So What Are the "Damagings" Clauses and Why Do We Care?

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Maureen E. Brady, *The Damagings Clauses*, 104 **Va. L. Rev.** (forthcoming 2018), available at SSRN.

In her article, *The Damagings Clauses*, Professor Molly Brady comprehensively analyzes provisions known as "damagings clauses," which twenty-seven states have enacted in their constitutions. Her work explains the history of their enactment, the courts' interpretation of these clauses over time, and the potential for reenergizing these constitutional claims to address governmental damages and injuries to property owners that takings jurisprudence or the common law may not otherwise remedy.

Professor Brady's stated goals for the article are to persuade readers that "there is a place for damagings within condemnation law, that this neglected constitutional provision has the capacity to address a confusing and undertheorized gap in the application of the compensation requirement, and that courts have lost sight of the language's history in narrowly construing it."

She has certainly persuaded this reader, and I encourage anyone working in eminent domain law, regulatory takings law, or property law to read this article.

I am embarrassed to say that, even if I had heard about state damagings clauses in the past (which I do not recall), I have never paid any attention to them until I read Professor Brady's draft paper last year for the Property Law Works in Progress session at the AALS Annual Meeting in San Francisco. Please read this article so you will not be similarly embarrassed in the future, as I anticipate that scholars and litigants will be hearing more about these clauses in response to projected infrastructure growth.

As Professor Brady sets out in a heavily researched history of the beginning of these clauses, Illinois was the first to adopt a damagings clause into its state constitution in 1870 to address a gap in condemnation law "during controversies over street grading and railroad construction."

Brady expresses this gap as one in which property owners experience a diminution in the value or usefulness of their property as a result of government action that does not take, occupy, or regulate their particular property but that does substantially impair their property interest and should require compensation based on principles of fairness and justice.

The Court in Lucas v. South Carolina Coastal Council expressed this gap as the "gross disparity" between the landowner whose property is taken by eminent domain to build a highway and the landowner who has suffered a ninety-five percent loss in value from the government's nontrespassory and nonregulatory actions that are not compensable.[1]

Professor Brady notes that "long before regulatory takings were even conceived of as a category, hundreds of lawyers in jurisdictions across the country worried about the fact that physical takings might not cover all the activities of government affecting land for which compensation should be required," and they moved to address this problem through state constitutional changes.

The article provides many examples of government actions such as alterations in the landscape to

accommodate railroads where nearby "homes [were] either left in midair or buried by mountains of dirt filling in the streets." Because these actions did not appropriate or occupy land, they were noncompensable even though they destroyed property values or caused the ouster of the landowner.

The language of the state damagings clauses adopted in response to these noncompensable actions varies among the states. However, most states have adopted the language used by either Illinois or Pennsylvania. Illinois in 1870 constitutionalized the principle that "Private property shall not be taken or damaged for public use without just compensation." In its 1874 constitution, Pennsylvania provided:

> Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed by the construction or enlargement of their works, highways or improvements, which compensation shall be paid or secured before such taking, injury or destruction.

The damagings clauses offer the opportunity for both professors and practitioners to address the "gross disparity" that has existed in takings jurisprudence between landowners who are the target of condemnation or confiscatory regulation and nearby landowners who experience the devaluation or destruction of their property interests from what Abraham Bell and Gideon Parchomovsky have described as "derivative takings."

Professor Molly Brady's excellent article is not only a "must-read" for purposes of understanding "these forgotten provisions of the state constitutions," it also presents some intriguing discussions of the relationship of nuisance law to the interpretation of these clauses and takings jurisprudence.

1. 505 U.S. 1003, 1019 n.8 (1992) (noting "[i]t is true that in at least *some* cases the landowner with 95% loss will get nothing, while the landowner with total loss will recover in full. But that occasional result is no more strange than the gross disparity between the landowner whose premises are taken for a highway (who recovers in full) and the landowner whose property is reduced to 5% of its former value by the highway (who recovers nothing). Takings law is full of these 'all-or-nothing' situations.").

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