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THE TAKINGS-PUZZLE PUZZLE

JAMES E. KRIER*

Regulatory takings are widely regarded as a puzzle. Whether from the standpoint of merely trying to describe judicial doctrine, or from the more ambitious standpoint of trying to normalize the doctrine in some way—finding the theory that can “rationalize the cases,” or the theory that *should*—the opening cliché in most of the scholarly commentary is that the law in this area is a bewildering mess. We can go back thirty years, more-or-less, and find statements to that effect in classic articles by Joe Sax and Frank Michelman.¹ We can skip forward to recent work and observe the same.² We can also take it on faith (trust me) that most of the scholarly literature in between shares the sentiment.³

My aim here is to unpack the regulatory takings problem in a way that suggests why it is intractable. The idea is to reveal some of the different types of ambiguity necessarily entailed in

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1. See, respectively, Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 37 (1964) (“[T]he predominant characteristic of this area of law is a welter of confusing and apparently incompatible results.”); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1170 (1967) (stating that the courts’ takings decisions reveal “jarring outcomes” that are “liberally salted with paradox”). The abstract of Michelman’s article refers to the “bewildering array of rules” found in takings cases. *Id.*

2. See, e.g., Douglas W. Kmiec, *At Last, the Supreme Court Solves the Takings Puzzle*, 19 HARV. J.L. & PUB. POL’Y 147, 147 (1995) (“Many commentators and practitioners, ranging from property rights advocates to police power hawks, have viewed the Supreme Court’s takings cases as incoherent, piecemeal, or categorical.”).

3. See, e.g., Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles, Part I—A Critique of Current Takings Clause Doctrine*, 77 CAL. L. REV. 1299, 1303-04 (1989) (“[I]t is difficult to imagine a body of case law in greater doctrinal and conceptual disarray.”).

takings cases. Seeing these ambiguities, we readily can understand why the doctrine in this area is so confused and confusing; why there is, in short, a "takings puzzle." To my mind, it is much more difficult to understand why anyone would expect matters to be otherwise. This oddity I call the "takings-puzzle puzzle."

It seems to me that takings cases routinely give rise to at least three different kinds, and different levels, of ambiguity and uncertainty. The first and most superficial kind was suggested in an article by Douglas Kmiec.⁴ Professor Kmiec claimed that the Supreme Court, thanks to several of its recent decisions, "largely has solved the takings puzzle."⁵ He didn't mean by this that all of the uncertainties about regulatory takings doctrine have suddenly vanished; what he meant, instead, is that the Court has, in his view, settled on general principles. Kmiec acknowledged, however, that the uncertainty of applying those principles remains intact. "The takings puzzle has been solved," he said, but "specific applications always will remain contentious."⁶

I don't believe that the takings puzzle has been solved in the sense that Kmiec meant, but put that aside. The point remains that even very clearly settled principles commonly will give rise to uncertainty, and thus to some degree of unpredictability, about how to apply the principles. For example, standard takings doctrine plainly holds that government regulations resulting in permanent physical occupations are always takings.⁷ But when is an occupation "permanent"? Indeed, when does a government regulation even work an occupation or invasion that is cognizable for takings purposes? The answers to these questions are not at all obvious, so the questions themselves present something of a puzzle.⁸

4. See Kmiec, *supra* note 2.

5. *Id.* at 147.

6. *Id.* at 158.

7. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). By way of contrast, temporary invasions "are subject to a more complex balancing process to determine whether they are a taking." *Id.* at 435 n.12.

8. See, e.g., *id.* at 448-51 (Blackmun, J., dissenting). Note also that the majority opinion in *Loretto* suggested that an easement of passage is not a permanent occupation, *id.* at 433, whereas the majority opinion in *Nollan v. California Coastal Commission*, 483 U.S. 825, 831-32 (1987), suggested that it is.

To cite another example of the same problem, it is clear that government regulations are takings if they effectively wipe out the value of regulated land, unless the land uses targeted by the regulations amount to nuisances under the terms of a state's common law.⁹ As Kmiec noted, however, "[n]uisance law is imprecise,"¹⁰ so substantial uncertainty arises even in the course of applying settled doctrine.

We need not belabor the obvious. Takings doctrine simply cannot escape this first kind of uncertainty and confusion that I have been discussing, even when takings principles are settled and clear. Consider now a second kind and level of ambiguity and uncertainty, one having to do with arguments about what our general principles of law in this area should be. Here, uncertainties arise that are more fundamental than those found in the first kind of ambiguity that I identified, more fundamental in the sense that one initially needs to settle on the frame within which to ponder the more mundane issues of applying the general to the particular. Carol Rose has discussed this problem in the context of regulatory takings:

In takings doctrine, the tradition of property's civic responsibility is embodied in a test that balances public benefits against private losses from a particular measure. This [balancing] test baffles legal commentators who take a neoclassical economic approach. From a Benthamite point of view, this [balancing] test might be relevant to the utility of the proposed measure, but would have no bearing at all on the issue of compensation: if the public needs property, it may acquire it, but must still pay for it. The premise of this [balancing] takings test, however, is quite the reverse; that is, that citizens may be required to sacrifice and bear private losses in the face of a substantially greater public need.

Thus, the arguments about disturbing established expectations take two very different directions: one would protect the acquisitive faculties which bring wealth and strength; the other would protect the citizen independence and participation which enhance the community, but would thereafter raise no principled objections to redistribution

9. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

10. Kmiec, *supra* note 2, at 154.

This tension between the two arguments helps explain why the takings problem is so intractable.¹¹

Notice that Professor Rose observed a pair of opposing principles; one-on-one contests between two competing principles seem fairly typical in the context of regulatory takings. There is the classical-liberal/classical-republican debate to which Rose alluded, the courts-should-decide/legislatures-should-decide argument,¹² the debate about ordinary versus scientific points of view, the fairness/utility (Kantian/Utilitarian) debate,¹³ and so on.

In order to resolve such differences of opinion about theories on takings—to reach consensus, to settle upon a frame and get rid of the second level of uncertainty, leaving only the first level (which always will be present)—one needs in essence some kind of metatheory that can bring the disparate voices into harmony. But, of course, there is no one universal metavantage point shared by everybody, much less a metametatheory to lead to such a metatheory to lead to a single theory, etc. There are just big, long arguments about first principles, the bedrock on which all else ultimately depends. I think that Professor Rose had this most fundamental kind of uncertainty in mind when she expressed the view that our inability to reconcile different theoretical positions on takings “in any principled way suggests the inadequacy of our existing political vocabulary.”¹⁴ It is time, she said, “to change the subject and generate a more promising vocabulary by examining the issue in another manner.”¹⁵ But

11. Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561, 593-94 (1984).

12. See WILLIAM A. FISCHER, *REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* (1995). For a summary of the debate, see, for example, *id.* at 4-5; James E. Krier, *Takings from Freund to Fischer*, 84 GEO. L.J. 1895 (1996) (book review). See also William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995) (giving an account of the Framers' views of the Takings Clause).

13. For a discussion of ordinary versus scientific points of view, and on Kantian versus Utilitarian outlooks, see BRUCE A. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* (1977).

14. Rose, *supra* note 11, at 596.

15. *Id.* at 597.

which other manner? There are competing alternatives, and not all of us would make the same choice as Professor Rose.

So we have at least three distinct types of uncertainty or ambiguity entailed in the resolution of regulatory takings. The first arises from application of general principles to particular situations, the second from theoretical differences regarding what the general principles should be, and the third from divergent metatheoretical approaches to arguments over theory. Such a mix can create confusion enough, but the necessary interaction among the types of uncertainty promotes even more. The types are, so to speak, "geared" to each other, such that their joint operations can be unpredictable to a fault. The kind of uncertainty entailed in applying general principles to particular concepts always will provoke contentiousness, as Kmiec noted earlier.¹⁶ No matter the frame selected, there will be conflicting judgments about what fits within it, and the resulting conflicts will suggest a state of disarray. That impression, of course, is only heightened by the fact that there will be disagreements within disagreements, by which I mean:

(1) Persons *A* and *B* might agree on one principle yet argue about its application; persons *C* and *D* might agree on another principle yet argue about its application. (This pattern of agreement on general principles but arguments about the particularities gives rise to the first kind of ambiguity that I identified).¹⁷

(2) But all the while it might be less than clear to any of them (or any of us) that the *A-B* group is framing matters one way (in terms of one principle) while the *C-D* group is standing on different theoretical ground, such that it is difficult or impossible to discern why some facts are regarded as important and others are not. There is uncertainty about the underlying principle or theory (the second kind of ambiguity), and it can exacerbate the uncertainty arising from a principle's application.

(3) Even if the underlying theoretical debate between the *A-B* group on the one hand and the *C-D* group on the other is rea-

16. See *supra* text accompanying note 6.

17. For just one example of this type of ambiguity, see my discussion of the disagreements among a group of people who subscribe together to a "process" point of view, in Krier, *supra* note 12, at 1909-10.

sonably apparent, how and why either group decided on one frame as opposed to any other of the contending frames often will be obscure. This is the metatheoretical ambiguity.

Andrea Peterson has put all of these points together in describing the messiness of takings decisions by the United States Supreme Court:

The Court also has announced at least four different tests for determining when a "taking" occurs, without explaining why its inquiry should differ from one takings case to the next or providing clear guidelines as to when each takings test should be applied. The Court has even used more than one takings test in a single opinion. Even when the Court confines itself to only one of its announced tests, the structure of the Court's analysis is difficult to predict, for the Court's interpretation of each takings test can vary from one opinion to the next.

If one focuses on the Court's articulation of the principles underlying its takings doctrine, its decisions fare no better. The Court has repeatedly stated that the ultimate issue in a takings case is whether "fairness and justice" require that compensation be paid for economic injuries caused by the government. Yet the Court has provided little explanation of how its present array of takings tests bear[s] on the fairness issue.¹⁸

In sum, that there's a "takings puzzle" is easy enough to understand. "The takings issue is muddy because it is inherently hard to deal with," William Fischel has said,¹⁹ and for the reasons I have suggested that seems exactly right to me. What seems wrong is that people are so puzzled by this "puzzle," because the problems that I have been discussing are *so* pervasive, *so* common to virtually *any* substantive legal field, that one would expect *everybody* to expect them.

As an example, consider the law of torts and its treatment of accidents, beginning with the familiar regime—negligence doctrine. The law of negligence is a body of very general principles

18. Peterson, *supra* note 3, at 1304.

19. FISCHEL, *supra* note 12, at 325.

designed to govern an amazingly diverse array of human interactions (diversity, obviously, is the very feature that motivates the generality of the governing law; the alternative would be a code of conduct of unwieldy length and complexity, and one that would no doubt be shortsighted in any event). Necessarily, a lot of uncertainty is involved in applying general negligence principles to particular cases. By definition, general principles have vague boundaries (for example, what is "reasonable"?) tested at the margin by individual instances. The core may be both solid and clear but the perimeter is neither, and there is reason to suppose that litigated cases will not be core cases. Cases in the core will be settled prior to trial.

The kind of guessing that arises in the course of applying general negligence principles to particular cases is taken for granted, just as one would suppose, because it is confronted so regularly in any substantive field. In a particular contracts case, what provisions are "unconscionable"? In a particular homicide case, when is there "premeditation"? In the case of a contested will, what was the deceased's "intention"? In a custody matter, what is "in the best interests of the child"? And so on.

Now take the law of torts again and consider the academic debate about negligence versus strict liability.²⁰ The question arises whether a given kind of accident should be governed by the reasonableness standard of negligence, or instead by the more categorical rule of strict liability. Whichever alternative is chosen, the first kind of ambiguity, discussed above, will persist. What is "unreasonable" in the case of allegedly negligent behavior? What is a "defect," or an "abnormally dangerous activity," in the case of behavior alleged to give rise to strict liability? Now the second kind and level of ambiguity also comes into play. Ambiguity in this instance derives from competing notions about which principle (here, the principle of negligence or the principle of strict liability) to apply to a given situation. As we saw in discussing regulatory takings, this second level of uncertainty is more fundamental than the first. To resolve it, we need to reach agreement on bedrock principles, which is very unlikely to occur.

20. For a quick summary, see RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 175-80 (4th ed. 1992).

So Professor Fischel is right that takings are “inherently hard to deal with.”²¹ The trouble is that a lot of questions in the legal world are inherently hard to deal with—and are so for the same reasons that takings questions are—yet, so far as I can see, all of those hard questions taken together have provoked nowhere near the claims of Babel that run through the takings literature.

This, as I said, is what puzzles me. I presume that the answer to the takings-puzzle puzzle has at least something to do with our particular situation in the United States. Private ownership has been a central part of our economic and political history from the outset; activist government has become central, especially over the last half century or so. And it is over that latter period of time in particular—over the last fifty years—that the subject of takings has come to capture so much attention from legal commentators and (most recently) the public at large. Ambiguity and uncertainty, however typical they might happen to be, are likely to provoke unusual anxiety when we sense them at the heart of our political-economic system. Whether we address takings through the courts, through legislation, or by some other means, the same bewildering questions will persist. They inhere not in the topic of takings but in the nature of law. In the context of takings, however, persistent puzzles have a special salience.

21. *See supra* text accompanying note 19.