

Translation Without Fidelity

A RESPONSE TO RICHARD EPSTEIN'S FIDELITY WITHOUT TRANSLATION
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William Michael Treanor

FEW LEGAL SCHOLARS can even dream of having the effect that Richard Epstein has had on law and on politics, and his remarkable influence is probably greatest in the area of takings law. In his brilliantly provocative 1985 book *Takings* and a series of articles and essays, Professor Epstein has argued that the takings clause bars government actions that have redistributive consequences. His scholarship has pushed the Supreme Court to a broader reading of the clause (although not as broad as he would like), and it has helped galvanize a popular movement that seeks, and that in some cases has obtained, statutes that require the government to pay compensation in cases in which courts will not order it.

Explaining why a body of work is influential is inevitably a complex matter, but part of the success of Professor Epstein's writings un-

doubtedly stems from their grounding in the original understanding of the Constitution. He has claimed the mantle of the framers, and that claim gives his reading of the takings clause a deep resonance it would not otherwise have.

Explicitly rejecting Epstein's reading of the clause and the history that lay behind its adoption, I have previously advanced my own view of the original understanding and, drawing on Professor Lawrence Lessig's translation model of constitutional interpretation, argued that proper regard for that understanding should lead us to adopt a political process theory of the takings clause.¹

In his recent essay, *Fidelity Without Translation*, Epstein takes both Lessig and me to task, criticizing Lessig's model and my application of it (as well as Lessig's application of his model to the commerce clause). "We don't need

William Michael Treanor is an Associate Professor of Law at Fordham University. He would like to thank Marty Flaherty, Abner Greene, and Larry Lessig for comments on earlier drafts.

1 William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995).

rarefied theories of linguistic interpretation that celebrate the confluence of context, structure and changed circumstances,” he writes. “What we need are careful readings of text that capture the balance, sense and logic of the original doctrine.”

There is an irony to this criticism. Of all of the major approaches to the takings clause that pre-existed Lessig’s work, Epstein’s is the only one that can in any way be said to anticipate Lessig’s translation model. Epstein is thus criticizing Lessig for preaching what Epstein practices.

According to Professor Lessig, the translator starts her task by placing constitutional text in its original historical context, and she seeks to determine what the text meant in the setting in which it arose. She then determines which factual presuppositions that underlay the original understanding are no longer accurate. Finally, she reinterprets the text to respond to these factual changes, altering the original reading as little as possible while establishing its modern “equivalent.”

In his takings scholarship, Epstein does something similar. He is not a strict originalist who resolves questions by relying on concrete historical understandings. (Some takings scholars supportive of government regulation have adopted the traditional originalist approach.) Indeed, he finds unconstitutional some things that he acknowledges the framers believed constitutional. At the same time, unlike most takings scholars, he does not disregard the original understanding altogether. Strikingly, at the core of Epstein’s approach to the takings clause is his view of what the clause meant in 1791. Like Lessig, Epstein offers a reading that has as its goal the application of the original doctrine in modern circumstances.

In describing his methodology, Epstein observes, in *Fidelity Without Translation*, “[E]ven as the semantic meaning of given terms remains constant and unchanged, the class of objects to

which they apply could change, and could conceivably expand to matters that were beyond all human imagination in 1787.” This is a description of a type of translation – it involves a reading that changes because of changed circumstances. There is, I admit, a difference between Epstein’s and Lessig’s approaches: Lessig’s translator searches for underlying meaning and then translates to preserve meaning; Epstein lets the words themselves do the work. A word such as “property” translates itself because “the class of objects to which [it] appl[ies] changes” as society changes. Nonetheless, a person who rejects strict originalism but still seeks to develop a constitutional jurisprudence that accords with the original understanding is engaged in translation, regardless of whether one determines original understanding by looking to underlying meaning, like Lessig, or to “the internal written logic of the text,” like Epstein (*Takings* at 28).

Thus, the real question suggested by Epstein’s essay is not whether translation is a good idea. Rather, it is whether the readings Epstein offers are good translations. Even from the perspective of his own methodology, Epstein’s translation of the takings clause fails. More important, Lessig’s approach to translation is superior and leads to a better reading of that clause.

THE TEXTUALIST APPROACH TO THE TAKINGS CLAUSE

Epstein’s discussion of the takings clause in *Fidelity Without Translation* begins with the language of the clause itself: “nor shall private property be taken for public use, without just compensation.” He interprets this language by looking to the historically-grounded definition of property. “The standard definition of property from Roman times on down” is that property is not merely a tangible object, but “its incidents of use, enjoyment or disposition.” This definition was part of the “back-

ground materials that were fully available and widely understood in 1791,” and therefore should guide our understanding of the clause today. As a result, when the government diminishes the value of something, it must compensate the property owner because the property owner’s property has been taken.

Epstein notes that I and other legal historians have found that many regulations existed at the time of the ratification of the takings clause, but he treats this as insignificant. “The great question,” he writes, “is whether ... an appeal to [the takings clause’s] internal logic invalidate[s] many of the laws in effect in 1787.” He answers that it should. “The basic logic of the takings clause requires that it reach partial regulations much as it reaches partial occupations.” There is no need for translation, though: “[T]he takings clause as drafted was equal to its task when read in light of the standard definitions, usages and practices prevalent in its own time.”

The threshold problem with Epstein’s text-centered account is that it ignores part of the text.

Epstein is absolutely right that in 1791 people understood property to mean “incidents of use, enjoyment or disposition.” But this definition was not the only definition of property then current. Another definition of property was that property was a person’s tangible possessions. An even narrower definition was that it was a person’s land. Indeed, the same is true today. Sometimes the word property refers to tangibles; sometimes it refers to intangibles.

When a word can have a number of different meanings, a textualist, seeking the word’s meaning, must look at how the word is used in the document in conjunction with the words it is connected to. Thus, while Epstein’s essay focuses on one word, the takings clause as a whole must be examined. Read as a unit, the

clause – “nor shall private property be taken for a public use, without just compensation” – reflects a physical conception of property. The critical word is “taken.” The relevant meaning of “take” at the time of the takings clause’s ratification was “seize,” and seize, in turn, implicates a physical act of control over physical property. Because the current meanings of “take” and of “seize” accord with that in the late eighteenth century, contemporary examples illustrate this point. In *California v. Hodari D.*,² Justice Scalia held for the Court that an individual who tossed away a rock of crack cocaine while running from a police officer had not been “seized” within the meaning of the Fourth Amendment. Justice Scalia wrote, “From the time of the founding to the present, the word ‘seizure’ has meant a ‘taking possession.’ For most purposes at common law, the word connoted not merely grasping or applying physical force to the animate or inanimate object in question, but actually bringing it within physical control.”³ To offer a common language illustration: If I were to tell my daughter she couldn’t play ball in the house, I would have unquestionably deprived her of an incident of the enjoyment of the ball, but I wouldn’t have “taken” the ball from her. I only “take” the ball from her when I physically seize it.

In fairness, I must add that, while Epstein’s essay essentially ignores the word “taken,” the same is not true of his book *Takings*. There, over the course of many pages, he patiently, through the use of analogies and subtle reasoning, develops the argument that the government takes when it does something that would be actionable if it were done by a private party. But his elaborate analysis obscures, rather than clarifies. If, like Epstein, one believes that “the takings clause ... [should be read] in light of the standard definitions, us-

² 499 U.S. 621 (1991).

³ *Id.* at 624.

ages and practices prevalent in its own time,” then the meaning of “taken” is clear, and it is not the broad definition developed in *Takings*. Rather, the standard definition of “take” was to “seize.”

Because the use of the word “taken” makes apparent that the relevant definition of property is one of the two definitions limited to physical property, if the takings clause is read in terms of 1791 usage it means either “nor shall a person’s tangible possessions be seized for a public use, without just compensation” or “nor shall a person’s land be seized for a public use, without just compensation.” Contrary to Epstein, then, a purely textualist approach leads to the view that the takings clause should not be read to cover regulations. Instead, under such an approach, the clause should be read as barring only uncompensated dispossession. It should be recognized that the meaning of tangible property has changed over time. For example, in 1791, dogs were not considered property (at least for purposes of common law larceny). Today, if the government were to seize my dog for a public use – say, to incorporate her into a canine corps of drug-sniffers – a court applying the textualist approach favored by Epstein would presumably require compensation. But such changes in the class of tangible property obviously have no bearing on the issue of whether regulations run afoul of the takings clause. Use of Epstein’s methodology, then, ironically supports the conclusion that regulations are never takings.

TRANSLATION AND UNDERLYING MEANING

Until after the Civil War, the takings clause enjoyed a consistent reading. While the clause was not the subject of debate in Congress when James Madison proposed it, and there are no reports of relevant debates in the states that ratified it, Madison’s post-ratification writings show that he thought the clause re-

quired compensation only when property was physically taken (including when slaves were freed by the government), not when the value of property was diminished by regulations. The early caselaw is to the same effect. As a treatise-writer noted in 1857, “It seems to be settled that, to entitle the owner to protection under this clause, the property must be actually taken in the physical sense of the word”

These readings are at odds with Epstein’s depiction of the “internal logic” of the takings clause. His essay suggests that the driving force of the clause is antiredistributionism. In his book *Takings*, Epstein develops this argument (in a way that he does not do in the essay) by appealing not merely to textual exegesis, but to history. “The Lockean system was dominant at the time when the Constitution was adopted,” he writes (*Takings* at 16), and further observes that “the founders shared Locke’s and Blackstone’s affection for private property, which is why they inserted the eminent domain provision in the Bill of Rights.” (p. 29). The takings clause therefore embodied the Lockean principle that “whenever any portion of [his property] is taken from [the property-owner], he must receive from the state . . . some equivalent or greater benefit as part of the same transaction.” (p. 15). This principle is said to apply equally to regulations and to physical dispossessions.

Thus, as noted, Epstein argues that the clause’s “internal logic” means that regulations of the type that were in place in 1791 are unconstitutional. As a purely analytic matter, this is a plausible move and, as Epstein points out in his essay, it is a standard move in modern equal protection law. *Takings* provides a helpful example of how this argument works in the takings context:

[The framers] may have meant to endorse both the takings clause and wage and price controls without knowing the implicit tension between them. If they cannot have both, then

their explicit choice takes precedence over their silent one. Suppose the framers believed both A and X, when A entails not-X. If A is the constitutional text, then X is not allowed. (p. 28)

The flaw in the argument is that it only works if the takings clause was originally understood to bar some antiredistributive regulations, but not others. Were that the case, then one could plausibly contend that the framers failed to grasp the fact that certain regulations they thought permissible actually ran afoul of the principle of antiredistribution. The fact, however, that the original understanding – regardless of whether one views that understanding through text or historical practice – was that *no* regulations violated the takings clause indicates that the internal logic of the takings clause is not simple antiredistributionism. In other words, to use Epstein's symbols, there is no tension between A and X because A is not what Epstein believes it to be.

So what was the original internal logic of the takings clause? Why did it bar dispossession, but not regulation? To answer these questions, it is first necessary to recognize that the founding generation did not have the simple commitment to Lockeanism that Epstein posits in *Takings*. Rather, as a substantial body of historical scholarship produced over the last thirty years has shown, the founding generation's worldview reflected both the presence of the communitarian philosophy of republicanism – in which property is held subject to the demands of the common good as those demands are established by majoritarian decisionmakers – and the Lockean liberalism which Epstein describes. The scope of the takings clause reflects a balancing of these two competing views, an attempt to give majoritarian decisionmakers freedom where their decisionmaking was most worthy of deference and to restrain them where their decisionmaking was most suspect.

In general, the framers of the Constitution

constructed a document that reflected republican attitudes toward property (using property here in the broad sense of property as value). So long as they acted within the scope of federal power, majoritarian decisionmakers could limit property rights. The takings clause represents an exception to this general rule. It defined an area – dispossession – in which majoritarian decisionmakers could not trump individual rights. The takings clause is the liberal hole in the republican donut.

So, why did dispossession merit special treatment? The answer is that, for the framing generation, physical property was peculiarly at risk in the political process. In particular, Madison, the author of the takings clause, believed that the two groups whose property claims the national government was most likely to treat unfairly were landowners and slaveowners. He thought that most property interests were adequately protected by the structural safeguards described in *Federalist* 10 because factions were willing to enter into deals with each other. But landowners and slaveowners were likely to be shut out of the bargaining process. He anticipated that landowners would soon be a minority, and slaveowners already were. His writings and his statements at the constitutional convention reflect his fear that a hostile majority, rather than negotiating with slaveowners and landowners, would consistently advance its ends at the expense of these minorities. The takings clause, then, represents Madison's attempt to provide these groups with the protection that they could not get through normal political bargaining: if the national government took land or freed slaves, compensation would be owed. Heightened constitutional protection was provided for the limited categories of cases in which unfairness was most likely.

Changed circumstances have created a gap between the ends the takings clause was intended to promote and the concrete circumstances in which the clause was originally

understood to require compensation. Slavery is, obviously and thankfully, a moot use. Contrary to Madison's expectations, most Americans are landowners. Thus, the choice raised by the debate about translation is particularly evident in the takings realm. Do we read the clause to mandate compensation only when there is dispossession? Such a reading could only appeal to a strict originalist. Given the political power of landowners – indeed, as Professor Daniel Farber has observed, “compensation for physical invasions is almost universal in democracies” – to limit the takings clause to instances of dispossession is to make it trivial, protecting only those who are well-equipped to protect themselves. At the same time, it fails to protect those whose property interests are most at risk in the political process. Such a result thwarts what the framers were trying to do.

A similar point can be made about the Epsteinian text-based approach to the original understanding. As argued in the previous section, although Epstein would have it go elsewhere, his approach leads to the conclusion that dispossessions are takings, but regulations aren't. Again, given what the framers were trying to do, that result is perverse because it protects those best-equipped to defend their interests through the political process while it leaves unprotected those who are most likely to be victimized by process failure.

Translation avoids this problem. Lessig's model of translation shares the major virtue of strict originalism and Epstein's approach: Judges decide not based on their own values, but on the basis of considered decisions made by “We the People” in ratifying the Constitution and its amendments. But, when translating, the aspect of the framers' decision that is relevant to modern decisionmaking is the framers' values and the ends they were seeking to achieve. As a result, courts, by translating, implement the framers' vision and respect their basic choices, rather than blocking what

they were trying to do and rendering the Constitution an anachronism.

In the context of the takings clause, translation leads to a process-failure theory since the framers' underlying purpose was to provide heightened protection for property in those situations in which the political system was particularly unlikely to consider the claims of property owners fairly. In the contemporary context, unfairness is particularly likely to occur when legislation singles out an individual or a small group of people. When a large number of people are potentially affected by a proposed statute or regulation, they can protect themselves through the political process, engaging in logrolling to ensure that they are not forced to bear an undue share of the public's burden. The same is not true when a proposal affects a few people or, worse, one person. Public choice theory tells us that such groups, by simple virtue of the fact that they are a tiny part of the polity, are poorly situated for engaging in political trades. They are effectively shut out – just as Madison feared slaveowners and landowners would be. A similar point can be made about racial minorities. Much of modern constitutional law has been premised on the belief that racial minorities are disadvantaged in the political process. This belief is of particular relevance in the area of environmental racism, and the empirical evidence to date indicates that minority communities bear more than their fair share of locally undesirable land uses. Thus, under a translation of the takings clause, courts should scrutinize with particular care government acts that single out the property interests of individuals or small groups and they should similarly scrutinize government acts that specially burden the property interests of minorities. Outside of these limited areas in which process failure is most likely, courts should defer to majoritarian decisionmakers, just as, under the takings clause as it was originally understood, majoritarian decisionmakers were deferred to except

where process failure was most likely.

While Epstein approves of my view that the takings clause applies to regulations, he criticizes me for not following his lead and concluding that all regulations that have redistributive consequences are takings. He writes, "The basic logic of the takings clause requires that it reach partial regulations much as it reaches partial occupations. But Treanor will not go that far, without explaining why." The explanation is that there is no one principle behind the original understanding of the takings clause. Rather, there are two. The takings clause is antiredistributionist, as Epstein correctly argues. Antiredistributionism is its animating principle. But equally important is its limiting principle. Majoritarian decisionmakers are free to make decisions about property rights except in those limited categories of cases in which their decisionmaking is particularly suspect. It is only in this limited category of cases that the animating principle comes into play.

When the framers protected property only

against dispossession, they balanced their competing commitments. The translation approach that I have advanced also reflects a balance, with the difference being that the translation approach strikes the balance in a way that accords with modern circumstance. Epstein's understanding of the takings clause as embodying only antiredistributionism looks to only one side of the balance. Lord Macauley famously observed that the Constitution is "all sail, and no anchor." He is obviously wrong. But Epstein misreads the Constitution in the opposite direction. He gives us a Constitution that is all anchor and no sail, one that ignores the fact that the founders gave tremendous deference to majoritarian decisionmakers. And so, when Epstein argues, "What we need are careful readings of text that capture the balance, sense and logic of the original doctrine," I find myself in agreement with him. What he has failed to see is that this is precisely what the translation model interpretation of the takings clause does. *GB*