Learning from the History of State Damagings Clauses

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Maureen E. Brady, The Damagings Clauses, 104 **Va. L. Rev.** 341 (2018).

The Fifth Amendment to the federal Constitution and virtually all state constitutions require the government to pay compensation when it "takes" private property. But many state constitutions also require compensation for government actions that "damage" property. Until now, these "Damagings Clauses" have largely been ignored by legal scholars, particularly constitutional law scholars—and even by property rights advocates. But an outstanding 2018 article by Professor Maureen "Molly" Brady (who has just moved from the University of Virginia to Harvard) could help change that. She sheds light on the origins of these clauses in the late nineteenth and early twentieth centuries, the ways in which they have been largely gutted by court decisions, and what can be done to resuscitate them today.

Twenty-seven state constitutions have clauses clause prohibiting the "damaging" or "injuring" of private property for public use without just compensation. In the article, Prof. Brady explains how damagings clauses were enacted in order to compensate owners for harm inflicted by new infrastructure development that was not covered by the then-dominant interpretation of state takings clauses, which generally required either a physical invasion or occupation of the property or (in the case of regulatory takings) direct restrictions on the owner's right to use the land. This did not cover such situations as the creation of various types of pollution, debris, and access barriers that sometimes rendered property difficult or impossible to use. But, while the wording of the clauses and the originally understood meaning, suggested they should apply broadly, Brady shows that over time courts in most states effectively gutted them, restricting compensation only to cases where compensation was already likely to be required by state or federal takings clauses.

This history is a lesson in how a seemingly successful constitutional reform movement can be stymied over time by failure to follow up on early victories, and restrictive judicial applications. This experience is certainly worth considering, as modern property rights activists seek to combat abuses of eminent domain, and restrictive zoning. Often, enacting legislation or even (as in this case) passing constitutional amendments is just the beginning of the battle, not the end. Brady's article is thereby an addition to the growing literature on constitutional reform movements, and the factors that explain their successes and failures.

Brady identifies multiple possible reasons for the ineffectiveness of Damagings Clauses, including judges' concerns that enforcing them would impose too many constraints on building of new infrastructure. But one factor that is worth highlighting is the way in which the vagueness of the clauses make it difficult to distinguish between "damagings" (which require compensation), and mere diminutions of value (which do not). Another, less emphasized by Brady, is the seeming failure of property rights advocates to engage in strategic litigation to ensure effective enforcement of the clauses.

In many states, the role initially intended for Damagings Clauses was filled by tort claims that offered an alternative mechanism for aggrieved property owners to seek compensation. But Brady argues that neither tort claims nor regulatory takings doctrine offers an adequate substitute for effective Damages Clauses.

This article should be seen as part of a growing recognition among legal scholars that we should pay more attention to state constitutional law. Even in age where the federal government controls more and more areas of public policy, state constitutions still play a major role in constraining abuses of government power. This is particularly true in the field of property rights, where states and localities are responsible for the vast majority of uses of eminent domain, and regulations that restrict or usurp property owners' control over their land.

The article also makes a good case for why courts should interpret Damagings Clauses more broadly, in the future, so as to impose tighter constraints on state and local officials. As Brady explains, there is a great deal of historical evidence indicating that the original meaning of these clauses provides much broader protection for property owners than courts have been willing to enforce. She also offers a number of reasons why living constitutionalists should support a broader view of these clauses' application.

The political backlash generated by the Supreme Court's 2005 decision in led to numerous state constitutional amendments barring "economic development" takings and several state supreme court rulings holding that their states' constitutional "public use" clauses already forbade such takings, even if the Supreme Court's interpretation of the Fifth Amendment does not. There has now been a good deal of scholarship (including some of my own work) on the state-level reaction against Kelo, and state public use rules generally, and the ways in which they often deal from the extremely lax approach adopted by the US Supreme Court in interpreting the Fifth Amendment.

There is much less work on state constitutional law on "regulatory takings" and related property rights issues—of which the history of "damagings" is a notable example. Fortunately, younger scholars such as Molly Brady and Gerald Dickinson are now beginning to fill that gap. This is particularly important in an era where new infrastructure projects, regulations, and efforts to deal with natural disasters seem likely to generate more cases where state and local governments damage property in ways that fall short of occupation or invasion, and might not be ruled compensable under conventional takings clauses.

This article is not the last word on Damagings Clauses. As the author recognizes, she does not provide a clear standard for expanding the use of these clauses in the future, though she makes a good case that the current highly restrictive approach adopted by most state courts is defective. There is also more work to be done in explaining how and why these clauses were rendered largely toothless over time. But the piece is a major step forward in our understanding of this important and unduly neglected episode in the history of legal battles over property rights. If you have any interest in takings law, property rights, constitutional reform movements, or state constitutional law generally, you should check it out!

Parts of this post have been adapted from a blog post at the Volokh Conspiracy law and politics blog, hosted by *Reason*.

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