

We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or the Fourth Amendment, should be relegated to the status of poor relation in these comparable circumstances.

What are your thoughts on the sentiments that quote expresses?

Judge BREYER. I do not think I see these things in tiers. I think I see, or at least I start out by seeing—and I might learn more later—but I start out by seeing the individual words of the Constitution that start talking about rights as trying to identify certain basic values or clusters of values, and those values are obviously different, and they lend themselves to different kinds of potential regulation or State interference, depending on what they are.

But you, I thought, said which is there is a sense in which a person's own personality can be mixed with a material thing—think of your old sofa, or mine, or our house; we live in it for a while, and think of how it becomes part of us. And there is something in also being able to earn a living that is terribly important to everyone. And those kinds of things—what the Court said in *Roth*—it is the purpose of the ancient institution of property to protect people in those rights which they rely upon in their ordinary lives. You see, it is driving at something that is important under that term “property”—a different thing than under free speech and so forth, but still something that is important to people. How that interacts with the needs of the rest of society to function will be different, because it is a different kind of thing. That is why the Constitution does not enact some particular theory of the economy. That is why the Constitution recognizes, and Holmes, again, recognized, you know, the need, that it is perfectly necessary for the Government to say to a coal mine operator: Coal mine operator, you must leave columns of coal in the mine so it does not collapse. That is called regulation.

Balancing what is at the heart of the matter in the case of property and the need for society to function through regulation is different in that area than in some other area, but that is because different things are involved, and because, quite clearly, as we said yesterday, no particular theory of the economy is written into the Constitution.

The CHAIRMAN. Senator, would you yield on that point?

Senator BROWN. I would be glad to yield.

The CHAIRMAN. We do not balance in the same way whether or not a black man or woman can move into a neighborhood.

Judge BREYER. No; absolutely not.

The CHAIRMAN. Explain the distinction, please.

Judge BREYER. There is a basic promise of fairness written right into the Constitution in the 14th amendment.

The CHAIRMAN. So there is a tier—the Senator's point is correct, though—there is a tier.

Judge BREYER. Seen that way, there is a tier. Seen that way, there is a tier. Seeing—you start talking about taking away a toothbrush—I am saying there can be something basic, but there is a tier, of course.

The CHAIRMAN. And you do see that tier?

Judge BREYER. Yes; I do.

The CHAIRMAN. OK. Thank you.

I thank you for the interruption.