

Being Just While Conceptions of Justice Are Changing

By T. NICOLAUS TIDEMAN*

A conception of justice is a framework for resolving questions of what liberties people ought to have. The smooth functioning of society requires substantial consensus about conceptions of justice, because without such consensus, people will take actions and make claims on resources that others regard as intrusions upon what is properly theirs. This can be expected to lead, at a minimum, to disharmony and possibly to violent conflict. On the other hand, when people agree on a conception of justice and who is competent to interpret it, conflicts will be less likely to arise, and those that do arise can be settled more easily. Thus there is strong impetus toward stability in any society's conception of justice: any doubts about a shared conception of justice may be suppressed or hidden to preserve the advantages of consensus.

Moral evolution, however, can require conceptions of justice to change, as when the world came to recognize that slavery could not be just or that women must be accorded the same civil rights as men. When, as with the abolition of slavery, a new conception of justice entails the elimination of the sale value of what had previously been assets, there will be calls for compensation, on the ground that, as provided in the fifth and fourteenth amendments to the U.S. Constitution, governments should not take property without compensation. Advocates of the new understanding, on the other hand, will argue against compensation on the ground that citizens who knew better should not be obliged to bail out those who had sought to enrich themselves through the perpetuation of old injustices. When

slavery was ended in the United States, not only was there no compensation for the previous "owners" of slaves, but the thirteenth amendment to the U.S. Constitution explicitly forbade any state from paying compensation.

Why should the fifth and fourteenth amendments to the U.S. Constitution require compensation in general while the thirteenth amendment forbids it for losses sustained from the end of slavery? Bruce Ackerman (1984) points out the importance of the distinction between ordinary legislation, where it must be accepted that self-interest will be rife, and constitutional law-making, where something much closer to consensus is achieved. It was not inconsistent for the thirteenth amendment to depart from the general principle that compensation must be provided, because the constitutional process attenuated the self-interested forces that the requirement of compensation was designed to check.

This paper analyzes the issue of compensation in connection with the possible emergence of an understanding that land is the common heritage of citizens and that, therefore, the rental value of land should be collected for public purposes or for a guaranteed income. The impetus toward the understanding that land is the common heritage of citizens comes from the combination of the Lockean view that claims of rights to exclude others must be rooted in productive effort (John Locke, 1690 [*Second Treatise*, paragraph 27]), the recognition of the substantial elements of force and fraud in the origins of land titles (Alfred N. Chandler, 1945), and the recognition that parcels of land have value that is independent of human effort expended on them. If such an understanding is implemented by a constitutional amendment, there would be no necessity of compensation. Would it nevertheless be appropriate?

* Virginia Polytechnic Institute and State University, Blacksburg, VA 24061.

The paper argues that there are various factors that attenuate claims for compensation and make a justifiable system of compensation so complex that it may be unworkable. However, if there is to be a system of compensation, the one justifiable source of funding it is assets that have been acquired by appropriating or buying land and then selling it.

One possible way of avoiding the conflict over compensation is to focus on potential practical problems with the understanding that land is the common heritage of citizens: Is it really possible to identify the rental value of land, apart from improvements that have been made to the land? Is there a principled answer to the question of how rent should be divided among levels of government? Would recognition of equal claims to land result in population growth that would threaten the habitability of the planet? I have addressed these questions in other papers (Tideman, 1990, 1991). Here it is assumed that any such concerns would not be serious enough to block implementation if the basic principle is accepted. The issue of compensation will be examined by considering some idealized cases, identifying the principles they exhibit, and then asking how those principles apply to the circumstances in which modern societies are likely to find themselves.

Case 1.—A republic of the former Soviet Union privatizes land by selling it to the highest bidders. Six months later the republic decides that the proper treatment of land is to require every possessor to pay the rental value of land to the public treasury.

This is an easy case for compensation. Without compensation, the case has all the hallmarks of deliberate deception of buyers to fleece them. Since the government treasury is the sole beneficiary of the initial use of the wrong rule, it has an obligation to repay the purchase price to every purchaser or to that person's successor in title before the rental value of the land can respectably be collected.

Case 2.—There is an agricultural society that has been using a rule by which whoever plants on land first in any year owns the

harvest of that land that year. It is noticed that this rule leads to premature and excessive planting, so the society divides the available land equally among all families. Then, a few years later a new family is formed, and this couple argues that they should not be deprived of an equal share of land just because they were children at the time that the division of land occurred. Recognizing that this is going to be a recurring problem, the society adopts a rule that the rental value of land will be collected and divided equally among all adults. No trades in land have occurred between the initial division and the decision to collect the rental value of the land.

This is an easy case for no compensation. The mistake is recognized in time to give everyone what he or she would have gotten if the right rule had been implemented from the beginning.

Case 3.—This is a variation on case 2. First the land is divided equally among existing families, with an understanding that land rights will be tradable. Land trades occur for ten years, and then under pressure from young persons who did not receive allocations, at a time when it is possible to identify all the trades in land that have occurred, a decision is made to collect the rental value of all land and divide it among all adults in the society.

Compensation is plausible in this case because it is possible to identify who should compensate whom. If the recognition had occurred earlier that the rental value of the land should be collected socially, past transactions in unimproved land would have involved only nominal amounts of money. The initial choice of the wrong allocation rule can be corrected by giving every purchaser of land a claim on the person from whom the land was purchased, for the amount of the purchase price.

Case 4.—There is an agricultural society in which land is initially redivided equally each year among all adults. Then a band of marauders invades and claims ownership of all land by right of conquest. The marauders form a ruling oligarchy and create tradable land titles, which they parcel out equally among themselves. The original in-

habitants are allowed to continue to use most of the land in exchange for payments of rent. They are also allowed to buy land. Two generations later, the softer descendants of the marauders succumb to pressures to implement a democracy. At a time when 90 percent of the land is in the hands of descendants of the marauders, a democratically elected parliament implements a tax of 100 percent of the rental value of land.

For this case, the descendants of the marauders have no claims to compensation. Those who bought land from the marauders or their descendants have respectable claims against the sellers, as in case 3. But such claims cannot always be satisfied. A profligate son of a marauder may have sold all the land he inherited, spent the proceeds on high living and died penniless, leaving nothing to his heirs. If there is no reason why some buyers of land should be compensated but not others, and if there are substantial fortunes that can be identified as the products of land sales, then it may be sensible to have an aggregate compensation scheme, in which all persons who sold land and their heirs are required to compensate all persons who had purchased land.

Case 5.—Land has been privately owned and rather equally distributed since time immemorial. One day people suddenly realize that land should be regarded as the heritage of all citizens.

The new realization entails redistribution from current citizens to future ones. It cannot be achieved without making current citizens worse off. Virtually all current citizens have participated in the past legitimization of private ownership of land by buying and selling land titles; but there is no realistic possibility of identifying how much of the assets of any person were derived from appropriations and sales of land.

In these circumstances, there may be no class of individuals who can reasonably be called upon to finance compensation. Financing compensation by either a tax on wages or a capital levy could only be justified by a high correlation between the tax base and unjust enrichment under the previous order. It may be most appropriate

simply to allow losses from the new understanding to lie where they fall and handle any resulting case of true distress by whatever system is used to care for other persons who are not able to provide for themselves.

If, despite the difficulties, a compensation scheme were implemented, it would at least be possible to reduce claims for compensation by the amounts of claimants' past gains from rises in the price of land. A person who has been the beneficiary of a rise in land values because of population growth and expansion of public services cannot reasonably complain if subsequent moral development eliminates those gains.

Case 6.—This is a variation on case 5, in which the recognition that equal access to land should be a birthright occurs gradually, over decades. As the recognition develops momentum, the price of land begins to fall because people believe that, if it succeeds, land may have no sale value and there may be no compensation. After 30 years of public debate, the movement has achieved the degree of acceptance necessary to implement a constitutional amendment that will cement the new understanding. The only question that remains to be decided is what compensation, if any, will be granted to people for the loss of sale value of their land.

Here, whatever strength there may have been to the claim for compensation is attenuated by the discounted transactions. Anyone who knows that the price of an asset that he or she buys is lower because of the possibility that a new understanding of justice will prevail has a hard time arguing for compensation once it does prevail. It should be noted that in this case the attenuation does not apply to the claims of those who hold land throughout the period of discounting.

Case 7.—This is a variation on case 6, in which there are initially substantial taxes on labor and capital. The proposal that is put forward entails removing from labor and capital taxes that yield revenue equal to the revenue that can be raised by collecting the full rental value of land. For this case, compensation has all the difficulties of case 6. However, if there is to be a compensation

scheme, the magnitude of any claim for compensation can be reduced by the claimant's expected savings in future taxes on labor and capital.

Having considered these seven idealized cases, I can now summarize the principles they embody. Cases 1 and 2 both embody the principle that when a mistake in social rules is corrected, it is reasonable to require people to relinquish the expectations that the mistaken rules gave them. In one case this implied that compensation for the loss of sale value of land titles should be provided; in the other case this implied that it should not be provided. Case 3 embodies the principle that it is sometimes appropriate to restructure past private transactions on the basis of new understandings of the requirements of justice. Case 4 embodies the principle that the perpetrators of injustice and their heirs are particularly responsible for providing compensation when the claims they appropriated are overturned. Case 5 embodies three principles: first, that there can be circumstances in which the costs of a new moral understanding must be left where they fall, because there is no one to whom they can properly be shifted; second, that compensation financed by taxation should be supported by a finding that those who are taxed are, as a class, particularly responsible for, or have been beneficiaries of, the discredited understanding; third, that if compensation is provided, a person's past gains from the discredited understanding offset claims for losses from the new understanding. Case 6 embodies the principle that public moral debate puts people on notice that a future political decision might eliminate the value of their acquisitions without compensation. Case 7 embodies the principle that if compensation is provided, a person's future benefits from the new understanding offset claims for losses from the new understanding.

One can now ask what lessons these principles hold for the situations in which actual societies are likely to find themselves. The conquest of case 4 is highly relevant to the histories of Latin America, the Philippines, Britain, and probably many other countries

as well. It also has relevance to the United States, in view of the existence of slavery in the South until all the good land was claimed, the extensive royal land grants in the original colonies and in the Southwest, and miscellaneous skulduggery in numerous places (Chandler, 1945). Thus, if social collection of the full rental value of land comes to the United States, there should be no compensation for persons whose holdings of land derive directly, or by inheritance, from disproportionate land appropriation. Furthermore, any remaining wealth that can be traced to these activities is a particularly appropriate source of compensation for "innocent buyers," if such a scheme is to be implemented.

If there is to be a compensation scheme, claims can be reduced by the claimants' past income and inheritances from rises in land values, as suggested by case 5. It is likely that the recognition would come slowly rather than suddenly, so that the attenuating effects of case 6 would be present. It is likely that social collection of the rent of land in the United States would be a substitute for other taxes, as in case 7. Thus, claims for compensation could be reduced by the claimants' expected future savings in other taxes.

For all of these reasons, any justified compensation scheme would be relatively small. Nonetheless, there would be so many complications in administering a justified compensation scheme that it would probably be more appropriate to let the losses lie where they fell and handle any cases of true distress by whatever system is used to care for other persons who are not able to provide for themselves.

A more general lesson that may be taken from this exercise in analyzing compensation is that, while there are advantages to the durable consensus that comes from regarding a conception of justice as immutable, it is sometimes attractive to acknowledge the possibility of improvement, so that tensions that strain a conception of justice can be dealt with in an evolutionary rather than a revolutionary manner. When principles appear to be conflicting, an examination of the purposes behind the princi-

ples can lead to the identification of restructured principles that resolve the apparent conflict.

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