LEAVING THE LAND OF EASY ANSWERS: REGULATORY TAKINGS, *RUCHO* AND THE NATURE OF CONSTITUTIONAL ANALYSIS

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INTRODUCTION

Every facet of constitutional law raises the same basic question: when will, or should, the adjudicative process substitute its judgment for the political process. The basic issue of constitutional law is who decides or, more exactly, what decides, since the decision-making alternatives are not individuals but large processes or institutions. Thus, constitutional law is institutional choice. The central issue of constitutional analysis is how this institutional choice should be made. There are several conventional analytical approaches, including examining the text of the Constitution, seeking the meaning given that text by its Framers and focusing on essential constitutional values or goals. Or the institutional choice question can be addressed directly by assessing the relative merits of the adjudicative and political processes in any given setting. In this Article, I show that, especially when the analysis is normative (when we are asking what constitutional law should be), the conventional approaches are inherently insufficient unless they seriously address institutional comparison and comparative institutional analysis.[1]

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1. Although positive or descriptive analysis can in theory be approached in many ways, approaches based on institutional analysis have proved powerful. Andy Coan's book is a prime example. *See* ANDREW COAN, RATIONING THE CONSTITUTION: HOW JUDICIAL CAPACITY SHAPES SUPREME DECISION-MAKING 13–18 (2019). In turn, I have used comparative institutional analysis to understand the pattern of US constitutional law. *See generally* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW,

I use the regulatory takings doctrine to demonstrate the essential role of institutional analysis in constitutional law and the problems created when these considerations are ignored. The regulatory takings doctrine provides that, under certain circumstances, regulation constitutes a taking of private property and, therefore, requires just compensation.[2] Understanding regulatory takings necessitates identifying those circumstances. We could attempt to define them by examining the phrase, "taking of private property." But virtually anything the government does can be seen as taking property. We could see what the term meant to the Framers of the Fifth Amendment. But that would cast considerable doubt on the application of the Takings Clause to regulation and, as we shall see, it would, as a general matter, be insufficient. We could look to the goals of just compensation commonly articulated as fairness and correction.[3] These goals are worthwhile, but without institutional analysis they tell us virtually nothing about what we see, and should see, from takings or regulatory takings.

In order to understand what the regulatory takings doctrine is, will be, or should be, we need to explore the decision-making processes that define and implement the doctrine. We can start with the role of the costs of information. Even in a society devoted to distributional fairness and blessed with unbiased decision-making processes, the cost of information dictates that only a fraction of the unfair distributional impacts of government action would be compensated.

When we come to the goal of correction, we must explore the biases in the political process and then ask how these biases might be corrected by compensation. Political malfunction is also important in understanding why just compensation is an issue taken from the political process and allocated to the courts. But understanding this shift in decision-making also requires examining the adjudicative process and its malfunctions.

In Part I of this Article, I examine just compensation in a world of costly information and advance the notions of optimal ignorance and optimal arbitrariness. In Part II of this Article, I explore the connection between political malfunction and just compensation, the role of just compensation in correcting political malfunction and the basis for shifting the determination of just compensation from the political process to the courts. Here, I present an analytical framework capable of understanding

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ECONOMICS 3–13 (1994) [hereinafter KOMESAR, IMPERFECT ALTERNATIVES]. European constitutional scholars have used this analysis to show similar patterns in European and European Union constitutional law. *See* MIGUEL POIARES MADURO, WE THE COURT: THE EUROPEAN COURT OF JUSTICE AND THE EUROPEAN ECONOMIC CONSTITUTION 68–78 (1998); JOHANNA CROON-GESTEFELD, RECONCEPTUALIZING EUROPEAN EQUALITY LAW 6–8, 12–16 (2017).

2. *Pa. Coal Co. v. Mahon*, 290 U.S. 393, 415 (1922).

3. *See, e.g.*, Katrina Miriam Wyman, *The Measure of Just Compensation*, 41 U.C. DAVIS L. REV. 239, 246 (2007).

both the political and adjudicative processes. In Part III, I use this framework to show the limits of regulatory takings and the impossibility, and even perversity, of sweeping definitions of regulatory takings like that of Richard Epstein and even of more tailored proposals like that of William Fischel.[4] In Part IV, I review the existing regulatory takings doctrine and explain why it is far less than its advocates desire. In Part V, I consider the wisdom of retaining a doctrine that does little but create mischief. In Part VI, I use the insights from the analysis of regulatory takings to show the inadequacy of constitutional approaches like essentialism and originalism that do not take institutional analysis seriously. Here, I employ the issue of partisan gerrymandering to explore the optimal use of judicial review.

I. JUST COMPENSATION AND OPTIMAL IGNORANCE

The most straightforward goal of just compensation is distributional fairness—benefits and burdens of governmental programs should be equitably shared.[5] There is also a second, more indirect goal of just compensation: the improvement of government decision-making.[6] If the government pays for what it gets, it will take these costs into account. Both fairness and correction are worthwhile goals. But, standing alone, goals, no matter how attractive, tell us virtually nothing about when compensation would, will, or ought to be paid. In order to understand why, we will have to delve into the character of the decision-making processes involved in just compensation.

We can start simply by assuming a well-intended, unbiased decision-making process with only one imperfection—ignorance. Consider first the goal of distributive fairness. If we had a frictionless, costless, and totally accurate compensation machine, we could use it to correct maldistribution across-the-board. Feed in the government program and the machine identifies losers, the extent of the loss, and then pays that amount into their account. All government activity could be included because all government activity—from changing speed limits to declaring war—has the potential for creating net losers. Acquiring land for roads and government buildings is only a minor subset. With a frictionless machine, there is no reason to leave any maldistribution uncorrected.

But this machine is unavailable. Just compensation requires determining who is a loser and the extent of the loss. These determinations

4. *See* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 93–94 (1985); WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLICY 9–11 (1995).

5. Michael A. Heller & James E. Krier, *Deterrence and Distribution in the Law of Takings*, 112 HARV. L. REV. 997, 998–99 (1999).

6. Wyman, *supra* note 3.

are difficult and expensive to make accurately, and some may not be accurately determined whatever the outlays. If it is true—and I believe it is—that all government programs can create net losers, any attempt to provide broad-based compensation would create administrative costs that would swamp the public sector. Moreover, there would be a substantial chance of error as we trade-off the cost of accuracy with the benefits of accuracy—as we seek an optimal level of ignorance. As such, the compensation program could create rather than alleviate unfairness. As we shall see, this problem is magnified when the cost of information interacts with systemic bias.

To be clear, the cost of just compensation is not the amount of the transfer itself. That transfer is the objective of just compensation. The worrisome cost is the cost of making the transfer—the administrative costs of designating losers and determining the amount of loss. Added to this would be the costs of any maldistribution created by inaccuracies in making the judgment of who loses and the amount of the loss. It is now obvious why we could not and would not want to compensate the losers from all government actions.

We would need to find a subset—a small subset—of the impacts of government programs that trigger just compensation. Here optimal ignorance begets optimal arbitrariness. We could seek out those instances in which unfair distribution was most likely, and in which it was easiest to discern winners from losers and determine the amount of the loss. Perhaps limiting just compensation to instances where the government acquires title to a fee simple absolute interest in land (the core example of takings) serves this purpose. But arbitrary cutoffs, even if optimal, always contain a kernel of instability. Just across the arbitrary line lies uncompensated losses that share many of the attributes of the losses that are compensated. Attempts to move beyond such simple but arbitrary cutoffs, however, invite difficult trade-offs between the benefits of just compensation and its costs. Regulatory takings are one such example and will be our principal focus. But there are many examples of extensions and the need to find arbitrary, if optimal, cutoffs in the takings context.

As a general matter, public decision-makers, such as the political or adjudicative processes, will face severe problems in delivering distributive fairness through just compensation. These costs are not relevant only to adjudicative process determinations of just compensation. The cost of information and the associated issues of optimal ignorance and optimal arbitrariness are as relevant for the political or administrative processes as they are for the adjudicative process.

This brings us to the other major goal of just compensation: the correction of governmental decision-making. The mechanics of correction seem simple: if the government bears the costs it is imposing, it will make better decisions. Of course, like the goal of distributional fairness, the determination of just compensation for the purpose of correction would be

subject to the administrative costs of identifying net losers and the amount of the loss. And, as we shall see, in the context of regulatory takings, these costs are especially high.

But to understand correction, we must answer a more basic question: why do we suppose the political process needs correcting? Why aren't the costs already internal? The political process as the determiner of the public interest should account for all impacts without having to pay compensation. The political process decision-maker that we have considered thus far suffers from ignorance. But there is no a priori reason to see these information problems as more associated with costs than with benefits. In order to understand the corrective role of just compensation, we will need additional institutional analysis.

II. INSTITUTIONAL MALFUNCTION: AN ANALYTICAL FRAMEWORK

Understanding the correction goal of just compensation requires delving more deeply into the forms of political malfunctions and how they might be corrected by just compensation. Understanding the political process and its malfunctions is the first step to understanding the broader issue of why just compensation is an issue that needs to be taken from the political process and allocated to the courts. That, in turn, requires us to understand the adjudicative process and its malfunctions.[7]

A. The Two-Force Model of Politics

Much of what economists and political scientists have contributed to the analysis of politics and political malfunction is based on a simple but powerful paradigm—the dominance of interest groups small in number of members but with high per capita stakes over groups larger in number but with smaller per capita stakes. This dominance holds even when the total stakes for the larger group exceed that for the smaller. These theories are variously called capture theory, special interest theory, or interest group theory. For simplicity sake, I will call this body of work the interest group theory of politics (IGTP) and the disproportionate influence of the concentrated few minoritarian bias.

When one considers the interaction between the costs and benefits of political participation and, in particular, the costs and benefits of information, it is easy to see why the dominant image of the political process and its biases is minoritarian. The concentrated few with their substantial per capita stakes have the incentive to understand their

7. For fuller treatments of these models, see KOMESAR, IMPERFECT ALTERNATIVES, *supra* note 1, at 97, 149–50 and NEIL KOMESAR, LAW'S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS 51–52 (2001) [hereinafter KOMESAR, LAW'S LIMITS].

interests, organize for political activity, and determine the correct channels of influence in the political process. On the other hand, in the extreme but not uncommon case, the members of the losing majority (often consumers or taxpayers) do not have the incentive to even recognize that they are being harmed let alone how to do something about it.

But variation in the costs and benefits of participation can produce variation in the degree of dominance of concentrated interests. On the benefit side, as the per capita stakes for the majority increase (even holding constant the ratio between majoritarian and minoritarian per capita stakes), members of the majority will more likely expend the resources necessary to recognize their interests.[8] On the cost side, the probability of majoritarian response varies with the costs of information and the costs of political action.[9] In turn, these costs depend on the complexity of the issue and the structural characteristics of the political process, such as the population of the jurisdiction, the size of the legislature (number of legislators), the frequency of election and the size, and scope of the legislative agenda.[10] Smaller majorities are easier to organize. Legislatures with fewer legislators and simpler agendas make it easier to understand the position of any legislator and, therefore, easier to discipline unwanted action at the ballot box. Taken to its logical conclusion, this analysis suggests not just that the relative advantage of the concentrated group will vary, but that there may be instances in which the larger group can dominate and even be overrepresented. Voting provides larger groups with a form of political action that, in some circumstances, can be powerful and even dominant.

We now have a two-force model of politics that broadens the scope of the IGTP. Where the dynamics of participation make the majority dormant and majoritarian influence negligible, we get the minoritarian bias predicted by the IGTP. But as the chance of majoritarian activity grows, we get a countervailance between the two forces and, with it, political outcomes that are more "balanced" than predicted by a one-force model. In turn, the two-force model recognizes a political evil beyond the purview of the one-force model—majoritarian bias where active majorities impose disproportional losses on minorities. Some of the most dramatic evils done by government reside here. The two-force model provides a way to understand when and why majoritarian bias or minoritarian bias is likely.

For the purposes of this Article, the important issue is which of the two forces characterizes regulatory takings and which can be corrected by just compensation. The primary focus of regulatory takings is land use regulation, and there the form of political malfunction will depend on the

8. KOMESAR, IMPERFECT ALTERNATIVES, *supra* note 1, at 72.
9. *Id.* at 71–72.
10. *Id.* at 73.

size of the political jurisdiction with local zoning most likely to be characterized by majoritarian bias. Local homeowners have significant per capita stakes. A family's most valued asset is normally its home and, therefore, families are sensitive to government actions that may affect the value of their homes. Because local homeowner majorities are smaller in number and larger in per capita impact than majorities in most other political settings, organization is easier, and the stakes are high enough to produce both an appreciation of the issue and a willingness to act. Local land use decision-makers are more accessible both geographically and procedurally (simpler, less formal procedures) than most political bodies. Small local governments have relatively simple agendas that allow easier monitoring by local majorities.

The corrective effect of just compensation works most straightforwardly on majoritarian bias where active majorities impose disproportionate burdens on the minority. The majority pays the taxes that fund just compensation. If, as taxpayers, they must shoulder costs greater than the benefits they receive, they will not pass such regulations.

Correcting majoritarian bias in local zoning would create benefits across the ideological spectrum. Excessive restrictions emanating from local zoning impose widespread and serious social problems. The excesses of local zoning, often referred to as exclusionary zoning, have serious adverse ramifications on the supply and cost of housing, the equitable distribution of public education and the chance for economic and racial integration.[11] These adverse impacts are likely to be regressive, falling disproportionately on lower income families.[12]

It is even possible to imagine just compensation reducing minoritarian bias. If the controlling minority knows that it will be compensated for any losses imposed by the regulation, it would have a reduced incentive to oppose regulation where the costs are less than the social benefit. There are, however, strong reasons to believe that just compensation would increase rather than decrease minoritarian bias. We will return to these perverse impacts shortly. But even if we limit just compensation to majoritarian bias settings, the goodness of correction depends on the ability and availability of the adjudicative process.

B. The Adjudicative Process

Analyzing the adjudicative process raises three broad institutional considerations: the dynamics of litigation, physical capacity, and judicial

11. Elliot Anne Rigsby, *Understanding Exclusionary Zoning and its Impact on Concentrated Poverty*, CENTURY FOUND. (June 23, 2016), https://tcf.org/content/facts/understanding-exclusionary-zoning-impact-concentrated-poverty/.

12. *Id.*

competence or substantive ability. The interaction of these three considerations determines the performance of the courts.[13]

These interactions play out against the background of the structure of the adjudicative process. Compared to the political process, the adjudicative process exhibits three distinctive structural attributes. First, the adjudicative process has more formal requirements for participation. Second, the adjudicative process is much smaller—its physical resources and personnel are far fewer—than the political process and, more importantly, it is far more difficult to increase in size. Third, judges, the central officials of the judicial process, are more independent from the general population than their political counterparts. These three basic characteristics—higher access cost, limited scale, and judicial independence—interact.

The independence of judges stems primarily from their terms of employment. Federal judges serve for life. Even elected state court judge stand for election less frequently than officials in the conventional political process and, at least until recently, judicial elections have been characterized by greater non-partisanship.[14] Judges are also insulated from unequal influence by funneling information through the adversarial process and screening it by an array of procedural devices. However, the same structural elements that produce independence and evenhandedness raise the cost of participation in the adjudicative process—the costs of litigation. In turn, the costs of litigation, interacting with the distribution of stakes, can keep the courts from seeing many social issues and can produce serious inequality as low stakes players and those with limited experience with adjudication are systematically disadvantaged.

Scarcity of available resources and constraints on expansion also significantly impact the adjudicative process.[15] This is a factor emphasized by Andy Coan.[16] In theory, increasing or decreasing physical capacity (scale) of any institution helps determine the ability of that institution. However, the constraints on the size of the adjudicative process and the implications of these constraints on judicial choices are more obvious and dramatic than any comparable constraints on the size of the political process.

The physical capacity of the adjudicative process interacts with the competence of judges in a familiar way. As we saw earlier, there is a trade-off between accuracy and the cost of accuracy. As such, the costs of the judicial determination of just compensation will be a function of not only

13. *See* KOMESAR, LAW'S LIMITS, *supra* note 7.

14. *See* Justin Levitt, *The Partisanship Spectrum*, 55 WM. & MARY L. REV. 1787, 1831–83 (2014).

15. COAN, *supra* note 1; KOMESAR, LAW'S LIMITS, *supra* note 7, at ch. 3.

16. *Id.*

the number of cases or claims made but also the difficulty of discerning loss—a particularly serious problem for regulatory takings.

III. REGULATORY TAKINGS—HOPES AND DREAMS

As we shall see, the existing regulatory takings doctrine falls far short of the hopes of its proponents. But shifts in the makeup of the Supreme Court have brought on more Justices who may think the doctrine should come closer to these hopes. I could speculate on the sorts of programs these new Justices might consider, but I am saved from this task by two well-known scholarly pieces that set out broad (and broader) roles for regulatory takings. Examining these proposals provides a good idea of what expansions to the regulatory takings doctrine would entail.

Writing ten years apart, Richard Epstein and William Fischel advocated enlarging the coverage of regulatory takings. Epstein offers the more sweeping proposal.[17] He argues that any government action that interferes with the use of private property constitutes a takings whether or not the government acquires title, reduces the value to zero, directly invades the premises, or fulfills any of the arbitrary criteria that characterize existing takings jurisprudence.[18] Given Epstein's broad definition of property, virtually all forms of regulation become presumptive takings. It hardly seems surprising that a libertarian like Epstein should be delighted with the prospect of regulation vigorously scrutinized. But serious analytical problems undermine Epstein's proposal even for the property owners he believes he is protecting and the libertarians he represents.

On the demand side (the need) for regulatory takings, Epstein asserts that "the takings clause is designed to control rent seeking and political faction."[19] Epstein, like others who have employed the interest group theory of politics, sees government malfunction largely in terms of minoritarian bias.[20] Epstein is correct when he asserts that the compensation mechanism can at least in theory serve to correct political malfunction by forcing the political process to internalize losses. But internalization through compensation works most straightforwardly to correct majoritarian bias, not rent-seeking and minoritarian bias.

In fact, Epstein's expansion of regulatory takings would likely increase rent-seeking and minoritarian bias. A massive compensation program with a complex administrative apparatus provides fertile ground

17. *See generally* EPSTEIN, *supra* note 4.

18. *Id.* at 93–96.

19. *Id.* at 281.

20. *Id.* at 3–6. This interpretation is consistent with that, given his works by such readers as Einer Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 32–35 (1991).

for manipulation by concentrated interests resulting in a surge in claims and overcompensation of these concentrated interests. Rather than decrease rent-seeking, Epstein's program would increase it. For someone so distrustful of government programs in general, it is surprising that Epstein is so sanguine about the huge bureaucracy his plan establishes.

On the supply side, the amount and scope of judicial activity Epstein proposes violates even the simplest senses of scale. Without regard to the competence of the courts or the chance that they would make worse decisions than even a highly defective political process, the range and complexity of the issues that the courts must consider under Epstein's proposal would break the judicial bank many times over. Reallocating such a mass of complex social decisions from the political to the adjudicative process is impossible without a change in the size of the judiciary so massive that it would alter its basic character.

William Fischel offers a more focused and considered program than Epstein.[21] He limits his proposal not only to land use regulation, but also to land use regulation emanating from local as opposed to state and federal governments and, therefore, land use regulation more likely to be subject to majoritarian bias.[22] But even Fischel's better focused and more limited proposal for regulatory takings is beyond the capacity of the adjudicative process.

The size and difficulty of the task that Fischel proposes for the adjudicative process is paradoxically inherent in his arguments about political malfunction. Fischel continuously, and I think correctly, points out that local homeowner majorities are doggedly determined to exploit their zoning advantages.[23] Local homeowner majorities will push their representatives to defend local zoning ordinances and resist any attempts by the courts to "correct" the bias that gives them their political advantage.[24] Every plausible issue will be litigated.[25]

In the land use setting, the issue of who should be paid and how much is especially difficult, involving a number of factors that vary from context to context. These include the determination of whether the use in question

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21. FISCHEL, *supra* note 4.

22. *Id.* at 1–7, 9–11.

23. *Id.* at 254–64.

24. *Id.* at 262–64.

25. Consider the famous *Mt Laurel* litigation where the travail created by local resistance wore down even an adjudicative process determined to overcome exclusionary zoning. *S. Burlington Cty. N.A.A.C.P. v. Twp. of Mount Laurel* (*Mt. Laurel I*), 336 A.2d 713, 724 (N.J. 1975); *S. Burlington Ct. N.A.A.C.P. v. Twp. of Mount Laurel* (*Mt. Laurel II*), 456 A.2d 390, 418–420 (N.J. 1983). Local authorities dragged their heels and clogged the courts, using every possible excuse and loophole and exploiting every complication. There is no reason to suppose that they would not react in the same way faced with an expanded regulatory takings doctrine. For a more extensive discussion of *Mt. Laurel* and the various studies of the case, see KOMESAR, LAW'S LIMITS, *supra* note 7, at 79–86.

was a common-law nuisance or a sub-normal use.[26] But most troubling is the confounding issue of reciprocity of advantage which is also inherent on a much larger scale in Epstein's proposal.

Reciprocity of advantage plays a prominent role in private land-use planning. Private developers impose restrictions on their parcels because they believe that purchasers will find the restrictions on their parcel more than justified by the protections provided by restrictions on the other parcels. Each purchaser receives reciprocal benefits that justify the restrictions on their parcel and the value of the private development increases.

Public land use authorities, in theory, provide the same reciprocal benefits on a grander scale. Public land use authorities may not always or perhaps even usually achieve these results. But, given the amount of local land use regulation and the array of interacting provisions in each zoning plan, attempting to measure whether reciprocity of advantage is sufficient to overcome the losses complained of by those seeking compensation is a herculean task. At the least, the resulting difficulty will increase the complexity of litigation and drain the resources of the adjudicative process. Moreover, given the dynamics of litigation, we can expect that the resulting pattern of compensation via this complex litigation will be biased in favor of larger scale landowners.[27] Although Fischel's plan is more sensible and focused than Epstein's, the adjudicative process is simply too small and poor to shoulder even this lesser load.

It is little wonder then that the actual regulatory takings doctrine is a long way from the hopes and dreams of these grand plans.

IV. REGULATORY TAKINGS—WHAT IT IS

Lucas v. South Carolina Coastal Commission[28] was heralded as a revolution in property rights protection.[29] No doubt trying to avoid the complex and watered-down balancing of earlier cases, the Court sought a categorical ground for regulatory takings in the form of the total takings doctrine. The reality of regulatory takings depends on the meaning given to total takings. If total takings means that the land in question cannot be

26. *See* KOMESAR, LAW'S LIMITS, *supra* note 7, at 101–03.

27. *See* Patricia Munch, *An Economic Analysis of Eminent Domain*, 84 J. POL. ECON. 473, 476–78 (1976).

28. 505 U.S. 1003 (1992).

29. *See* Douglas W. Kmiec, *At Last, the Supreme Court Solves the Takings Puzzle*, 19 HARV. J.L. & PUB. POL'Y 147, 148, 156 (1995) (asserting that "the Court has awakened to its responsibility under the Takings Clause" and that "[t]here is no constitutional basis for confining [these cases to] complete value deprivation or property concession"); *see also* James L. Huffman, *Lucas: A Small Step in the Right Direction*, 23 ENVTL. L. 901, 901–02 (1993); Robert M. Washburn, *Land Use Control, the Individual, and Society:* Lucas v. South Carolina Coastal Council, 52 MD. L. REV. 162, 164 (1993).

developed at all, the number of land use restrictions that trigger the new doctrine is very limited. Most land use restrictions—even those that severely limit development and severely reduce value—would be beyond the scope of *Lucas*. The language of the majority opinion, however, invites a broader definition. In his much-discussed footnote 7, Justice Scalia, writing for the Court, provides the basis for a broad-based definition of total takings:

> Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured . . . unsurprisingly this uncertainty regarding the composition of the denominator in our "deprivation" fraction has produced inconsistent pronouncements by the court.[30]

In theory, this footnote and the "denominator issue" it raises could significantly expand regulatory takings. Conceptually every regulation could be a total takings since, by imposing restrictions, every regulation takes a negative easement, a well-recognized property interest. Those who wish to see the *Lucas* precedent expanded have looked to this footnote.[31]

But lurking here is the confounding issue of reciprocity of advantage which we explored in the previous section. The facts of *Lucas* skirt the issue. If David Lucas cannot develop, he cannot gain reciprocal benefits from beach erosion control. Control of beach erosion may be crucially important to beachfront property owners, but presumably not if they cannot develop these beachfront lots at all.

But viewed in this way, *Lucas* would hardly be revolutionary. Governments can still prohibit most use so long as they do not prohibit all. Severe restrictions and serious losses would go unexamined and uncompensated by the courts. In order to offer more than a symbolic gesture or a bluff to impede zealous land use authorities, the Court would need to move total takings beyond the rare instance of a complete refusal of development. But it is precisely this expansion that would trigger all the difficulties of resolving compensation claims that increasingly involve reciprocity of advantage. And this is a step the Court has avoided.[32]

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30. *Lucas*, 505 U.S. at 1016–17.

31. *See, e.g.*, Michael M. Berger, Lucas v. South Carolina Coastal Council: *Yes, Virginia, There Can Be Partial Takings*, *in* TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER *DOLAN* AND *LUCAS* 148–64 (David L. Callies ed., 1996).

32. See the refusal to expand *Lucas* in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 342 (2002), a case redolent with reciprocity of advantage.

V. REGULATORY TAKINGS—WHAT IT SHOULD BE

But should the doctrine exist at all? The regulatory takings doctrine is a Potemkin village with an impressive facade hiding primarily empty ground with a few poorly planned structures. As we have seen, the doctrine cannot confront or correct any serious political malfunction. At best, it is a waste of resources. But it has the potential for mischief. Given the shift in the personnel on the Supreme Court and the recent rumblings in the doctrine,[33] it is easy to imagine that Court signaling a broad regulatory takings doctrine and inviting litigation which would roil the lower courts—both state and federal. Eventually, the Supreme Court would need to control the mayhem and the institutional realities of regulatory takings would again take hold. But, in the meantime, there would be a significant increase in litigation and, with it, increased litigation costs for land use authorities. It is entirely possible that these increased costs would deter some land use regulation that would in reality not constitute regulatory takings. Such deterrence might be welcomed by property rights advocates and might be an objective of the new Supreme Court majority.

But such a tactic would come at significant societal cost. Lower federal courts and even state courts would use a significant part of their resources on litigation that would alter nothing in the long run. More importantly, the pattern of any deterrence of land use regulation will be perverse. The worst forms of majoritarian bias are least likely to be deterred by litigation costs. That is the lesson of cases like *Mount Laurel*. Moreover, widespread land use problems such as beach erosion or the deterioration of Lake Tahoe are least amenable to control by alternative non-regulatory solutions such as common law nuisance actions or market transactions.[34] In these settings, even a highly flawed regulatory process seems the best of highly imperfect alternatives and landowners as a whole would be hurt rather than helped by restricting land use regulation in general.

Andy Coan notes the parallels between regulatory takings and equal protection where doctrinal rules and categories are used to minimize the impact on judicial resources.[35] But although these two areas of constitutional law are similar on the supply side, they are quite different on the demand-side. Equal protection focuses on serious political malfunction.[36] The regulatory takings doctrine does not. The most serious form of political malfunction in land use regulation—majoritarian bias in

33. *See Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2167–68 (2019).

34. On the rapidly decreasing efficacy of market and common law solutions as numbers and complexity increase, see KOMESAR, LAW'S LIMITS, *supra* note 7, at 3–10.

35. COAN, *supra* note 1, at 137–39.

36. *See* KOMESAR, IMPERFECT ALTERNATIVES, *supra* note 1, at 223–30.

local zoning—will go untouched by any plausible regulatory takings doctrine.

There are many competing projects for judicial review. From this perspective, there is a strong case that the Potemkin village of regulatory takings, which at best does nothing of value and at worst is subject to mischief, should be disassembled and its materials used elsewhere. At least viewed from afar, there appear to be several other Potemkin villages constructed on the constitutional landscape including federalism and commercial speech. In each of these areas, judicial language promises broad-based, serious judicial review, but the pattern of cases reveals far more limited and vacillating judicial action characterized by ideological sniping and unexplained ad hoc results. I leave it to those more familiar with these areas to determine whether they too should be dismantled.

VI. LEAVING THE LAND OF EASY ANSWERS

Constitutional law is institutional choice. It inevitably comes down to the question of whether and when the adjudicative process should substitute its judgment for the political process. In this section, I use the lessons from regulatory takings to show that the conventional approaches to constitutional law that fail to seriously address institutional choice are inherently insufficient and largely incoherent.

There is a long tradition of focusing constitutional analysis on the search for essential or fundamental goals and values. These goals and values are established by recourse to the words of the Constitution or of iconic judges, or of political or moral philosophers. In the analysis of takings, we saw that establishing compelling goals like distributional fairness or correction of political malfunction tells us little if anything about regulatory takings or just compensation. Showing that we (or Framers or philosophers) care or cared passionately about fairness, correction, equality, liberty and so forth does not tell us whether constitutional judicial review makes sense. In other words, essentialism does not tell us when, and to what extent, courts as opposed to the political process should define and implement any of these goals. Without institutional choice, goal choice is analytically insufficient.[37]

This brings us to originalism and textualism which have become the major focus of constitutional analysis for a number of judges and legal scholars. The basic imagery is appealing. The lawgivers, backed by the legitimating force of democratic enactment and ratification, establish the constitutional order. We, and more particularly unelected judges, are bound by what the Framers set out. The verities of constitutional law lie in the words of the Constitution and the historical record.

37. *See id.* at 3–13.

Institutional analysis, however, casts doubt on the value of originalism and textualism. First, the lawgiver imagery connotes a clarity of constitutional language and meaning that belies the realities of constitution-making. The primary task of written constitutions is institutional design—the design of public decision-making processes. Here is the home of specific and clear language and here is where the major battles of constitution-making are waged. But this is not where constitutional law operates.

After addressing institutional design, there always remain questions of institutional allocation—which decision-making process decides which issues. Perhaps because of the challenges of predicting the future, or because the primary focus was on institutional design, the language employed in the U.S. Constitution to describe the roles of the political processes (state and federal) and the adjudicative process is more equivocal than the language that designs these institutions. Terms like takings of private property, interstate commerce, due process and equal protection are open-ended. The image of a definitive constitution works well for the specific language of institutional design, where it is least needed, and least well for the issues of institutional allocation which form the subject matter of constitutional law.

Turning to the historical record to see how drafters, enactors, or ratifiers viewed these issues of allocation creates empirical and conceptual problems again associated with the character of constitution-making. The original Constitution and subsequent amendments were a product of collective decision-making. The drafting of the Constitution was by committee and the enacting and ratifying were by conventions operating at national and state levels. Subsequent amendments came about through congressional enactment and state legislative ratification. Establishing, or even conceiving, of the meaning of terms employed by groups ranging from tens to thousands is, to say the least, tricky. Seeking to understand the meaning or intent of language from external sources is an inquiry suited to analyzing individual decision-making. At best, originalists are extrapolating from what a few of the thousands took words to mean, and that is inevitably arbitrary.

Even if we still wish to consider using the views of these Framers to define constitutional law, we must face the essential question: views about what? With or without passing constitutional inquiry through the minds of the long dead, we need to know what we are looking for. If the objective is to establish the goals and values of these historical figures and to use those to define constitutional law, then, like constitutional essentialism, originalism falls short. Without institutional choice, goal choice, no matter how it is done, is always analytically insufficient.[38]

38. *See id.* at 3–13.

Nor will it work to establish a particular concern about political malfunction on the part of the Framers et al. As we saw with Epstein's reliance on the correction of minoritarian bias to inform regulatory takings,[39] some forms of political malfunction do not fit the judicial response in question. More generally, as we saw from the discussion of Fischel's proposal,[40] even focusing on an appropriate form of political malfunction tells us little about what constitutional judicial review should be without also seriously considering the problems and limitations of the adjudicative process.

The real issue posed by constitutional law is the allocation of decision-making between an imperfect political process and an imperfect adjudicative process. Here, the views of the Framers are particularly problematic and elusive because the notion of constitutional judicial review had not seriously evolved at the original framing or fully evolved even at the drafting of the Fourteenth Amendment. Moreover, even if judicial review had been a paramount concern for the Framers, the issue of resource constraints and the differences between the scale of the political process and the adjudicative process have changed dramatically over time. If institutional choice is the core of judicial review, and the resources issue is important in assessing institutional capability and choice, why would we rely on views on these subjects formed in such different contexts?

These problems can be seen in an ambitious recent work by originalists Randy Barnett and Evan Bernick.[41] These authors employ both the historical record, and the views of other originalist scholars, to construct a case for constitutional judicial review under the doctrine of substantive due process based on the Framers' concerns about political process arbitrariness.[42]

Concern about political process arbitrariness is at once both current, and largely valueless, for constitutional analysis. As we have seen, the presence of political malfunction in any context provides, at most, a necessary condition for the allocation of institutional responsibility away from the political process and to the courts. Indeed, given the pervasiveness of political process arbitrariness, establishing its presence in any context is a trivial necessary condition; it is always present. The real issue is whether an adjudicative process subject to the biases of the dynamics of litigation and the limits of judicial competence and resources is a good substitute for a political process plagued by arbitrariness.

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39. EPSTEIN, *supra* note 4.

40. FISCHEL, *supra* note 4.

41. Randy E. Barnett & Evan D. Bernick, *No Arbitrary Power: An Originalist Theory of the Due Process of Law*, 60 WM. & MARY L. REV. 1599 (2019).

42. *Id.*

Based simply on the strain on judicial resources and the limited scale of the adjudicative process, it seems impossible to imagine a regime of judicial review that can handle the tasks set by Barnett and Bernick.[43] The authors attempt to deal with the issue of judicial resources by turning to my work.[44] They want courts to seriously scrutinize legislation employing what they characterize as minimal scrutiny with teeth.[45] They quote a passage in which I emphasize the role of judicial resources in understanding the sort of tiered scrutiny associated with the *Carolene Products* footnote.[46] They argue that since minimal scrutiny in the era of *Carolene Products* was minimal scrutiny with teeth and I discuss minimal scrutiny in the context of *Carolene Products*, then any resource concerns I might have with their proposal are met.[47]

This shallow analysis just sidesteps the resource issue and is inconsistent with the intellectual depth of the rest of their article. It seems a bit like trying to wave off an avalanche. My point in the analysis of the tiered scrutiny Barnett and Bernick discuss is that the dominant form of judicial review must be zero scrutiny.[48] If they are correct that between 1931 and 1955 the Court used the term minimal scrutiny to mean minimal scrutiny with teeth,[49] then it was a form of minimal scrutiny that did not and could not describe the dominant form of judicial review actually in use even then. Whatever the Supreme Court says, the dominant form of judicial scrutiny is zero scrutiny. That result stems not from judicial language, but from institutional reality.

To Barnett and Bernick, the great wrong-turn in judicial review was *Williamson v. Lee Optical*.[50] They prefer the approach of the three-judge court below which carefully established that the regulation of opticians was arbitrary and pretextual.[51] The lower court was clearly correct. The legislation was a classic example of minoritarian bias protectionism in which established suppliers seek to exclude low-cost competition under the pretext of consumer protection.[52] Whether one labels this as arbitrariness or minoritarian bias, there is clear political malfunction of a

43. *Id.* at 1643–48.
44. *Id.* at 1648–49.
45. *Id.* at 1647–48.
46. *Id.* at 1648–49.
47. *Id.* at 1648–50.
48. *Id.* at 1648–49.
49. *Id.* at 1649–53.
50. *Id.* at 1649–51 (discussing *Williamson v. Lee Optical*, 348 U.S. 483, 487–88 (1955)).
51. *Id.* at 1651–52 (discussing *Lee Optical of Okla., Inc. v. Williamson*, 120 F. Supp. 128, 131–43 (W.D. Okla. 1954)).
52. *Id.* at 1652 (discussing 1953 Okla. Sess. Laws 271).

serious and pervasive sort.[53] Yet, the Supreme Court took this occasion to declare zero scrutiny as the dominant mode of judicial review. Looked at from the perspective of political malfunction (the demand side of judicial review), how could the Supreme Court tolerate such shenanigans? But when one integrates the supply side and asks about issues like judicial resources and competence, the question becomes: how could they not tolerate such shenanigans?

Where and when more than zero scrutiny is to be employed—whether it is called strict scrutiny, heightened scrutiny, minimal scrutiny with teeth or something else—can be determined only by facing the institutional realities of judicial review. Any strategy for constitutional law based on a political malfunction as broad and amorphous as arbitrariness is doomed from the outset; anything more than zero judicial scrutiny as a general response is impossible. That Barnett and Bernick should touch on the issue of judicial resources by turning to the work of a non-originalist like me, shows the gap in originalism. The Framers are simply not a useful source to deal with issues like the use of scarce judicial resources in contemporary contexts and, therefore, with constitutional judicial review. Barnett and Bernick's originalist approach to substantive due process is an erudite and sophisticated examination of history and philosophy. But, it is fundamentally incomplete as an analysis of constitutional law.

Originalism is reputed to offer the means to control excessive judicial activity.[54] Yet, as we can see in Epstein's sweeping proposals for regulatory takings, Barnett and Bernick's use of originalism to support expansive substantive due process and Justice Scalia's opinion in *Lucas* which ignores originalism when it proves inconvenient, it will do no such thing. That is either because originalists are asking the Framers et al. the wrong question (what was your view about goals and political malfunction?), because the Framers would be a poor source for answering the right question (what was your view about the choice between an imperfect political process and an imperfect adjudicative process?), or because originalism is a makeweight used only when convenient. Moreover, if the objective is controlling open-ended judicial activity, that control already exists in the characteristics of the adjudicative process where limited size and resources will always curb judicial activity. Originalism without serious institutional analysis is window dressing, or perhaps more exactly, window covering.

If I had my druthers, I would use the judicial resources obtained by dismantling constitutional law's Potemkin villages on judicial review of political process determinations about the political process, and, in

53. *See generally* Neil K. Komesar, *A Job for the Judges: The Judiciary and the Constitution in a Massive and Complex Society*, 86 MICH. L. REV. 657, 668–72, 695–99 (1988) (discussing minoritarian bias and the way it functions in the political process).

54. *See, e.g.*, Barnett & Bernick, *supra* note 41.

particular, on judicial review of partisan gerrymandering. This the Supreme Court refused to do.[55] *Rucho* is a disappointing result. But, perhaps forced by Justice Kagan's trenchant dissent, even the majority opinion recognizes the central place of institutional choice and comparison.[56] Recognizing the evils of partisan gerrymandering, Chief Justice Roberts suggests that the existence of this evil does not necessitate a judicial as opposed to political response.[57] In fact, he could have correctly noted that few evils will, or should, receive a judicial response. The difficult question remains whether partisan gerrymandering is one of those few. Here, any fair reading of the opinions would award the day to Justice Kagan's institutional analysis and to judicial review of partisan gerrymandering.

The demand-side is strong. The fear that those who gain power will do whatever they can to retain it is the essence of the First Amendment and is reflected in iconic constitutional moments like the *Carolene Products* footnote.[58] Indeed, the suppression of opposition in pursuit of maintaining power transcends time and culture. The problem is intensified by the interaction between minoritarian bias and the desire of politicians to maintain office. In an increasingly complex world, minoritarian bias has grown ever more prevalent and promises to get worse.[59] Increasingly, this minoritarian bias is being used to entrench minoritarian bias by manipulating the structure of the political process to disadvantage majorities through devices like partisan gerrymandering. Legislation that increases the power of incumbency and enhances the most serious form of political malfunction is unlikely to be reformed by this distorted political process itself.

The supply side of judicial review, however, is not so simple. One can expect that legislators entrenched by partisan gerrymandering and the special interests that back them will litigate any ambiguity and raise every plausible and some implausible arguments. This is the paradox of comparative institutional analysis: where political malfunction is worst, it will generally be most difficult and expensive to correct.

It is crucial, however, to realize that this is not the magnitude of strain on judicial resources and competence that faces serious judicial review of regulatory takings. There are fifty states whose redistricting will be subject to serious scrutiny every ten years when the census requires redrawing

55. *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

56. *Id.* at 2494–96.

57. *Id.* at 2497–508.

58. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

59. *See* Neil Komesar, *Constiutions as Basic Structure*, *in* THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION 147–52 (Mark Tushnet et al. eds., 2015).

boundaries for state legislative and congressional districts.[60] The amount of redistricting legislation to be scrutinized is, therefore, a small fraction of what a serious examination of regulatory takings, a new version of substantive due process, or, for that matter, serious scrutiny of congressional control vis-à-vis the states or the president, would entail. Still, there is little doubt that redistricting is a complex issue and a challenge to get right. There is, however, a significant social science (and mathematics) literature addressing the question.[61] These tools have made gerrymandering more skillful and damaging.[62] But, as the litigation leading up to *Rucho* showed, the same tools can establish a finite set of tests to determine the degree of partisan gerrymandering and to judge and correct it.[63] It seems realistic to suppose that, as courts become better informed, these tests will become firmer and litigation will settle down leading to more sensible redistricting legislation or the creation of legislative safe harbors like nonpartisan commissions.

But even if judicial review of partisan gerrymandering involves costs more significant than I suppose and requires judicial review over a longer period of time, the constitutional issue is whether the benefits of judicial review justify these costs. Judicial review of partisan gerrymandering, even if expensive, promises to correct a profound political malfunction that will not be corrected by the political process itself. The real lesson of scarce resources is not that it is wise to buy cheaply, but rather that it is important to use those resources wisely.

Just as with the takings issues, if we had a costless and frictionless device that could correct political malfunctions and remove their evils, we would surely embrace it. But we do not have such a device. So, we are left with the question posed by Justice Roberts: which issues should be allocated to the adjudicative process in the form of constitutional judicial review?[64] Generating lists of political malfunctions or societal evils through originalism, essentialism, or any other source, cannot answer this question. The question can be answered only by seriously confronting institutional comparison and comparative institutional analysis.

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60. Although it is not common, it is also possible to have mid-decade redistricting which could potentially increase the load for judicial review. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006) (involving such a redistricting).

61. Gregory S. Warrington, *A Comparison of Partisan-Gerrymandering Measures*, 18 ELECTION L.J. 262 (2019); Nicholas O. Stephanopoulos & Eric M. McGhee, *The Measure of a Metric: The Debate over Quantifying Partisan Gerrymandering*, 70 STAN. L. REV. 1503 (2018).

62. *Rucho*, 139 S. Ct. at 2509 (Kagan, J., dissenting).

63. Justice Kagan's dissent in *Rucho* provides a superb summary of these methods and how they might be used in judicial review. *Id.* at 2509–25 (Kagan, J., dissenting).

64. *Id.* at 2494.

Armed with the insights of comparative institutional analysis, it is easy to critique constitutional analyses that fail to take institutional choice and institutional comparison seriously. One simply accepts all the arguments employed and then shows that these analyses still cannot reach the results they desire without seriously confronting the institutional issues. Comparative institutional analysis is a powerful tool and it travels well across law and public policy.

But comparative institutional analysis lays bare the difficulty of determining what constitutional law should be. Institutional choice and comparison are challenging, because the alternative institutions are highly imperfect and the imperfections are often parallel. I have been asked whether I really expect judges to do comparative institutional analysis—the implication being that I could not realistically expect this. I expect judges to employ the tools necessary to address the task set for them. Constitutional law is institutional choice. As such, judges and the legal scholars who advise them must address rather than avoid this issue and use the best tools available.

It is long past time for judges and constitutional scholars to leave the land of easy answers and face the unavoidable if challenging issues of institutional choice and institutional comparison. Without confronting these issues, constitutional analysis goes nowhere. Only when these issues play a central role, can constitutional scholars and constitutional judges effectively employ history, the patterns of cases, the use of judicial language, and the views of the Framers or any other source to make, understand, and debate constitutional law.