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Rejoinder to Professor Merrill

By WILLIAM S. BREWBAKER III*

Professor Merrill, in his forcefully written reply¹ to my article,² gives the impression of responding directly and firmly to the major objections I raise concerning the application of the Takings Clause to health care price regulation. In this case, however, appearances are deceiving.³ The main points of my article are that (1) the economic interests at stake in regulatory takings analysis are indistinguishable from those the Court has largely declined to protect since the *Lochner* era ended, and (2) evaluating the net effects of government action in the health care sector is likely to greatly complicate the takings inquiry. Merrill never seriously addresses the first concern. His improbable response to the second is to propose individualized public utility-style ratemaking proceedings at the option of each of the 600,000 physicians in the United States.⁴

Remarkably, Merrill suggests that by applying the “reasonable return” standard to health care price regulation, courts would be applying the Takings Clause “as that Clause has come to be understood by courts through decades of interpretation.”⁵ Although Professor Merrill is not specific, the group of “courts” to which he refers apparently does not include the Supreme Court of the United States. That Court has, at least since 1937, uniformly rejected takings claims pre-

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1. Thomas W. Merrill, *Reply to Professor Brewbaker*, 21 HASTINGS CONST. L.Q. 709 (1994).

2. William S. Brewbaker III, *Health Care Price Controls and the Takings Clause*, 21 HASTINGS CONST. L.Q. 669 (1994).

3. Merrill inveighs, in turn, against (1) process-based constitutional theory, Merrill, *supra* note 1, at 710-13, (2) substantive due process, *id.* at 713-15, (3) my alleged desire to “doom” takings inquiries from the outset by broadening the scope of regulatory takings analysis, *id.* at 715-18, and, finally, (4) the idea (attributed to me) that “the burdens of price controls should be overlooked because physicians and hospitals can engage in . . . ‘defensive maneuvers’ to mitigate the financial costs of [price] controls.” *Id.* at 718.

4. *Id.* at 716-17.

5. *Id.* at 709.

mised on price regulation, except when such claims were brought by a public utility.⁶

Finally, Professor Merrill notes "one theme [that] stands out overall" in my article: "Each of the criticisms leveled by Professor Brewbaker, even if valid, could also be made about the Supreme Court's decisions applying the Takings Clause to public utility ratemaking, or . . . to exercises of the power of eminent domain."⁷ The impossibility of theoretical consistency is, of course, the first feature of regulatory takings doctrine noted in my article.⁸ It follows that the line-drawing exercise in which the Court has been engaged in the regulatory takings field reflects a practical (as opposed to a theoretically consistent) accommodation of the tensions inherent in regulatory takings doctrine.⁹ As first noted by Justice Holmes, these tensions are the need, on one hand, for adequate protection of individuals against confiscatory government action, and, on the other, government's need to govern without undue administrative and financial burden. Because (1) the Takings Clause protects some, but not all, economic interests, and (2) the Court has not yet found a theoretically consistent way of distinguishing between those interests that deserve protection and those that do not, virtually *any* argument against compensation in a particular case will "prove[] too much"¹⁰ in the sense that it could be used to argue against compensation in some case in which the Court has reached a contrary result. The same reasoning also applies to arguments *supporting* compensation, however, as Professor Merrill's "specific capital" test illustrates. Like my "sweeping equation of any protection of economic rights with *Lochner*[, Merrill's test] cannot be confined to issues involving physician price controls."¹¹ As interesting as it is, the "specific capital" theory cannot be limited consistently to price controls and thus would require compensation in a host of cases where the Court has previously found compensation not to be due.¹²

It is to Professor Merrill's enduring credit that he has managed to make the argument for Takings Clause review of health care reform

6. See Brewbaker, *supra* note 2, at 707 (citing *Yee v. City of Escondido*, 112 S. Ct. 1522 (1992); *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *Bowles v. Willingham*, 321 U.S. 503 (1944); *Block v. Hirsch*, 256 U.S. 135 (1921)).

7. Merrill, *supra* note 1, at 709.

8. See Brewbaker, *supra* note 2, at 672-73.

9. See *id.* at 672-73, 676.

10. Merrill, *supra* note 1, at 717.

11. *Id.* at 715.

12. See Brewbaker, *supra* note 2, at 697 & n.123.

legislation, including price controls, sound plausible. However, applying the Takings Clause in the way he proposes would, for practical purposes, require the Court to tell Congress (and the American people) that Congress may not deal with the nation's perceived health care crisis in the way it deems best. The Takings Clause has never been strong enough to carry that sort of message.

