EASTERN ENTERPRISES, PHILLIPS, MONEY, AND THE LIMITED ROLE OF THE JUST COMPENSATION CLAUSE IN PROTECTING PROPERTY "IN ITS LARGER AND JUSTER MEANING"

Robert Brauneis[*]

Last Term, the Supreme Court decided two cases about the application of the Just Compensation Clause to money. In *Eastern Enterprises v. Apfel*,[1] although a plurality of four held that a statute requiring a company to contribute to a benefits fund violated the Just Compensation Clause, the five Justices who were *not* members of the plurality—Justice Kennedy, concurring in the judgment, and four dissenters—concluded that the Just Compensation Clause does not limit government action that merely imposes a general liability, that is, an obligation to make monetary payments, without identifying any particular fund from which those payments must be made.[2] Rather, according to those five Justices, the Just Compensation Clause is only brought into play when the "property" taken is "an identified property interest,"[3] that is, "a specific interest in physical or intellectual property."[4] Legislation creating general obligations, according to the five, is to be reviewed under the Due Process Clause, which presumably provides a lesser degree of protection.[5]

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* Associate Professor, George Washington University School of Law.

1. 524 U.S. 498 (1998).

2. *See Eastern Enters.*, 524 U.S. at 540 (Kennedy, J., concurring in the judgment and dissenting in part) ("The [Coal Act, 26 U.S.C. §§ 9701-9722 (1994)] simply imposes an obligation to perform an act, the payment of benefits."); *id.* at 554 (Breyer, J., dissenting) ("This case involves, not an interest in physical or intellectual property, but an ordinary liability to pay money, . . . ").

3. *Id.* at 540 (Kennedy, J., concurring in the judgment and dissenting in part); *see id.* at 2155 ("a specific property right or interest . . . specific and identified properties or property rights").

4. *Id.* at 554 (Breyer, J., dissenting).

5. *See Eastern Enters.*, 524 U.S. at 558 (Breyer, J., dissenting) (suggesting that the Due Process Clause protects against "fundamentally unfair and unjust" laws).

By contrast, earlier in the same Term, a bare majority of the Court—the *Eastern Enterprises* plurality plus Justice Kennedy—decided in *Phillips v. Washington Legal Foundation*[6] that a law requiring attorneys to place their clients' funds in an account that generated interest income to fund legal services for low-income persons was potentially a "taking" of the clients' property under the Just Compensation Clause. Because the funds—the principal placed in the account—were "private property" within the meaning of the Clause and because state law had previously applied the general rule that "interest follows principal," the interest generated by the funds was also the clients' "private property" within the meaning of the Just Compensation Clause.[7] The reasoning in *Phillips* followed the Court's analysis in *Webb's Fabulous Pharmacies v. Beckwith*,[8] a 1980 case striking down a state statute allowing a county to take as its own the interest on money required to be deposited in an interpleader fund in the county court for the depositor to avail itself of statutory protection from competing claims to that money.[9]

What are we to learn by putting *Eastern Enterprises* next to *Phillips*? Since there was only one Justice who thought there could be no Just Compensation Clause violation in *Eastern Enterprises* but could be in *Phillips*—Justice Kennedy—maybe the only thing we learn is something about his idiosyncratic preferences. However, the pair of cases can arguably be seen as reinforcing the view that the Just Compensation Clause is and should be about government actions that dispossess owners of ordinary objects—in other words, about takings of private property, as we use that term in ordinary language—and not about redefining legal rights or metaphorically taking strands from a bundle of rights.

There are two basic assertions about the Constitution and private property, one substantive, the other methodological. The substantive assertion is that the Just Compensation Clause is and always was understood to be a partial, incomplete protec-

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6. 524 U.S. 156 (1998).
7. *See Phillips*, 524 U.S. at 157.
8. 449 U.S. 155 (1980).
9. *Beckwith*, 449 U.S. at 155.

tion of property rights in general. The Framers were not primitives who failed to understand that "property" could refer both to distinct things which people could possess, use and enjoy, and to legal rights more generally and abstractly. After all, James Madison begins his 1792 essay "Property" by distinguishing two meanings of the term: a "particular application" to "'that dominion which one man claims and exercises over the external things of the world, . . .'" on the one hand, and a "larger and juster meaning . . . embrac[ing] everything to which a man may attach a value and have a right,"[10] on the other. But the protection of "property" in that "larger and juster meaning"[11] was the purpose, not only of the Just Compensation Clause, or even of the Just Compensation Clause and the Due Process Clause, but also of most of the American constitutional scheme.

We all know that the prevailing view of the founding generation was that, as Gouverneur Morris, echoing Locke and others, put it at the Constitutional Convention, "property [is] the main object of Society."[12] Naturally, then, the original 1787 Constitution, even though it contained neither a Just Compensation Clause nor a Due Process Clause, was designed to protect "property" in the broad sense. For Madison in *The Federalist* No. 10, for example, the republican form of government itself and the construction of relatively large districts for representatives were justified largely as structural protections of property rights, or as he put it, of the "different and unequal faculties of acquiring property," the protection of which was "the first object of government."[13] Alongside these structural protections, the 1787 Constitution contained a number of specific substantive provisions designed to protect property in more particular circumstances, most prominently the Contract Clause,[14] intended above all to protect creditors from state debtor relief laws.[15] Even though

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10. James Madison, *Property*, *in* THE MIND OF THE FOUNDER 243 (Marvin Meyers ed., rev. ed. 1981).

11. *Id.* at 243.

12. THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 533 (M. Farrand ed. 1911); *see* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 355, Second Treatise, ch. XI, § 134 (P. Laslett ed., student edition 1988) ("The great end of men's entering into society, being the enjoyment of their properties in peace and safety, . . . ").

13. THE FEDERALIST No. 10, at 78 (J. Madison).

14. U.S. CONST. art. I, § 10.

15. *See, e.g.*, Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 204-06 (1819);

the Supreme Court interpreted the Contract Clause quite broadly in the nineteenth century,[16] it declined to find in that Clause anything like a general protection against legal change or the implementation of a general theory of justice in resource holdings.[17] Rather, many difficult, subtle judgments about justice in particular cases were left to the legislature and to the executive, institutions which hopefully were shaped to respect property in conformity with the Constitution's structural provisions. The Contract Clause, in the Court's view, picked out one group of similar cases generally thought to involve injustice and embodied the judgment that those cases were discrete enough that the judiciary could implement a directive to identify and remedy them.[18]

Against this 1787 background of a mix of broad institutional arrangements and specific substantive protections to protect property, comes the 1791 Bill of Rights, containing, among other things, the Fifth Amendment Just Compensation and Due Process Clauses.[19] One possibility is that these provisions were intended to be very broad and general, so that the protection of property generally, which previously was widely thought to be the chief object of the entirety of government and society, was now entrusted to a small group of federal judges. Many theorists these days seem inclined to explore the broad view. Richard Epstein's book *Takings*,[20] for example, builds an entire theory

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Michael W. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 CAL. L. REV. 267, 278-81 (1988).

16. *See, e.g.*, Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) (applying the Contract Clause to protect an executed grant from the state to a private party).

17. The Court's consistent position was that the Contract Clause only implemented part of the vested right doctrine, the prevailing general theory of property right protection in the antebellum United States. *See* Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420, 539-40 (1837) (quoting Satterlee v. Matthewson, 27 U.S. (2 Pet.) 380, 413 (1829) (stating that a law divesting vested rights must "'impair the obligation'" of a contract to be unconstitutional)); Watson v. Mercer, 33 U.S. (8 Pet.) 88, 110 (1834) (refusing to declare an act void merely because it "d[i]vests antecedent vested rights of property"); Satterlee v. Matthewson, 27 U.S. (2 Pet.) 380, 413 (1829) (holding that a statute which "divest[ed] rights which were vested by law" would not violate the Constitution "provided, its effect be not to impair the obligation of a contract").

18. *See infra* notes 1, 6.

19. U.S. CONST. amend. V.

20. RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMI-

of justice on the Just Compensation Clause and Frank Michelman's famous 1967 article,[21] while subtitled "Comments on the *Ethical Foundations* of 'Just Compensation' Law," has become an authority to cite in many debates about Just Compensation Clause doctrine itself.[22]

Another possibility is that these provisions were more narrowly focused and targeted toward more particular situations, still leaving much of the protection of private property to structural and other substantive provisions. Under this alternative, it may well be true, as the Supreme Court never tires of repeating, that the Just Compensation 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."[23] That does not mean, however, that the Just Compensation Clause makes every legislative or executive shift in burden justiciable. Rather, the Just Compensation Clause focuses on a kind of shift in burden that can be identified relatively easily and a kind which almost everyone can agree is unfair for particular people to bear alone, since that kind of case—administrable and supported by a broad consensus—is the most appropriate for the judiciary to handle. In addition, that kind of shift in burden is one that is perceived in ordinary thought and language as involving the taking of discrete objects, paradigmatically, although not exclusively, physical objects.[24] As between those two broad possibilities, I think the second is

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NENT DOMAIN (1985).

21. Frank I. Michelman, *Property, Utility, and Fairness: Comments and the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967).

22. Michelman himself disavowed any intention "to reformulate doctrine, redirect it, or overhaul it" and "counselled . . . more than anything else, a de-emphasis of reliance on judicial action as a method of dealing with the problem of compensation." *Id.* at 1167.

23. Armstrong v. United States, 364 U.S. 40, 49 (1960).

24. This builds on the work of Bruce Ackerman and Margaret Jane Radin. As Radin puts it:

> One's expectations crystallize around certain "things," the loss of which causes more disruption and disorientation than does a simple decrease in aggregate wealth. . . . [Moreover,] relief for object loss permits line drawing. Courts can perceive whether or not an object has been taken, but cannot in the same way discern whether "too much" wealth has been taken.

Margaret Jane Radin, *Property and Personhood*, *in* REINTERPRETING PROPERTY 35, 64-65 (1993); *see* BRUCE ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 113-67 (1977).

by far the more plausible.

Even if I am right that the Just Compensation Clause is particular and targeted, rather than a source of universal protection of claims to the use, disposition and exclusion of others from resources, how are we to determine what that target is and what the outer boundaries of Just Compensation Clause protection are? Here we come to the second assertion, the methodological assertion, from which I want to start. It seems to me that the best model for Just Compensation Clause interpretation is the common-law model which, in its application to constitutional interpretation, is probably most closely associated with Justice Holmes. As I have argued elsewhere, Holmes believed that constitutional adjudication, like common-law adjudication, involved drawing analogies between each case and various existing paradigm cases that did and did not fall within the scope of the constitutional provision at issue.[25] Holmes believed that the lines defining the scope of constitutional rights "are pricked out by the gradual approach and contact of decisions on the opposing sides."[26] The final line "is so far arbitrary that it might equally well have been drawn a little further to the one side or to the other[,]" but "it is better to have a line drawn somewhere in the penumbra between darkness and light, than to remain in uncertainty."[27]

Consider the history of Just Compensation Clause interpretation in that light. The original paradigm cases to which the Clause applied are, I think, quite clear: public occupation of real property, building roads and other public facilities, and seizure of personal property for public use, often of horses, carriages and other supplies for military use. These were practices familiar to the Bill of Rights Framers, and there is no doubt that the Just Compensation Clause was meant to apply to them.[28] For all of

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25. *See* Robert Brauneis, *"The Foundation of Our 'Regulatory Takings' Jurisprudence": The Myth and Meaning of Justice Holmes's Opinion in* Pennsylvania Coal v. Mahon, 106 YALE L.J. 613, 660-64 (1996).

26. Noble State Bank v. Haskell, 219 U.S. 104, 112 (1911).

27. 1 HOLMES, THE THEORY OF TORTS, *in* THE COLLECTED WORKS OF JUSTICE HOLMES 326, 327 (Sheldon M. Novick ed., 1995).

28. *See, e.g.*, Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-State Just Compensation Law*, 52 VAND. L. REV. 57, 104 (1999) (quoting 1 HENRY ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES 305-06 (1803) (opining that the Just Compensation Clause "was probably intended to restrain the

the enormous publicity about regulatory takings in the last twenty-five years, the cases in which the Supreme Court has actually found a regulatory taking are, for the most part, quite close to these paradigm cases. Public authorization of permanent physical occupation of land by a private party, as in *Loretto v. Teleprompter Manhattan CATV Corp.*,[29] for example, is very close. And the exaction cases, *Nollan v. California Coastal Commission*[30] and *Dolan v. City of Tigard*,[31] are also tightly linked to traditional occupation-of-land cases, as they both concern the extraction of permanent interests in land by means of regulatory pressure.[32] *Lucas v. South Carolina Coastal Council*[33] appears to be and is undoubtedly more radical because it seems to cross over the line from occupation to use restrictions. Nonetheless, the *Lucas* Court's insistence on deprivation of all economically beneficial use and on the postulation of a public use that is being made of the land above and beyond harm prevention as defined in preexisting law[34] still gives the case the feel of the taking of an object for public use.

Now we come to *Eastern Enterprises*. Why is it that, from the point of view of five Justices in that case, laws imposing general liabilities simply do not fall within the scope of the Just Compensation Clause? True, a law imposing a general liability on someone leaves that person with some choice and flexibility that a law expropriating a particular asset—a house or a painting, for example—does not. That person may be able to avoid parting with assets to which he or she has a particularly strong personal attachment or on which he or she places a particularly high value that would not be reflected in the just compensation paid by the government, which is ordinarily limited to market value.[35] Nonetheless, when the day specified for payment of

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arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressment, as was too frequently practiced during the revolutionary war, without any compensation whatsoever")).

29. 458 U.S. 419 (1982).

30. 483 U.S. 825 (1987).

31. 512 U.S. 374 (1994).

32. *See Loretto*, 483 U.S. at 825; *Tigard*, 512 U.S. at 374.

33. 505 U.S. 1003 (1992).

34. This is other side of the "nuisance exception" in *Lucas*. I am suggesting that the exception is important because of the way in which it defines the action that falls outside of it.

35. *See, e.g.*, United States v. 564.54 Acres of Land, 441 U.S. 506, 510-12 (1979)

that liability comes, that person will end up transferring particular funds from a particular account and if we focus on that event, it looks like the person is being forced to give up an object. True, if the "just compensation" provided by the government is a payment of money damages which, whether or not constitutionally required,[36] is certainly normal state and federal practice and the practice contemplated by the Tucker Act, then recognizing "takings" of money results in the oddity of exchanging money for money, dollar for dollar, an oddity that seems to be another clue that takings of money are far from the paradigm cases at the heart of the Just Compensation Clause. But why?

One good answer is that in the American tradition, taxes take the form of requirements to pay money—as far as I know, taxes payable in grain or gold were never big in the United States—so that the application of the Just Compensation Clause to requirements to pay money would seem to place courts in the position of reviewing all taxes to determine whether they were takings. Justice Breyer explicitly calls attention to this problem in his *Eastern Enterprises* dissent when he asks rhetorically "[i]f the Clause applies when the government simply orders A to pay B, why does it not apply when the government simply orders A to pay the government, i.e., when it assesses a tax?"[37] Some of you, of course, may welcome the elimination of many currently imposed taxes, so that if the problem of subjecting taxes to Just Compensation Clause scrutiny is the practical problem of radically undermining the current system of government finance, you will cheer and shout "so much the better!"

The problem with applying the Just Compensation Clause to the practice of taxation, however, is not just a practical problem; it is a problem of constitutional interpretation. Article I, section 8 of the Constitution grants Congress in very general

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(confirming the use of fair market value as the general measure of just compensation under the Fifth Amendment).

36. *See generally* Douglas T. Kendall & James E. Ryan, *"Paying" For the Change: Using Eminent Domain to Secure Exactions and Sidestep* Nollan *and* Dolan, 81 VA. L. REV. 1801, 1837-43 (1995) (observing that Supreme Court dictum is inconclusive on the issue of whether nonmonetary compensation would satisfy a government's obligation under the Just Compensation Clause and that state just compensation provisions sometimes require payment in money either textually or by judicial interpretation).

37. *Eastern Enters.*, 524 U.S. at 556.

terms the power to "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States,"[38] subject only to a few specific limitations in sections 8 and 9.[39] The Fifth Amendment, of course, could have added a new limitation, providing that when Congress's otherwise valid exercise of its Article I tax power amounted to a taking, it had to pay just compensation. However, there has never been any hint before or after the adoption of the Bill of Rights that anyone understood the Fifth Amendment to add such a limitation. Rather, taxation was thought to be a practice wholly outside the Just Compensation Clause.[40]

This was not because no one understood that taxes could threaten property, broadly speaking. Chief Justice Marshall was surely expressing a widespread attitude when he said in *McCulloch v. Maryland*[41] that "the power to tax involves the power to destroy";[42] more generally, everyone knew that questions of who to tax and how much to tax were questions of the just allocation of burdens on private resources. They were, however, complex questions, and there was no consensus theory that could provide algorithms or even guidelines for courts to follow in deciding the right amount to tax particular people for particular activities. Hence, the Framers fell back on structural and procedural protections, including most particularly the provision of Article I, section 7 that "[a]ll bills for raising Revenue shall originate in the House of Representatives,"[43] and the substantive limitations on the taxing power generally addressed federalism issues (and the delicate issue of slavery) rather than individ-

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38. U.S. CONST. art. I, § 8.

39. *Id.* §§ 8, 9.

40. Indeed, it might be argued that the Just Compensation Clause assumes the practice of taxation, for where else, practically speaking, is a government going to get the funds to pay just compensation awards? Thus, when the *Armstrong* Court states that the Clause's purpose is to prevent the 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," Armstrong v. United States, 364 U.S. 40, 49 (1960), it surely has in mind taxation as the mechanism by which the public burden will be placed on the shoulders of the public as a whole.

41. 17 U.S. (4 Wheat.) 316 (1819).

42. *McCulloch*, 17 U.S. (4 Wheat.) at 429.

43. U.S. CONST. art. I, § 7.

ual property rights issues.

Now, in true Holmesian fashion, we could take the paradigm case of a tax and the paradigm case of a taking of private property, think about the possible intermediate points between those two paradigm cases, and then ask how the line might be pricked out by successive cases. The plurality in *Eastern Enterprises* said very little about what it was about the Coal Act that made it fall within the orbit of the Just Compensation Clause, but surely one important aspect was that the Act required Eastern Enterprises to pay money directly to another private party or group of parties rather than to the government.[44] This may seem paradoxical because the paradigm case of a taking involves the appropriation of property by government agents for their use or for the use of the general public. But the fact that the payments were not to be made to the government presumably meant that the Coal Act was not subject to the procedural protections applicable to tax legislation, such as the provision in Article I, section 7. Furthermore, the fact that in the paradigm case of taxation revenue raising is separate from appropriations—that is, the tax is not earmarked in advance—helps to keep the question of whether it is just to allocate the burdens of government in a particular way separate from the question of whether the government should make a particular appropriation. The collapsing of tax and appropriation may corrupt legislative judgment about the tax component. On the other hand, the complex review of history that the *Eastern Enterprises* plurality has to undertake in order to perform its takings analysis and the mismatch of regulatory takings factors with the facts of the case that Michael Allen Wolf identifies in his Article,[45] suggest that the *Eastern Enterprises* is very far from the core of the Just Compensation Clause.

Will the line between general liability and specifically identified property stand, and in what ways does it need to be elaborated? *Phillips v. Washington Legal Foundation*[46] provides an interesting set of facts to work with because of the difference

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44. *Eastern Enters.*, 524 U.S. at 542-43.

45. *See* Michael Allan Wolf, *Taking Regulatory Takings Personally*, 51 ALA. L. REV. 1355 (2000).

46. 524 U.S. 156 (1998).

between the popular perception and legal treatment of bank accounts. The *Phillips* Court uses physical language to describe what happens in an ordinary banking transaction: A client or customer deposits money into an account, in much the same way that valuables are placed in a safe deposit box, and that money retains its character as a separate object, "the principal," which is still the property of the banking customer, and when that principal generates interest, that interest is also the property of the banking customer, in the same way that the owner of the cow is also the owner of the calf.[47] That description of the banking transaction, as involving an object that is continuously held by a customer and then by the bank, goes a long way towards explaining the *Phillips* Court's conclusion that the interest generated by an Interest on Lawyer's Trust Account is the private property of the lawyers' clients.[48]

There is, however, another very different way of looking at the banking relationship, and the Court has sometimes embraced that other perspective in a constitutional context. In *Louisville Joint Stock Land Bank v. Radford*,[49] a 1935 case, the Court held unanimously that an amendment to federal bankruptcy law providing for the extinguishment of mortgage liens without the full repayment of the loans that they secured violated the Just Compensation Clause.[50] The Court held that this was a taking because the bank had acquired a "substantive right" in "specific property," a mortgage lien on a specific piece of real estate, before the passage of the amendment in question.[51] But the Court distinguished Congress' ability to provide for the discharge of the debtor's personal obligation to the bank.[52] Such a discharge might be an impairment of the obligation of a contract, but it was not a taking because the personal obligation did not involve any specific property; it was just a general liability.[53] Now, of course, it seems as though we've come back to the line drawn by the five Justices in *Eastern Enterprises*. But if a

47. *Phillips*, 554 U.S. at 165-66.
48. *Id.* at 170.
49. 295 U.S. 555 (1935).
50. *Louisville Joint Stock*, 295 U.S. at 602.
51. *Id.* at 589.
52. *Id.*
53. *Id.*

loan from a bank to an individual falls on the "general liability" side of the "general liability/specific property" line, why doesn't an individual's deposit of money in a bank fall on the same side? The legal relationship is the same; the individual does not retain some sort of lien on the specific money deposited.

Should we, then, recast *Phillips* as a case about the regulation of the debtor-creditor relationship between lawyers and clients, which does not involve specifically identified property that can be taken? I think it is very difficult to do this, even as an exercise in redescription, and I suggest that the difficulty may be connected to the way that our perception of whether a government action involves "specific property" or "general liability" may depend on whether the government action is perceived as singling out particular individuals to bear burdens or whether it is perceived as more general action. In other words, we can describe laws as "regulating debtor-creditor relations," with less of a "property" cast, when they are part of a general scheme applicable to debts generally or many different kinds of debts; it is harder to do that when a law singles out one group of people—clients of lawyers—and when the point of the law is to benefit a third party—neither the client, nor the lawyer.