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Biden on property rights

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TAKINGS TALK

The ascent of Joe Biden to the top spot on a presidential ticket has caused many people to review the half-century of Biden's public life for possible clues as to future actions. As this column deals with regulatory takings law, I was reminded of an incident that occurred while Biden was a United States senator, presiding over a hearing to determine whether a presidential nominee should be confirmed to the U.S. Supreme Court. The nominee was Clarence Thomas. As the scene unfolded, it was apparent that Biden was not only not pleased with Judge Thomas, but was skeptical of the idea of protecting property rights at all. Here is what happened.

If it was not an uncertain trumpet sounded by Sen. Biden as he opened Judge Thomas' Supreme Court confirmation hearings, it was certainly a peculiar one. As everyone waited for the nominee to be pressed on his views about abortion, privacy and *Roe v. Wade*, Sen. Biden threw a curveball from deep left field. He started talking about zoning and land use regulation and waiving aloft (with evident disdain) a book with the obvious title, "Takings."

What was he talking about? And why? And what was he trying to say?

What he was talking about is easy. The subject was the protection afforded property owners by the 5th Amendment's guarantee that private property will not be taken for public use without the payment of just compensation and the 14th Amendment's guarantee that no state can deprive anyone of life, liberty or property without due process of law.

Why he chose to lead off his interrogation of Judge Thomas with this subject is more of a mystery. It's certainly not something that was on the tip of everyone's tongue. Nor, I suspect, was it at the forefront of the nation's desire to have this nominee's views on this subject made more public. (At least it wasn't mentioned in any of the ads that I had read. You know, the ones that start out "5 Questions Judge Thomas Should Answer..." or some such.) Perhaps the senator merely thought he might catch the judge off-balance with an unexpected line of questioning. Lawyers are wont to do that at times.

What I found troublesome about the issue, however, was the evident message that Sen. Biden was attempting to convey with his questions (and the inevitable speeches between questions). Try as I might, I couldn't shake the feeling that he was trying to tell the American public that the idea of protecting the rights of those who own property is some sort of clandestine plot by a reactionary cabal whose views were virtually unheard of until some trouble making professors started writing books about it. No "liberal" ought to have anything to do with it.

That message is dreadfully inaccurate. No self-respecting "liberal" should have been led by that performance into abandoning this aspect of the Fifth Amendment to the "conservatives." By that time, card-carrying "liberals" of the modern Supreme Court era, from William O. Douglas to Thurgood Marshall, had written cogent defenses of the rights of our property-owning citizens. And, since then, most of the current liberal members of the Supreme Court (including the iconic RBG) have written or signed opinions upholding the rights of property owners. *See, e.g.*, *Arkansas Game & Fish Commn. v. United States*, 133 S. Ct. 511 (2012) (Ginsburg, for a unanimous court). Although it is true that "conservative" Professor Richard Epstein's 1986 book concluded that regulatory takings violated the Constitution, "liberal" Professor Lawrence Tribe reached the same conclusion at least eight years earlier: "forcing someone to stop doing things with his property -- telling him you can keep it, but you can't use it -- is indistinguishable, in ordinary terms, from grabbing it and handing it over to someone else. Thus, a taking occurs in this ordinary sense when government controls a person's use of property so tightly that, although some uses remain to the owner, the property's value has been virtually destroyed." Tribe, "American Constitutional Law" (1978) 460.

Although Sen. Biden expressed the view that "regulatory" or "police power" action is not the same as "taking" property, Justice William Brennan (hardly a member of the Epstein claque) was probably the most outspoken advocate of the opposite position. As Justice Brennan put it: "Police power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property. From the property owner's point of view, it may matter little whether his land is condemned or flooded, or whether it is restricted by regulation to use in its natural state, if the effect in both cases is to deprive him of all beneficial use of it." *San Diego Gas & Elec. Co. v. City of San Diego*, 450 US 621, 652 (1981) (Brennan, J., dissenting). Justice Brennan's *San Diego Gas* dissent became the basis for the majority decision in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 US 304 (1987), in which the Supreme Court held that regulations can be just as much taking devices as physical invasions and that all takings -- even regulatory ones -- require compensation.

Although it is true that the six-justice majority in *First English* included "conservative" Justice Antonin Scalia and "conservative" Chief Justice William Rehnquist, it also included "liberal" Justices Brennan and Marshall and "centrist" Justices Lewis Powell and Byron White.

Cases involving the takings clause are difficult to evaluate in a strict "liberal" vs. "conservative" way.

Even the "liberals" on the court have recognized the difficulty in drawing clear lines between the protection of "personal" rights and "property" rights. Perhaps that is because, although we tend to talk loosely of "property" rights, we are really talking about the rights of people who own property. In any event, as an opinion for the court by Justice Potter Stewart (joined by Justices Douglas, Brennan and Marshall) put it: "Such difficulties indicate that the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a 'personal' right, whether the 'property' in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized. [Citing, inter alia, Locke and Blackstone.]" *Lynch v. Household Fin. Corp.*, 405 US 538, 552 (1972).

Justice Marshall (whose "liberal" seat Judge Thomas had been nominated to fill) also weighed in with an opinion (for a unanimous court) explaining the protection provided owners of property from excessive regulation: "We have frequently recognized that a radical curtailment of a

landowner's freedom to make use of or ability to derive income from his land may give rise to a taking within the meaning of the Fifth Amendment, even if the Government has not physically intruded upon the premises or acquired a legal interest in the property. Thus, we have acknowledged that a taking would be effected by a zoning ordinance that deprived 'an owner [of] economically viable use of his land.' And we have suggested that, under some circumstances, a land-use regulation that severely interfered with an owner's 'distinct investment-backed expectations' might precipitate a taking." *Kirby Forest Indus., Inc. v. U.S.*, 467 U.S. 1, 14 (1984) (citations omitted).

Constitutional property cases are difficult enough to deal with even when one has complete understanding. Getting them bollixed up in disputes between "liberals" and "conservatives," when justices in both camps have waxed eloquent in defense of the rights of property owners, is a mistake.

The takings clause should not be the site of some great "liberal" vs. "conservative" Armageddon. The protection of the rights of private property owners was linked by the draftsmen of the 14th Amendment with the protection of life and liberty. The takings clause was not invented by "right wingers," "conservatives" or even Republicans. That clause, and its protection against confiscatory regulations and other similar government activities, has been praised, endorsed and enforced by the most "liberal" justices who have sat on the Supreme Court in our lifetimes, along with some of the most "conservative."

The next time someone tries to tell you that the protection of the rights of property owners is a scam cooked up at secret meetings in the dark of night, remind your alarmist informant of *First English*. There, united in their votes to protect the rights of property owners against confiscatory regulation were the Supreme Court's archest "conservatives" -- Rehnquist and Scalia -- along with its farthest out "liberals" -- Brennan and Marshall -- with two from the "center" thrown in for good measure.

The takings clause is a poor ideological battleground. Counting "liberal" and "conservative" noses on judicial panels has never been a reliable predictor in takings cases.

That Biden chose to press Thomas vigorously is his right and of no concern here. That the chairman of the Senate Judiciary Committee, himself a lawyer, did so in a way so seriously misleading about the underlying legal precepts and their origins ought to concern us all. I am sure that I am not alone in hoping that his views on this issue have matured over the years.