contemporaneous land use regulation by States) that might inform an interpretation of the Takings Clause, there is almost no direct evidence of the intent of those who actually proposed and adopted the Takings Clause.⁷ The Bill of Rights was adopted by Congress in 1789 and subsequently ratified by the States.⁸ Many of the provisions in the Bill of Rights arose from petitions submitted by the states, but this was not the case with the Takings Clause. The Takings Clause stands alone as the only part of the Bill of Rights that was not requested by a single state.⁹

Madison’s first draft of what became the Takings Clause stated that a person could not “be obligated to relinquish his property, where it may be necessary for public use, without just compensation.”¹⁰ This draft was later revised, without explanation, into its current version by

7. See, e.g., John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 *Northwestern U. L.Rev.* 1099 (2000); John F. Hart, *Colonial Land Use and Its Significance for Modern Takings Doctrine*, 109 *Harv. L.Rev.* 1252 (1996); William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 *Yale L.J.* 694 (1985).

Perhaps the best exchange on the role of history in evaluating takings claims arose between Justices Scalia and Blackmun in *Lucas v. South Carolina Coastal Comm’n*, 505 U.S. 1003 (1992). In his majority opinion, Justice Scalia finds that the Taking Clause is grounded in some, presumably Lockean, “historical compact.” *Id.* At 1028. Justice Blackmun in dissent describes the lack of historical basis for the majority’s view. *Id.* at 1056. Scalia, in a footnote rebuttal, disputes the relevance of the historical record. *Id.* at 1028 n. 15. Blackmun, getting in the last word, writes: “I cannot imagine where the Court finds its ‘historical compact,’ if not in history.” *Id.* at 1060 n. 26.

8. Actually, Congress adopted twelve amendments as part of the Bill of Rights; only ten were subsequently ratified by States.

9. See E. Dumbauld, *The Bill of Rights and What It Means Today* 161-63 (1957).

10. See *The Complete Bill of Rights: the drafts, debates, sources, and origins* 361 (Neil H. Cogan, ed. 1997); Treanor, *supra* note 7 at 708-712 (discussion of the history of the adoption of the Takings Clause and discussion of Madison’s views).

a Committee of the House of Representatives. In the reported debate on the proposed Bill of Rights in the House and Senate, there is no reference to the Takings Clause.¹¹ Certainly the Takings Clause did not reflect an eighteenth century view that the government could not regulate land without providing compensation; scholars have pointed to numerous practices of the states at the time of adoption of the Bill of Rights that involved substantial government regulation of land use without compensation.¹²

In short, there is no contemporaneous evidence that the people who drafted or adopted the Takings Clause cast the provision as a central protection of government regulation of private property.¹³ Even more certainly, there is no evidence that the Takings Clause “was designed” to incorporate principles of distributive justice. This, of course, does not mean that the Takings Clause cannot fill that role; it does, however, raise real questions as to whether the “original intent” of its drafters supports a specific view of the meaning or purpose of the Takings Clause.

B. HOLMES, PENNSYLVANIA COAL, AND A JUDICIAL POWER GRAB

The Takings Clause was the subject of relatively little attention until the pivotal Supreme Court case of *Pennsylvania Coal v. Mahon* in 1922.¹⁴ *Pennsylvania Coal* involved a challenge by coal companies to a Pennsylvania statute that required coal companies engaged in subsurface mining to leave pillars of coal in place to support the surface from subsidence. Justice Holmes, in a short but seminal opinion, held that the statute violated the Takings Clause. The Supreme Court, for the first time, announced the crucial proposition that a regulation may violate the Takings Clause even if it does not effect a physical appropriation of property. As Holmes stated: “The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”¹⁵

11. See Cogan, *supra* note 10 at 375.

12. See Hart, *supra* note 7.

13. This has not prevented some from finding a specific intent underlying the Takings Clause in certain ideas current at the time of adoption of the Bill of Rights. Thus, Richard Epstein would define the purposes of the Takings Clause in his particular reading of John Locke. See Richard Epstein, *Takings: Private Property and Eminent Domain* (1985). In Epstein’s view, only “reciprocity of advantage” would justify a government regulation that seemed to diminish the value of property. In other words, Epstein would interpret the Takings Clause to prohibit redistributive goals of government. Douglas Kmiec would find a definite meaning in the Takings Clause arising from Blackstone’s views on the absolute nature of property. In Dean Kmiec’s views, government regulation that diminishes value is limited to those expectations of property ownership, defined by common law views of nuisance, that underlay some eighteenth century commentator’s views of property ownership. See Douglas W. Kmiec, *The Original Understanding of the Taking Clause is Neither Weak Nor Obtuse*, 88 Colum. L. Rev. 1630 (1988).

14. 260 U.S. 393 (1922).

15. *Id.* at 415.

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To be sure there is an obvious logic to the proposition. Being precluded from making use of your property may have the same effect as having title actually taken by the government. But besides the “obvious,” on what did Holmes rely for this groundbreaking proposition?¹⁶ The answer is nothing. Holmes cites to no support for this position other than the self-evident logic. Whatever its “obvious” logic and appeal, the expansion of the Takings Clause to cover regulatory acts by the government was a tremendous shift from the Court’s past treatment of the Takings Clause.¹⁷ It was, and is, an extraordinary assertion of the judiciary’s authority to invalidate otherwise validly adopted government regulation based on a court’s view of whether the regulation goes “too far.” Few opinions of the Supreme Court have resulted in so great a usurpation of authority by the judiciary with so little support.

Holmes sketched out a variety of factors that he viewed as relevant to determining “how far” is “too far” for purposes of determining whether a regulation constitutes a taking of private property. I will discuss some of those below, but the crucial first step was the equation of regulation with a taking. Since *Pennsylvania Coal*, the Court has identified a limited class of “per se” takings, but the major theme of Supreme Court takings analysis has been an “ad hoc” balancing of factors whose basis have largely been unexamined and unexplained.¹⁸

C. ARMSTRONG, FAIRNESS AND JUSTICE

In 1960, the Supreme Court announced what was a new and distinctive statement of the purpose of the Takings Clause. In *Armstrong v. United States*,¹⁹ Justice Black made the following assertion about “the” purpose of the Takings Clause. According to Black:

The Fifth Amendment’s guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.²⁰

There is much to be said for this view of the Takings Clause, but what

16. That is, in fact, the basis for Holmes’ opinion; he states that “obviously” government regulatory must have some limits. *Id.*

17. In *Lucas v. South Carolina Coastal Comm’n*, 505 U.S. 1003, 1014 (1992), Justice Scalia acknowledged that prior to *Pennsylvania Coal* the Takings Clause had been limited in application to situations of direct appropriation of private property.

¹⁸ See, e.g., *Lingle v. Chevron U.S.A.*, 545 U.S. 528 (2005) for a discussion of the Court’s existing approach to evaluating regulatory takings. See *infra* notes for a discussion of the factors generally identified by the Court as relevant in an “ad hoc” balance.

19. 364 U.S. 40 (1960).

20. *Id.* at 49.

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cannot be said is that it is founded in history or precedent. What source does Justice Black rely on for his statement about the purpose of the Takings Clause? Black cites the same source as Justice Holmes in *Pennsylvania Coal* – nothing.²¹ Although this view of the Fifth Amendment has been repeated many times by the Court,²² it is generally supported by a citation to Black’s statement in *Armstrong*. Nothing in the history of the adoption of the Takings Clause, of course, directly supports this position, and the Supreme Court has done nothing since *Armstrong* to justify its legitimacy.

Content to cite Black’s statement of the Takings Clause, the Supreme Court has never seriously explored the implications of viewing the Takings Clause in terms of distributive justice. Indeed, the Court seems to have shied away from any serious analysis. In *Palazzolo v. Rhode Island*,²³ Justice O’Connor, noted that

[t]he concepts of “fairness and justice” that underlie the Takings Clause, of course, are less than fully determinate. Accordingly, we have eschewed “any “set formula” for determining when “justice and fairness” require that economic injuries caused by public action by compensated by the government, rather than remain disproportionately concentrated on a few persons. The outcome instead “depends largely “upon the particular circumstances [in that] case.”²⁴

In essence, in assessing “justice and fairness” the Court has resorted to the same ad hoc balancing that has been the court’s traditional approach to the Takings Clause since *Pennsylvania Coal*.

This was certainly the approach the Court adopted in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*.²⁵ Justice Stevens’ majority opinion purported to address directly whether principles of “justice and fairness” would themselves support a categorical rule that development moratoria constituted a Fifth Amendment Taking. In rejecting such a categorical rule, Justice Stevens again essentially equated the application of principles of “justice and fairness” to the case-by-case balancing approach conventionally employed by the Court in takings cases. Although Justice Stevens assessed traditional factors in his analysis, there was nothing which applied those factors in any way that uniquely evaluated the distributional justice issues raised by the *Armstrong* principles.²⁶

21. Justice Black does provide a “cf.” to *Thibodo v. United States*, 187 F.2d 249 (9th Cir. 1951). This Ninth Circuit case, of no particular ethical pedigree, involved a rather technical discussion of whether a bond holder could recover principal and interest when the government condemned land securing the bond.

22. The Supreme Court, by my Westlaw search, has cited to this statement in *Armstrong* 16 times since 1960.

23. 533 U.S. 606 (2001)

24. *Id.* at 633 (citations omitted).

25. 535 U.S. 203 (2002).

²⁶ The statement, and its logic, was applied with perhaps the greatest force

If, however, the Court is going to ground Takings analysis in conceptions of “justice and fairness” it is time to confront the implications of this approach.

III. PRINCIPLES OF DISTRIBUTIVE JUSTICE

The concept of distributive justice has, at its core, a concern with the fair distribution of resources among members of society. It involves basic questions relating to the justifications for resolving competing claims to finite resources. What is a just distribution and what are the qualities that entitle an individual to claim a just share? It also involves, in the words of the Armstrong Principle, a concern for deciding when costs can be imposed on a few and when “in justice and fairness” such costs should be born by the public as a whole.

Evaluation of the concept of distributive justice has been a basic part of Western ethical thinking for over three thousands of years. Aristotle’s writings in the *Nicomachean Ethics* are still central to discussions in this area. Enlightenment philosophers, especially David Hume, have described fundamental principles that govern an evaluation of distributive justice. Over the last fifty years, much of the academic literature has focused on economic and game theoretic approaches to evaluation of distributive justice. John Rawls’ work on evaluation of the fairness of institutions and the role of impartiality has become a basic part of any discussion of distributive justice. The literature on distributive justice is enormous and can be extraordinarily technical.

As with most areas of ethics, the literature produces many questions but few answers. General consensus on a number of fundamental principles does exist, however, and these principles guide the search for theories of distributive justice.

A. PREMISES OF DISTRIBUTIVE JUSTICE

One concept stands at the center of an evaluation of distributive justice; it is the concept of equality. At least since Aristotle, the basic tenet of distributive justice is the requirement of equality of treatment of individuals. To paraphrase Aristotle, distributive justice involves treating “like things, in a like manner.”²⁷ According to Amartya Sen, all theories of distributive justice involve a requirement of equality;

by Justice Rehnquist in his dissent in *Penn Central Transportation v. New York City*, 438 U.S. 104 (1978). In that case, the majority upheld a New York City historic preservation law that limited plans for a major alteration of Penn Station. Rehnquist noted that the owners of Penn Central were being singled out because the building was built too well, and Rehnquist, relying in part on Black’s statement in *Armstrong*, would have held the requirement a taking since it unfairly singled out the property owner to bear the cost of a public benefit.

27. See Aristotle, *Politics*, Everyman Ed., Warrington trans., at pg. 80-81; Aristotle, *Nicomachean Ethics*, V.3. 1131a10-b15.

theories vary only with respect to what quality is to be equalized among people – the “*equalisandum*.”²⁸ This requirement for equality of treatment is generally known as the “formal principle of justice.”

Despite this focus on equality, distributive justice does *not* require that people be treated equally, only that differences in treatment are justifiable on grounds relevant to the distinction.²⁹ As Aristotle noted:

equals are entitled to equal things. But here we are met with an important question: Equals and unequals in what? That is the difficult question.³⁰

Difficult question indeed.

In contrast to the “formal principle of justice” that requires the equal treatment of equals, the “material principles of justice” define the criteria that justify differing treatment of individuals. Under varying theories, distributive justice is satisfied if differences are justified under appropriate material principles of justice. Thus, as discussed below, if “merit” is viewed as the appropriate material principle of justice, persons who work harder or produce more may be entitled to a greater share of a finite resource. If “need” is the appropriate material principle, a view of “from each according to his ability, to each according to his need” may be justified. Identification of appropriate “material principles” is perhaps the central debate in analysis of distributive justice.

In most ethical theories, virtues and a Kantian set of morally compelled behaviors exist independent of the society in which they are evaluated. Thus, benevolence towards others may be a virtue that is independent the social institutions of a culture. In contrast, many philosophers view distributive justice as constituting a virtue that can *only* be assessed or identified in a social context.³¹ As such, one cannot determine what is “just” outside the context of the institutions of society, and one cannot say what an individual is “due” under principle of distributive justice without regard to such institutions. Thus, the obligations of distributive justice are not defined *ex-ante*, but arise from the institutions that establish relationships and claims within a society. Putting it simply, there may not be one morally

28. Amartya Sen, *Inequality Reexamined ?* (1992).

29. The Oxford Dictionary of Philosophy defines distributive justice as principles specifying the just distribution of benefits and burdens: the outcome in which everyone receives their due. A common basis is that persons should be treated equally unless reasons for inequality exist: after that the problems include the kind of reasons that justify departing from equality, the role of the state in rectifying inequality, the link between a distributive system and the maximization of well-being.

Simon Blackburn, Oxford Dictionary of Philosophy (1996)(def. of “justice, distributive”)

30. Aristotle, *Politics*, 80-81 (Everyman Ed., Warrington trans.).

31. Indeed, David Hume described justice an “artificial virtue.” See David Hume, *An Enquiry Concerning the Principles of Morals* (1751)

correct answer to the obligations of distributive justice that can be identified through traditional ethical appeal to deontological obligations or moral intuition.

B. THEORIES OF DISTRIBUTIVE JUSTICE

With these principles as a predicate, a variety of theories of distributive justice have been proposed to “solve” the question of how finite resources are to be “justly” allocated within society. These theories have been organized in a variety of ways that highlight certain common qualities of the theories. No particular classification perfectly captures the relationships among the differing theories, but they do help to focus on important elements. The following taxonomy focuses on several factors and highlights specific approaches associated with these theories.

1. *Maximization of Social Utility*

Perhaps the most coherent and well explored theory of distributive justice is one which holds that resources should be divided to secure the greatest overall utility to society as a whole. - in other words, utilitarianism. The philosopher most associated with a strict utilitarian theory of justice is, of course, Jeremy Bentham. There are recurring issues with application of a Benthamite utilitarian approach. What is the nature of the “utility” that is being maximized? How do you assess the individual utilities that are to be maximized? Yet, at its core, utilitarianism is based on a simple concept – there is a moral goal of maximizing the overall extent of satisfaction in society.³²

It would seem curious to claim utilitarianism as a credible theory of distributive justice. One of the fundamental criticisms of utilitarianism is that the principle is blind to concerns for the distribution of utility within society.³³ Certainly, the theory allows the unequal imposition of costs on some so long as the overall utility of society is furthered. Nonetheless, utilitarianism in some form has been a central component of “welfare-based” analysis of distributive concerns.³⁴ Something like utilitarianism has been analyzed in more traditional ethical modes. John Harsanyi, for example, has approached

32. Although in some respects it seems to glorify a conception of efficiency as the goal of justice and fairness, utilitarianism clearly is premised on two compelling ethical principles. First, each individual speaks with an equal voice in calculating overall efficiency. Although different people have differing assessments of utility, each person’s assessment is entitled to the same weight. In some sense, utilitarianism contains elements of autonomy, or respect for individual capacities, and impartiality in the sense of equal moral standing for each individual. Second, utilitarianism is fundamentally grounded a virtue of benevolence. The furthering of the well-being of humans is itself a moral goal that forms the core of judgments about moral actions.

33. See, e.g., William K. Frankena, *Ethics* (2d ed. 1973); Steven Kelman, *Cost-Benefit Analysis: An Ethical Critique*, *Regulation*, January-February 1981 at 33.

34. See, e.g., Stanford Encyclopedia of Philosophy, “Distributive Justice,” <http://plato.stanford.edu/entries/justice-distributive/>.

the issue of distributive justice in a way that eliminates the bias of unearned differences in individual capacity.³⁵ In other words, distributive justice is to be assessed not from the perspective of the claims of actual individuals, but rather from an "impartial" perspective that identifies justifiable moral claims independent of the identity of an existing claimant. This approach involves application of a form of a Rawlsian "veil of ignorance." Harsanyi's conclusion leads to a rule that maximizes the average utility of all members of society. In other words, if you don't know which role you will be assigned in society, the best rule of allocation for you to choose is one which maximizes the average utility of everyone. This is a conclusion that is essentially equivalent to utilitarianism.

At one time, the Supreme Court flirted with the idea of some concept of efficiency as a measure of the Takings Clause. The Court suggested that a regulation could not be a Taking if it "substantially advanced legitimate state interests." In *Lingle v. Chevron, U.S.A.*, however, the Court recently rejected this formulation. The court concluded that a Takings assessment based on efficiency and rationality was inappropriate since a test that does not consider how a "burden is allocated cannot tell us when justice might require that the burden be spread among taxpayers through the payment of compensation."³⁶

The Court's conclusion is certainly appropriate and consistent with some criticisms of the distributive implications of utilitarianism. The Court's conclusion is not, however, compelled. This is not to suggest that utilitarianism is the correct or even a compelling principle of distributive justice. It is to suggest that a utilitarian approach cannot be dismissed from the class of possible, legitimate ethical principles of distributive justice.

2. *Maximization of Individual Utilities*

Other approaches to distributive judgment involve an assessment of the individual utilities of competing claimants. In contrast to a classic utilitarian approach which uses individual utility solely to calculate the sum of total social utility, these approaches try to define rules which fairly satisfy the individual objectives of the claimants. In effect, they attempt to define "fair" solutions to the problem of division of a finite resource that can be said to fairly satisfy the individual utility objectives of the competing actors.³⁷ These

35. See John C. Harsanyi, Can the Maximin Principle Serve as a Basis for Morality? A Critique of John Rawls's Theory. 69 *American Political Science Review* 594-606 (1975).

36. 545 U.S. at 543.

37. See generally Brian M. Barry, *Theories of Justice* (1989). The original insights for this area developed from the work of Von Neumann and Morgenstern. Applying game theory principles to a fair division problem between two persons, the goal was to use information about the preferences of the two parties to determine some "best" allocation of a finite resource. Since these approaches rely on an assumption that a fair allocation will be in

approaches generally lead into the complex and highly mathematical area of game theory and bargaining solutions. The work of John Nash, for example, has led to a series of Nash Bargaining Solutions to fair division problems. These types of analysis fall in the domain of mathematicians and economists, and pity the poor lawyers and judges who might need to understand these concepts.

Reference to game theory, in fact, leads to the fundamental question - what does this have to do with an ethical issue of distributive justice? There is a well recognized disconnect between the language and methodology of game theory approaches and a more traditional philosophical approach to the ethics of distributive justice.³⁸ Nonetheless, these approaches do have standing as moral theories. As noted above, an axiom of distributive justice, from Aristotle to Sen, is the goal of providing "equality" of treatment. In an important sense, these game theory approaches define the object of equality as individual utility. This is a conceptually strong basis for a fair or justice allocation; it is simply not the only basis as will be discussed below.

Even if viewed as a form of ethical analysis of distributive justice, these game theory approaches have deep analytical problems that may prevent their application as a solution to Takings issues. First, these approaches, relying as they do on a principle of equality of individual utility, ignore other possible principles that might be defensible in assessment of a fair distribution. As will be discussed below, principles of "blameworthiness" or "need" are traditionally advocated as appropriate criteria. Viewed in this way, Nash Bargaining Solutions and indeed most game theory approaches do not solve the problem of fair division; they simply define an approach to calculating the solution to one, among many possible, approaches to the definition of distributive justice.³⁹ These approaches are not wrong; they simply

the best interest of both parties, any fair allocation must provide that no party is worse off after the allocation than the party was before. In such a case, both parties have an incentive to vary the initial allocation: one or both will be better off and neither will be worse off.

Given information about the parties' initial position or "non-agreement point" and their relative preferences for the outcome, certain game theoretic approaches can provide a series of possible outcomes that defined a range of allocations that would improve the position of one or both parties. Each of these different outcomes represented an allocation in which it was not possible to improve the utility of one party without decreasing the utility of the other - the pareto frontier. They could not, however, produce a single or "unique" solution to a two player fair division problem. A series of approaches stemming from the work of John Nash have provided solutions that purport to define a unique solution to a two player bargaining problem. These all, in one way or another, can be characterized as among a class of "Nash Bargaining Solutions."

38. See John E. Roemer, *Theories of Distributive Justice* (1996).

39. It is possible to argue that, although additional factors may be appropriate in assessing the fairness and justice of division, any allocation that satisfies, for example, some form of Nash Bargaining Solution also satisfies minimum conceptions of fairness. In other words, any solution that provides an equivalent division of individual utility presumptively satisfies a sense of fair or just allocation unless "trumped" by some other principle of

have no more moral standing than other approaches in consideration of fair division.

More significantly, a fundamental problem arises from a basic premise of these approaches. All require definition of a "non-agreement" point that specifies the amount of the resource that the parties will receive in the absence of further allocation.⁴⁰ Identification of the non-agreement point is critical to define the range of possible outcomes. No solution which makes a claimant worse off is permissible since that party has no incentive to move from the status quo.

The very purpose of the Takings analysis, however, is to define the circumstances in which a party who currently owns property should be compensated when there is some reallocation of value from the owner to society as a whole. If the non-agreement point is defined as absolute ownership, then there may be no bargaining solution that does not require compensation since no rational landowner makes that bargain. If, however, existing property rights are not absolute, but are limited by legitimate government regulation, then some range of uncompensated "Takings" are possible as a "fair" distribution.

Indeed, the definition of the non-agreement point is, in many ways, the basic question of distributive justice in the context of a Takings analysis. Since game theoretic approaches require the definition of a "non-agreement" point (and predict the implications that arise from a given non-agreement point), but they beg the fundamental questions raised by the Takings issue. Some other principle or principles of distributive justice must be invoked to resolve this question.

3. Justifiable Inequality

Although distributive justice is premised on a goal of equality of treatment, in many ways the goal is not to define the elements of equality; rather the goal is to define the elements that justify unequal treatment among individuals. In other words, distributive justice requires equal treatment of all individuals unless there is a "material principle" that justifies different and unequal treatment. A search for justifiable principles of inequality leads to a vast set of proposals in the history of moral philosophy. In these approaches, the key component of distributive justice is the moral justification that is made for any specific material principle of justice. Obviously, there is no consensus on any one approach to define universally acceptable principles.

One historically significant material principle of justice is an allocation based on "need;" the factor that justifies different treatment of people is their varying levels of need. With need as the principle of justice, a redistribution of wealth from "haves" to "have nots" is just.

distributive justice. A solution which does not constitute a Nash Bargaining Solution might be presumptively unfair unless justified by some other principle.

40. *See supra* note 37.

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Although having a familiar Marxist flavor, some view of fairness and justice as not only authorizing but compelling special treatment for the needy has a strong ethical pedigree.

Other views of justice justify the different treatment of individuals based on “merit” or “desert.” In other words, individuals through their effort or other morally commendable behavior are entitled to a greater share of resources. In contrast to a theory of merit that justifies a reward for morally praiseworthy or productive effort, it is a relatively uncontroversial proposition that a principle of distributive justice allows for the different treatment of individual’s who engage in morally blameworthy conduct. Thus, few theories of distributive justice would preclude a reallocation of an existing resource from an individual that acquired the resource through theft or by violation of some other socially proscribed conduct such as cheating or even monopolistic behavior. The goal of a theory of distributive justice that relies on a criterion of blameworthiness is to define that class of “bad” behavior that justifies redistribution. As discussed below, this issue is implicit in much of the Court’s search for Takings criteria.

4. Impartiality and Process

Other approaches to distributive justice invoke a conception of impartiality in assessing the justice of the distribution of resources in society. The goal of this approach is to define the elements of social institutions that result in a fair distribution of resources in a manner that is neutral or impartial with respect to any individual’s class or status role in society. The focus of this approach is not on the outcome of the distribution, but on the process and rules that decide the allocation.⁴¹

Several premises underlie much of this thinking. First, distributive justice is implemented through social institutions, and it is the fairness of institutions, not the fairness of individual determinations or allocations, that should be the focus of justice concerns. Second, individuals have no moral claim to their individual capacity or status in society (i.e., intelligence, strength, inherited status) and fairness therefore requires a distributive scheme that does not depend on allocation based on capacity. This does not mean that just institutions cannot make distinctions based on these capacities, but it does mean that the justness of the institutions themselves must be assessed in a manner that is impartial and not biased to further the ends of any particular class or status. Third, to the extent distributive justice is premised on self-interest, and just social institutions are to be assessed

⁴¹ Robert Nozick, for example, would distinguish between patterned and unpatterned conceptions of distributive justice. Patterned conceptions judge the fairness of an allocation by whether there is, at a given point in time, a “just” distribution of resources in society. Unpatterned conceptions, in contrast, focus not on the outcome, but on the rules of allocation. In Nozick’s view, a given distribution of resources is not subject to criticism on distributive justice grounds if the initial allocation was fair and the rules of subsequent transfer among individuals are fair. See Robert Nozick, *Anarchy, State and Utopia* (1975).

based on the extent to which they satisfy the self-interest of an impartial participant.

Evaluating distributive justice through a lens of impartiality has both strength and weaknesses in the Takings context. A focus on social institutions rather than specific outcomes clearly has advantages. If social institutions are designed in a way that is perceived to result in distributive justice, the role of the courts would focus on ensuring the proper operation of the institution rather than an assessment of the outcome. Further, it has an appealing approach to the problem of equality by seeking to define institutions that are equally fair and equally acceptable to all elements of society since, in this approach, institutions must be assessed based on the possibility that any individual might occupy any position in society.

Distributive justice as impartiality has, however, obvious flaws as a tool for practical application. Unlike claims of game theory, it defines an approach rather than a unique solution to distributive justice questions. Further, to the extent that elements such as a Rawlsian “difference principle” rely not on impartial self-interest, but on a moral concern that justifies redistributive policies, this approach requires application of a material principle other than impartiality.

IV. THE IMPLICATIONS OF THE TAKINGS CLAUSE AS A PRINCIPLE OF DISTRIBUTIVE JUSTICE

If the Takings Clause is seen as embodying a principle of distributive justice, then it is time for the Supreme Court seriously to consider the implications that follow from this view. This is not an idle academic exercise; much is at stake in terms of the limits on government authority and the perception of legitimacy of the Court’s approach.

One thing certainly does *not* follow from this view. Application of the Takings Clause does not become simpler or clearer; no bright line test emerges to replace the current muddle. As Justice O’Connor has noted, principles of “justice and fairness” are less than “fully determinate.”⁴² The Supreme Court’s goal, if distributive justice is to be taken seriously, should be to articulate the factors that justify the imposition of regulatory costs on a limited group of people.⁴³

42. 533 U.S. at 633.

43. Obviously, this is a search for principles grounded in “justice and fairness.” Citing language from *Armstrong*, Dean Kmiec states that “[t]he straightforward purpose of the Takings Clause is to avoid the disproportionate placement of public burdens upon a single property owner.” Douglas W. Kmiec, *Inserting the Last Remaining Pieces into the Takings Puzzle*, 38 Wm. & Mary L. Rev. 995, 996 (1997). This statement, however, seriously mischaracterizes the *Armstrong* principle of distributive justice under which an action would be a taking if it “unfairly” or “unjustly” imposed a burden. “Disproportionate” burdens fail a test of distributive justice only if you view “proportion” as the appropriate principle of justice. If “disproportionate” is merely means that a Taking results when the distribution fails a test of “fairness” under some other material principle, then it is simply a tautology.

A. DISTRIBUTIVE JUSTICE AND INDIVIDUAL RIGHTS

One of the great challenges to conceptions of distributive justice is to reconcile concerns for justice with claims of individual rights. If distributive justice focuses on the “fair” and “equal” resolution of competing claims by individuals, a focus on individual rights has, as a central quality, a claim that such rights cannot be sacrificed to further a general social value. In Ronald Dworkin’s phrase, rights are “trump” that cannot be required to yield to a general utilitarian concern with social utility.⁴⁴ If, as discussed below, utilitarianism represents one valid theory of distributive justice, concerns for individual rights and distributive justice may, in certain circumstances, be in conflict.

Although not all theories of distributive justice create an inevitable conflict, the language of distributive justice and individual rights is clearly different. Rights language asks what fundamental claims can an individual make on society. In contrast, distributive justice asks how access to limited resources is to be allocated within society. Justice and fairness, in distributive justice terms, implies the possibility of trade-offs and compromise to satisfy the legitimate claims of competing individuals. Analyses based on individual rights have a quality of absolutism that is contrary to an approach of compromise and allocation. Rights have a Kantian or deontological quality while distributive justice, in Hume’s term, is an artificial virtue tied to particular social institutions.

Thus, a shift in Fifth Amendment Takings analysis from a focus on property rights to a concern for the “justice and fairness” of the allocation of costs of social programs is a major, if subtle, shift in a view of the purpose of the Takings Clause

B. REASSESSING TAKINGS FACTORS IN LIGHT OF DISTRIBUTIVE JUSTICE

Although the Court has generally failed expressly to evaluate its balancing factors in terms of distributive justice, most factors appear to have a rough relevance to a consideration of fairness. Much like Moliere’s Monsieur Jourdain, the Supreme Court may have been speaking “fairness and justice” for forty years without knowing it. A sharper focus on the implication of these factors to issues of distributive justice will, however, likely alter the way they are evaluated and suggest others that might be relevant.

1. *Reciprocity of Advantage*

At least since *Pennsylvania Coal* the Supreme Court has recognized that “reciprocity of advantage” is relevant in determining whether a regulation is a taking. Although a regulation may burden me to benefit another, that same regulation may benefit another to benefit

44.

me. The issue of reciprocity, in part, addresses the question of loss. It asks whether the benefits of the regulation to the landowner offset the burdens; a regulation will not be a taking if the landowner receives sufficient benefit to require no additional compensation. In other words: no harm, no foul.

This concept of “reciprocity of advantage” is clearly relevant to virtually any assessment of distributive justice. Without loss, it is hard to say that a person has been unfairly singled out to bear the cost of regulation.⁴⁵ In many ways, it is an imperfect application of a principle of equivalent individual utility, and satisfaction of a condition of reciprocity of benefits and burdens may define one class of regulations that do not require compensation. Regulations that do not provide reciprocity of advantage may still be justifiably imposed without compensation if they satisfy some other principle of distributive justice. Reciprocity of benefits and burdens is thus a sufficient but not necessary condition for determining regulations that, in “justice and fairness,” do not require compensation.

2. Magnitude of Loss

One of the more puzzling factors used by the Court in assessing takings is the magnitude of the loss suffered by a landowner. The clear implication of the Court’s pragmatic balancing approach is that some substantial level of loss must be accepted but that too great a loss results in a taking. Thus, at least since the crucial zoning case of *Euclid v. Ambler Realty*,⁴⁶ losses of property value of up to 75% may not constitute a taking. In contrast, the Court in *Lucas v. South Carolina Coastal Commission*⁴⁷ held that a 100% loss of value is a “per se” taking. Forgetting, for the moment, the difficulty of drawing the line where a loss of value becomes “too great,” the Court has never clearly articulated why some substantial loss does not require compensation while somewhat more loss does.

The answer may lie in terms of distributive justice. If we view most regulations as resulting in a roughly fair distribution of benefits and burdens over time (a form of “temporal” reciprocity of advantage), significant short-term burdens (although ultimately compensated through general social regulation) may still be viewed as unfair. Thus, in fairness terms, the issue of the magnitude of loss is relevant to determining whether a landowner has suffered a burden that is not only disproportionate over the short-term but also of such a magnitude that it is unfair to require a landowner to bear it at any time.

45. Although phrased in terms of “reciprocity of advantage” the principle surely cannot focus simply on the equality of benefits among affected landowners. Is distributive justice satisfied if my neighbor and I receive reciprocal benefits from a regulation although the regulation imposes a greater burden on me? The factor of reciprocity should, for purposes of distributive justice, focus not only on the magnitude and reciprocity of benefit but also on whether affected parties are all treated with some rough equality in terms of both benefits and burdens.

46. 272 U.S. 365 (1926).

47. 505 U.S. 1003 (1992).

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But again the issue is “how much is too much”? Perhaps, the answer lies in a utilitarian assessment of efficiency as reflected in insurance theory. Insurance involves the sharing of risk with others to minimize loss, but, in most economic views, insurance is appropriately employed only to avoid catastrophic loss from unusual and unpredictable events. Insurance theory indicates that we should not buy insurance to cover relatively small losses that arise from the regular and expected events; it is economically more rational to bear such losses ourselves. I am reasonably sure that there are nice formulas developed by economists that indicate the economically rational situations in which risks should be spread through insurance.

Perhaps the Takings Clause can be seen, in part, as a form of social insurance that requires compensation for catastrophic loss through regulation. Through taxes we pay the premiums for protection against such catastrophic loss, but we bear the costs of routine regulatory loss ourselves. In this view “temporal reciprocity” justifies the fairness of routine regulation and the “social insurance” aspect mitigates the unfairness of a loss of beyond a certain magnitude.

3. Blameworthy Conduct

A factor that has dogged the Supreme Court’s takings analysis has been the relevance of “blameworthiness” in assessing a taking. Is a regulation less likely to be a taking if it prohibits blameworthy conduct of the affected landowner? Is a regulation more likely to be a taking if it regulates otherwise benign conduct? It would be hard to dispute that the moral blameworthiness of the burdened landowner would be relevant in assessing the distributive justice of a regulation. No one complains that landowners have lost value because they are prohibited from selling heroin or dumping nuclear waste on their property.

The problem arises in how to characterize “blameworthiness.” One strange line of thinking suggested by the Court can be seen as the “two sided coin” approach. In this view, forcing a landowner to confer a public benefit is equivalent (the flip side of the coin) to preventing the harm of losing the benefit. This was, in part, the logic employed by the Supreme Court in *Penn Central Transportation Co. v. New York City*.⁴⁸ In *Penn Central*, the Court upheld a New York landmark preservation ordinance that limited the development of an historic building. Altering Penn Station may be an aesthetic disaster, but it is harder to make the case that the owner of a building considered important to the public is morally blameworthy for developing the building in the same manner available to the owners of less important buildings. Nonetheless, part of the Supreme Court’s analysis was premised on the view that altering the building was, in some sense, equivalent to harm-inflicting acts that are the more traditional target of government regulation.

48. 438 U.S. 104 (1978).

In contrast, others have suggested a view premised on an analysis of common law rules of nuisance. Although the Supreme Court has never gone this far, some have advocated a view that nuisance, the historic common law approach to regulating “unreasonable” uses of land, serves to define the limits of uncompensated government takings.⁴⁹ In this view, the government would be free to regulate nuisance-like behavior, but the Takings Clause would require compensation when the government regulated conduct that did *not* constitute a common law nuisance. In part, this view is premised on the view that one can have no legitimate expectation of a property interest in conducting nuisance like activity. It also, however, seems to reflect a view that nuisance like activity is also “blameworthy” and thus not entitled to compensation. Conceptions of nuisance that focus on efficiency concerns in reconciling two legitimate but competing uses, however, suggest that an evaluation of moral blameworthiness is not equivalent to an assessment of nuisance.

Thus, the issue of “blameworthiness” cannot be resolved either by sophistry or common law rules of land use. The issue, as focused by a concern for distributive justice, may more properly address whether the conduct of the affected landowner is such that it is appropriate to impose the onus of uncompensated regulation to address the consequence of the behavior.⁵⁰

4. Investment-Backed Expectations

The Supreme Court has regularly stated that it is relevant for purposes of a takings analysis if a regulation affects reasonable “investment-backed expectations.” This concept, first articulated by the Supreme Court in *Penn Central Transportation Co. v. New York City*,⁵¹ has been the subject of much debate and more confusion.⁵²

49. See, e.g., Kmiec, *supra* note 13. There are hints of this approach in *Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003 (1992). In *Lucas*, the Supreme Court held that a regulation that prohibits a common law nuisance can never be a taking (in part based on the logic that you can never be deprived of a property right that you never had). Although this seems clearly correct, it says nothing about whether a regulation could be a taking if it regulated other than nuisance-like behavior. In *Lucas*, the Court accepted as fact that the land in question had lost all of its value as a result of a government regulation. The Supreme Court adopted a per se takings rule that a 100% loss of value will be a taking unless the government was regulating a traditional common law nuisance. The Court did not resolve the issue of when a taking will be found where there is less than a 100% loss in value.

50. Even a focus on the moral “blameworthiness” of conduct raises very difficult questions. Is destruction of critical habitat of an endangered species sufficiently blameworthy to justify regulation without compensation? Destruction of this remaining habitat may only be significant because ninety percent of the habitat has previously been destroyed by unregulated prior development. In other words, how is one to claim that uncompensated regulation is justified based on the blameworthiness of conduct when the “blameworthy” consequences arise only because the landowner is among the last to engage in the conduct.

51. 438 U.S. 104 (1978).

52. There is general consensus that the Supreme Court has thoroughly

Although recognition of a role for “investment-backed expectations,” apparently finds its origin in Professor Michelman’s classic, *Property, Utility and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*,⁵³ the Supreme Court has never been clear about the relationship of “investment-backed expectations” to questions of “justice and fairness.”

Surely, however, a landowner’s “expectations” are relevant to an assessment of the fairness of imposing regulatory burdens. A focus on “expectations” can reflect a concern with the fairness of imposing costs on a landowner who has reasonably relied on a state of law. Certainly, the extent of reliance, perhaps reflected in the concept of “investment-backed” expectations, is relevant to the fairness of the allocation of costs.

The challenge is to turn the concept of “investment-backed expectations” to a focus on criteria of distributive justice. What are the special qualities of expectation that warrant special treatment of some landowners as opposed to others? Michelman provided some answers, but there are certainly others. Again, a concern for distributive justice does not resolve these questions but may help sharpen the focus and rationale on the role of expectations in takings analysis.

5. Selection Process

If distributive justice is concerned with unfairly “singling out” a person to bear the costs of regulation, one would assume that the actual process of selection would be relevant in assessing fairness. Decision-making processes that may repeatedly single out certain groups to bear regulatory costs would raise distributive justice, and therefore takings, concerns.

The Supreme Court, however, has only obliquely indicated that a takings analysis involves a focus on the decision-making process. There is an odd line of takings cases in which courts have not found a

muddled any coherent basis for a concern for “investment-backed expectations.” See, e.g., R.S. Radford and J. David Breemer, *Great Expectations: Will Palazzolo v. Rhode Island Clarify the Murky Doctrine of Investment-Backed Expectations*, 9 N.Y.U. Envtl. L.J. 449 (2001); Daniel R. Mandelker, *Investment-Backed Expectations in Taking Law*, 27 Urb. Law. 215 (1995).

53. Michelman, *supra* note 6. In his article, Professor Michelman identified the importance of the role of “justified, investment-backed expectations” in evaluating takings claims. See Michelman, *supra* note 6 at 1213. In part, Michelman focused on a utilitarian component that requires protection of expectations to promote efficient use of property. As Michelman notes, in a utilitarian analysis “security of expectation is cherished, not for its own sake, but only as a shield for morale.” *Id.* Michelman also expressed the view that “the purpose of compensation is to prevent the special kind of suffering on the part of people who have grounds for feeling themselves the victim of unprincipled exploitation.” *Id.* at 1230. This suggests some deontological obligation to avoid harming others as a basis for the Taking Clause. Yet utilitarian or deontological concerns for the protection of expectations do not capture the full set of issues of distributive justice that warrant protection of certain classes of reasonable expectations.

taking when the regulation was a result of some natural calamity. Thus, in the important but odd case of *Miller v. Schoene*,⁵⁴ the Supreme Court found no taking when the owner of cedar trees was required, in order to prevent the spread of an infectious disease, to destroy his trees to protect economically more valuable apple trees. Conceding the legitimacy of the need to protect the more valuable apple trees, this hardly provides an explanation of why fairness does not require compensation of the owner of the cedar trees. Certainly, the Court failed to provide such an explanation.

Perhaps the answer lies in the issue of process. The owner of the cedar trees was singled out, not by the potentially manipulated political process, but rather by the vagaries of disease. In other words, God, not people, selected the victim. If you have questions about fairness, take it up with clergy not the courts.

Whether this in fact underlies the courts’ treatment of calamity cases, the issue of selection process seems relevant to an assessment of fairness. In line with the calamity cases, a regulation should be less likely to be seen as a taking when the burden imposed by a regulation is assigned based on some objective criteria that do not lend themselves to political manipulation. In this view, Endangered Species Act or wetlands regulations would not raise heightened takings concerns if restrictions were imposed based on the qualities of the land (and its critters) rather than the qualities of the landowner.

C. LOOKING TO SOURCES BEYOND THE LAW

The Supreme Court’s search for factors relevant to a takings analysis has been long on imagination but short on references. The academic literature is rich with political and economic analyses of the takings issue, but this has generally been of little utility to the Court. It is problematic to rely on political theory and economics when it is unclear how those relate to the core objectives of the Takings Clause.

A focus on the Takings Clause as a principle of distributive justice has the potential to open a line of takings analysis based on the literature of moral philosophy. There is a substantial body of literature evaluating the concept and application of distributive justice that could be relevant to a court’s analysis. It might be odd to cite Aristotle in support of a takings argument before the Supreme Court, but the inherently extra-legal judgments inherent in distributive justice may point to reliance on extra-legal sources.

The application of philosophical analysis to law is not, of course, unknown. John Rawls, Robert Nozick, Ronald Dworkin, among many others, bring substantial insights from philosophy into the legal discourse on the Takings Clause. Perhaps the most influential (or at least cited) law review article on takings, Professor Michelman’s *Property, Utility and Fairness*, provides an interesting analysis of

54. 276 U.S. 272 (1928).

fairness in the takings context through an application of Rawls.⁵⁵ Thus, a focus on the Takings Clause in terms of distributive justice could open the door to a whole body of literature and analysis to inform the Takings debate. Thus, it may be appropriate to cite Aristotle as well as *Euclid*.⁵⁶

D. LEGITIMACY, JUDGES AND DISTRIBUTIVE JUSTICE

Although a focus on distributive justice may open the door to a judicial evaluation of philosophical concepts, the question remains as to whether we want judges to walk through that door. How is one to assess the legitimacy of a position that requires judge’s to apply their conceptions of “fairness and justice” in establishing limits on government power?

This issue raises a number of questions (and one significant conclusion). The initial question is whether a proposed theory of the Takings Clause that requires courts to make such indeterminate and extra-legal judgments fails on that ground alone? In other words, is it impermissible to interpret the Takings Clause in distributive justice terms *because* it requires judges to become involved in philosophical issues of fairness?

There are several not so simple responses to this concern. First, it is the Supreme Court itself that has articulated this rationale for the Takings Clause. It is also a principle that has been cited by a wide spectrum of views on the Court – from Blackmun to Rehnquist and Scalia. You can blame them if you do not like this claim of judicial authority. Second, alternative interpretations of the Takings Clause involve the courts in applying their value judgments; an express reliance of distributive justice makes this process more open. Finally, other aspects of constitutional interpretation, particularly the development of “substantive due process,” involve the courts in extra-textual and arguably extra-judicial limits on government power. Thus, the intrusion of judges’ values into constitutional interpretation has some pedigree.

A second question is whether, as an institutional matter, it is proper to rely on the philosophical views of a narrow, unelected, and unaccountable group of judges. Since this approach to the Takings Clause largely eliminates any “neutral” anchoring of takings analysis in text or history, a concern that the biases and prejudices of judges will shape takings law is quite real.⁵⁷ Certainly, concerns for modes

55. Michelman, *supra* note 6. Michelman’s article relies on an early version of Rawls’ work and hence fails to consider certain implications of changes, particularly the “difference principle, that Rawls made to his theories in a later version of *A Theory of Justice*.

56. Referring, of course, to *City of Euclid v. Ambler Realty*, 272 U.S. 365 (1926).

57. Addressing this issue, Professor Michelman notes that “[h]owever difficult the fairness standard may be to formulate and apply, there is no obvious reason for supposing that political actors should be able to understand it or handle it more deftly than judges can.” See Michelman,

of constitutional interpretation that rely on the underlying values of unelected judges are widely expressed by scholars and judges.⁵⁸ A focus on distributional justice has the virtue, at least, of being more, rather than less, explicit about this aspect of the law.

A third question is whether society would accept takings decisions premised on judicial views of distributive justice?⁵⁹ Will individuals be content to accept restrictions on the use of their property based on assurances by a court that it is fair? As noted, Rawls’ theory of justice involves an identification of those social practices and institutions that disinterested observers, operating behind a “veil of ignorance” as to their place in society, would agree are fair. This suggests that an individual could be expected to accept a decision based on the following logic: “You would think it was fair if you were as smart as I am.” This is perhaps not the most compelling argument for social acceptance of imposition of a regulatory burden.

These concerns with the institutional legitimacy of judicially derived judgments of distributive justice thus suggest perhaps the most significant consequence of a principle of takings grounded in “justice and fairness.” Since courts have limited institutional competence and few neutral criteria to apply in making distributive justice decisions, judges should be extremely chary of substituting their views of fairness for legislative judgments. In other words, the Takings Clause should have limited force except in the most extreme cases. This is not an abandonment of the principle of distributive justice, but it is a recognition that such judgments are better left to elected and socially responsive legislatures rather than courts.

This seems to be *exactly* the position taken by the Supreme Court in the area of substantive due process and the regulation of land use. Although the Court has recognized the possibility of invalidating legislative acts on due process grounds, it has largely chosen not to exercise such power except in defined areas of fundamental rights.⁶⁰

supra note 6 at 1248.

58. Concerns range the spectrum from “legal realists,” such as Karl Llewellyn, to Scalia’s criticism of the Court’s analysis in abortion decisions. *See, e.g., Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833, 984 (Scalia, dissenting). For some, however, moral readings are at the heart of a process of interpretation of fundamental liberties in the Constitution. *See* Ronald Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* (1996).

It is certainly not my intent here to delve in the murky waters of constitutional interpretation and post-modern critiques of the nature of the judicial process. Suffice it to say that an express reliance on principles of distributive justice clearly highlights the amorphous and untethered basis of judicial review of Takings.

59. The question of the legitimacy of courts in a democratic society raises its own set of concerns. *See, e.g.,* John Hart Ely, *Democracy and Distrust* (1980); Philip Bobbitt, *Constitutional Interpretation* (1991).

60. Thus concepts of substantive due process, hinted at by the Supreme Court in *City of Euclid v. Ambler Realty*, 272 U.S. 365 (1926) and *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), have largely disappeared from federal constitutional analysis in regulation of land use. *Cf. City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985).

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In this view, the conjoined twins of “due process” and “takings,” both contained within the same sentence of the Fifth Amendment, would serve as conceptual limits to government power, but a limit that would be sparingly invoked by the courts. Although specialized cases of takings (particularly actions that approach exercise of eminent domain power) might be subject to a more searching takings analysis, courts would largely defer to legislative judgments of fairness in most cases of regulatory restrictions.

In fact, this sounds like what the court is doing.⁶¹ What is different is that a focus on distributive justice provides a clearer basis than the Court’s current reliance on an unexplained and unexplainable balancing act. Further, it does suggest a line of analysis for courts brave enough to take on concepts of distributive justice.

VI. CONCLUSION

For good or ill, the concept of the Takings Clause as a principle of distributive justice arises from the Supreme Court’s own statements. The Supreme Court has made and repeated the claim that the Takings Clause is “designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” At a minimum the Court should be aware of the consequences that follow from such a view.

Viewed through the lens of distributive justice, takings analysis gains a sharper focus on those factors that are relevant to assessing the “fairness” of imposing costs on the few to benefit the many. The logical implication of this view is a takings test which is no more clear or certain in application than the current muddle. Additionally it expressly requires the courts to engage in social and philosophical judgments which many would say are beyond their competence (used both in the sense of judges’ institutional role and their intelligence). Perhaps most significantly, it suggests a limited role for the judiciary in policing the social judgments of legislators and could confine the Takings Clause, along with the Due Process Clause, to a limited role.

61. The Supreme Court in *Kelo v. New London, Conn.*, 549 U.S. 469 (2005), specifically articulated a general rule of deference to legislative judgments of “public purpose” in the Fifth Amendment context of eminent domain.