2000

Regulatory Takings and "Judicial Supremacy"

J. Peter Byrne

Georgetown University Law Center, byrne@law.georgetown.edu

51 Ala. L. Rev. 949-961 (2000)

Regulatory Takings and "Judicial Supremacy"

51 Ala. L. Rev. 949-961 (2000)

J. Peter Byrne
Professor of Law
Georgetown University Law Center
byrne@law.georgetown.edu

REGULATORY TAKINGS AND "JUDICIAL SUPREMACY"

J. Peter Byrne[*]

I. INTRODUCTION

The necessity for judicial restraint in constitutional interpretation has been a persistent theme for more than a century. Judges, from Holmes and Brandeis to Harlan and Souter, legal theorists, from Thayer to Bickel to Bork to Sunstein, and politicians, from Roosevelt to Nixon to Governor Bush,[1] have decried the propensity of courts to read personal political philosophies into vague constitutional provisions so as to frustrate democratic lawmaking. Reaction to what Raoul Berger famously termed "Government by Judiciary"[2] has spawned pungent dissents, proposals to restructure (or "pack") the Supreme Court, bills to strip courts of subject-matter jurisdiction, and concerted efforts to impeach Justices.

The thesis of this Article is that the Court of Federal Claims and the Court of Appeals for the Federal Circuit have become exposed to this classic critique of constitutional decision-making through the recent expansions of the regulatory takings doctrine. Though the chief agent for this expansion has been the Supreme Court,[3] these lower courts have made their own prominent contributions to broadening regulatory takings, and they are far more vulnerable to political reprisals. Like the Due Process Clause in the gilded age, the Takings Clause today can easily be and has been seen as an avenue for inappropriate judicial protection of established wealth and commercial practices

* Georgetown University Law Center

1. *See* Mike Allen, *Bush Draws Donations, and Conservatives' Fire*, N.Y. TIMES, June 16, 1999, at A26.

2. RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977).

3. *See* Philip Weinberg, Del Monte Dunes v. City of Monterey: *Will the Supreme Court Stretch the Takings Clause Beyond the Breaking Point?*, 26 B.C. ENVTL. AFF. L. REV. 315, 315 (1999).

frustrating legitimate efforts at reform.[4] Courts addressing claims of regulatory takings should proceed with caution, practice available "passive virtues," and ground decisions firmly in precedent and established constitutional values.

This Article will first examine the elements of substantive due process that led to decisions invalidating social welfare legislation and becoming notorious for judicial overreaching. This Article will then show how decisions expanding the regulatory takings doctrine share very similar characteristics. Finally, it will offer some suggestions about how judges concerned about real or apparent overreaching should approach regulatory takings issues.

II. SUBSTANTIVE DUE PROCESS JUSTIFICATIONS FOR JUDICIAL INVALIDATION OF STATE AND FEDERAL LEGISLATION

One of the most eloquent critiques of excessive judicial lawmaking is *The Struggle for Judicial Supremacy*,[5] written by Robert Jackson in 1940, and published shortly before his elevation to the Supreme Court. In it, Jackson chronicled the development of the Court's jurisprudence concerning substantive due process and the Commerce Clause that enabled it to hold unconstitutional a wide array of state and federal social welfare statutes designed to regulate the terms and conditions of labor. This assumption of judicial power culminated in the great legal conflicts concerning the New Deal, Roosevelt's proposal to increase the size of the Court, and the Court's abandonment of its role as guardian of laissez faire in 1937.[6] Jackson's argument was that the Court imperiled the Constitution itself when it repeatedly frustrated democratic majorities' lawmaking without a secure foundation in the language or explicit policies of the Constitution.[7] The Court he joined gave Congress and the state legisla-

4. *See generally* Douglas T. Kendall & Charles P. Lord, *The Takings Project: A Critical Analysis and Assessment of the Progress So Far*, 25 B.C. ENVTL. AFF. L. REV. 509 (1998).

5. *See* ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY (1941).

6. *See* David M. O'Brien, *The Great Judicial Stall: The Courts Were Meant To Be Above Politics but They Have Been Turned into an Arena of Ideological Combat*, L.A. TIMES, Sept. 5, 1999, at M1.

7. *See* JACKSON, *supra* note 5, at 320-24.

tures wide discretion in enacting economic and social legislation.

Of course, we know that the Court during the service of Chief Justice Warren greatly expanded judicial power by broadly construing the Bill of Rights to promote social equality and individual civil liberties.[8] We also know that many of its decisions were highly controversial and created a political backlash that persists to this day.[9] Both of Richard Nixon's successful presidential campaigns stressed his commitment to appointing Justices who were "strict constructionists" and interpreted the Constitution rather than inventing new rights that furthered their individual political visions.[10] Modern conservative constitutional theory has embraced "original meaning" largely in response to the perceived excesses of subjectivity by the Warren and Burger Courts. The rhetoric of "original meaning" persists to this day in political discourse, surfacing most recently in Governor Bush's response to questions about his position on abortion rights.[11] The current Supreme Court has persistently narrowed its reading of individual constitutional rights in virtually every area—with the conspicuous exception of property rights under the Takings Clause.

What are the elements of judicial decision-making that fuel such controversy and claims of illegitimacy? There appear to be three major elements.

First, undoubtedly the most frequently mentioned objection is that judges broadly construe vague provisions with weak or no foundation in the Constitution's text or history. As Jackson wrote:

> [Electoral majorities] should, of course, be so restrained where [their] program violates clear and explicit terms of the Constitution, such as the specific prohibitions in the Bill of Rights. But to use vague clauses to import doctrines of restraint, such as "freedom of contract," is to set up the judiciary as a check on elections, a nullification of the process of government by consent of the governed.[12]

---

8. *See* David Luban, *The Warren Court and the Concept of Right*, 34 HARV. C.R.-C.L. L. REV. 7, 8 (1999).

9. *See id.* at 7.

10. *See* O'Brien, *supra* note 6, at M1.

11. *See* Allen, *supra* note 1, at A26.

12. JACKSON, *supra* note 5, at 319.

More recently, Justice Scalia has argued vigorously against the use of substantive due process to maintain constitutional abortion rights.[13] While praising the abandonment of substantive due process during the New Deal crisis in 1937,[14] he chided an "Imperial Judiciary"[15] for making constitutional decisions based on "philosophical predilection and moral intuition"[16] concerning issues properly left to the political process.[17] He saw the result of such judicial frustration of the political process as being the politicization of judicial selection.[18] He concluded:

> [B]y foreclosing all democratic outlet for the deep passions this issue arouses, by banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight, by continuing the imposition of a rigid national rule instead of allowing for regional differences, the Court merely prolongs and intensifies the anguish.[19]

This is no place to enter into the debate about the proper scope of the Due Process Clause. But critics like Jackson and Scalia certainly can point out that the Clause makes no specific reference to contracting or abortion, but merely uses the word "liberty," in such a context as to cast doubt on whether the Clause has any substantive content at all. Moreover, it is very difficult to argue that the Framers of the Fourteenth Amendment intended to restrict the powers of legislatures to make laws improving employment conditions for workers. Judges thus were restrained neither by the text nor the understood purposes of the Amendment. This lack of direction from the Framers conferred great discretion on judges to pick and choose the instances where invalidation was warranted, increasing both judicial power and the appearance of subjectivity.

Second, the judicial position could easily be seen as opposition to a broad movement of social reform trying to change law

---

13. *See* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 979 (1992) (Scalia, J., dissenting).
14. *See Planned Parenthood*, 505 U.S. at 998.
15. *Id.* at 996.
16. *Id.* at 1000.
17. *See id.* at 1002.
18. *See id.* at 1001.
19. *Planned Parenthood*, 505 U.S. at 1002.

through political mobilization and legislation. In terms of the old substantive due process, judges had arrayed themselves against progressive era efforts to improve the terms and conditions of work. Similarly, recent abortion decisions can be understood, indeed have justified themselves, as stands against "right to life" political mobilization.[20] It is striking that both Jackson's book and Scalia's *Casey* dissent end by invoking the disaster of the *Dred Scott* case,[21] in which the Court sought to thwart abolition and free soil movements and remove the slavery question from politics, but actually brought the Civil War closer as well as the consequent eclipse of judicial power. Judges seen as political agents will not be respected, and law becomes the continuation of political war by other means. Moreover, given that the position being defended by the courts has lost in the political process, judges will be seen as defenders of an *ancien regime* headed for the last ditch.

The other side of this coin is that judicial power may be exerted on behalf of a controversial normative theory having at best a partial foundation in the Constitution. Of course, *Dred Scott* claimed that the federal government lacked power to restrict or end slavery.[22] The economic substantive due process cases are notoriously said to enshrine the social Darwinism of Herbert Spencer,[23] and they plainly privileged the view that government could not morally redistribute bargaining power nor wealth. While these theories understandably animated political debate at the time, the Court's decisions sought to privilege the values they embraced as constitutionally inviolate.[24]

Finally, economic substantive due process decisions tended to elevate the common law above statutes, with an emphasis on liberty of contract. In practice, this often meant that limitations

---

20. *See id.* at 865-69; Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992) (Scalia, J., dissenting).

21. Dred Scott v. Sandford, 60 U.S. 393 (1857).

22. *See Dred Scott*, 60 U.S. at 452.

23. *See* Anthony S. McCaskey, *Thesis and Antithesis of Liberty of Contract: Excess in* Lochner *and* Johnson *Controls*, 3 SETON HALL CONST. L.J. 409, 437-40 (1993).

24. Here the recent book by CASS SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999), seems most pertinent. Sunstein extols a form of judicial "minimalism," which seeks to promote democratic discourse by not attempting to finally settle large or deep philosophical debates, but rather, by finding common ground among opposing views through narrow decisions. *Id.* at 259.

on contracting originating in the common law or ancient ordinances were upheld, but those fashioned by statute to meet modern concerns were suspect. Thus, the Statute of Frauds was valid, but laws regulating the wage and hour terms of an employment contract were not.[25] In the latter case, the rules of common law contract and the scope of freedom it contemplated took precedence over otherwise valid statutes.[26] The Constitution, then, was used to reverse the normal constitutional presumption that statutes are to prevail over common law. The precedence of judges over legislatures thus mounted to a second degree.

III. THE REGULATORY TAKINGS DOCTRINE IN A SUBSTANTIVE DUE PROCESS CONTEXT

In this Section, this Article argues that recent developments in the regulatory takings doctrine share in all the problems associated with substantive due process. Indeed, regulatory takings sometimes seems to be the very same doctrine as substantive due process, attached to a different clause only as an alias to avoid the obloquy in which substantive due process is held. If there is more than a passing resemblance, then courts should be concerned about the political dynamic that they are setting in motion.

Let me settle preliminarily a small point of rhetoric. It sometimes is asserted that a finding that the government must pay just compensation does not limit the regulatory power of government at all, but merely provides monetary protection to the individual. This is deeply unpersuasive. First, such a decision holds that the government cannot do what it has purported to do, that is, regulate and not pay compensation. Second, as a practical matter, the government cannot afford to pay compensation broadly, and the threat of having to do so effectively constrains policy choices, as has been happening in several areas, such as endangered species protection.[27] Finally, *Eastern Enter-*

25. *See* McCaskey, *supra* note 23, at 431. *See also* Lochner v. New York, 198 U.S. 45, 53 (1905); Allegeyer v. Louisiana, 165 U.S. 578, 589 (1897).

26. *See Lochner*, 198 U.S. at 53.

27. *See generally* Weinberg, *supra* note 3, at 315; Jonathan Baert Weiner, *Glob-*

prises[28] has merely confirmed what had seemed so—that invalidation is an alternative remedy to the grant of compensation.[29]

There are several vices that regulatory takings and substantive due process share. First, the regulatory takings doctrine is very vague and rests on no textual or historical support. The vagueness is legendary—no body of constitutional doctrine has had more synonyms for imprecision attached to it.[30] The Supreme Court itself has said that there is no real test but only a fact-specific inquiry into various unweighted factors.[31] This gives individual judges great discretion and regularly results in decisions being attributed to the predilections of individual judges rather than to the logic of doctrine or precedent.

The language of the Takings Clause says nothing about excessive regulatory burdens; indeed, the word "take" denotes some change in possession or title. Historical research has established beyond reasonable dispute that the Framers intended the Clause only to apply to physical seizures.[32] Courts consistently so interpreted the Clause for more than 100 years, until the Court, in thrall to substantive due process, invented regulatory takings in 1922 in *Pennsylvania Coal*.[33] Justice Scalia conceded in *Lucas*[34] that contemporary historical understanding did not support the notion of a regulatory taking; he merely gestured at some unidentified "historical compact" that does not exist.[35] As for the text, Scalia merely claimed that since the text can be read to include regulatory takings, he would not overrule *Pennsylvania Coal*.[36] But "liberty" in the Due Process Clause can be just as easily read to include making employment contracts or having an abortion. It is ironic that Justice Scalia's opinion in

---

al Environmental Regulation: Instrument Choice in Legal Context, 108 YALE L.J. 677 (1999).

28. Eastern Enters. v. Apfel, 524 U.S. 498 (1998).

29. *See Eastern Enters.*, 524 U.S. at 521-22.

30. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 123-24 (1978) (noting that the question of what constitutes a regulatory taking for the purpose of the Fifth Amendment "has proved to be a problem of considerable difficulty").

31. *See Eastern Enters.*, 524 U.S. at 523.

32. *See* William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 791 (1995).

33. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414-15 (1922).

34. Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

35. *See Lucas*, 505 U.S. at 1028 n.15.

36. *See id.* at 1017-18.

Lucas should follow his dissent in *Casey*, since he violates in the latter all the principles of constitutional adjudication he extols in the former.

Second, vigorous enforcement of the regulatory takings doctrine has been and easily can be seen as an effort to oppose the environmental movement as it is broadly understood.[37] The most contentious cases arise when government regulation seeks to prevent development of land or water in order to preserve ecological or aesthetic benefits that the resource provides in its natural state. Restructuring legal relations to protect ecological values poses two challenges to traditional notions about the primacy of individual property rights. First, many common uses of land and water can be shown to harm the environment, demonstrating a ubiquitous "police power" rationale for limiting property use. Second, acknowledging ethical duties to preserve natural elements shifts the moral perspective on individual property claims from defense of the individual against the collective to defense of commercial values against ecological values. The doctrine of the takings cases seems designed to abridge the "police power" ground for sustaining environmental regulation, and the rhetoric of the cases seems intended to submerge legal doubts about the virtue of property rights.

The political origins of the regulatory takings revival have been frequently noted. The concept seems to have been reborn in the Reagan Justice Department and achieved its first legal realization in Executive Order 12,630 in 1988.[38] In recent years, bills to broaden and facilitate regulatory takings claims have been advanced in Congress repeatedly by members having close ties to extractive industries and to the National Association of Homebuilders.[39] While all this activity is perfectly legitimate, it creates a context in which expansion of the doctrine by judges can be seen as part of a larger political campaign to weaken environmental restrictions. Moreover, the acceptability of judicial expansion may be affected by the repeated political defeat of similar ideas.

There is another side of the coin here, too. Much of the

37. *See* J. Peter Byrne, *Green Property*, 7 CONST. COMMENT. 239, 247 (1990).
38. *See* Exec. Order No. 12,630, 3 C.F.R. § 554 (1989).
39. *See* Kendall, *supra* note 4, at 550.

energy behind the promotion of regulatory takings stems from an ardent belief in a *jejune* form of political libertarianism.[40] Under this view, every man remains an island until he chooses to come ashore; the individual owner's choices about what to do with his or her land overwhelm the concerns of neighbors about what the effects on them will be. Proponents view the Takings Clause as a broad guarantee against wealth redistribution and an economic check against legislative social engineering. Again, the people may rightly complain if a doctrine repeatedly routed in the political process should become constitutionally mandatory through judicial construction.

Third, regulatory takings rulings tend to elevate an idealized common law concept of property over the reach of statutes and regulations. Regulatory takings require some baseline of permitted property use that is privileged over regulatory restrictions; that privileging is found in the common law notion that, at least as regards land, an owner may make any use of his or her land that is not a nuisance.[41] Yet a statute restricting use simply changes the use rights that an owner has. Why should the common law scope be preferred to the statutory?

Finally, it should be noted that recent developments further blur any distinction between substantive due process and regulatory takings. First, the plurality in *Eastern Enterprises* would permit a regulatory takings claim to be based upon a requirement to pay money without there being any specific item claimed to have been even metaphorically taken.[42] It is interesting to note that Justice O'Connor justified the use of the Takings Clause in such circumstances, not on any point of principle, but because of the ill repute surrounding substantive due process;[43] a cardinal point of this Article is that regulatory takings ought not enjoy higher repute than substantive due process and may not long do so. Second, as noted above, the plurality also confirmed greater overlap in the remedies offered under the two Clauses, permitting invalidation as the remedy in a takings

---

40. *See* Roger Pilon, *Freedom, Responsibility, and the Constitution: On Recovering Our Founding Principles*, 68 NOTRE DAME L. REV. 507, 542-44 (1993).

41. *See* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 112-25 (1985).

42. *See Eastern Enters.*, 524 U.S. at 531-32.

43. *See id.* at 537.

case.[44] Finally, there is the growing use of a means-ends test for assessing a regulatory taking that imports just the doctrinal touchstones long used to find social and economic legislation to have violated substantive due process.[45]

IV. POTENTIAL JUDICIAL APPROACHES TO THE LAW OF REGULATORY TAKINGS

A judge on the Court of Federal Claims might be concerned about either the reality or the perception of the problems this article has outlined. He or she might doubt the propriety of his or her authority to require compensation for many forms of deliberate regulation, or he or she may worry that the public or the bar will view the court as exercising excessive judicial control over democratic decision making. But the Supreme Court has fostered regulatory takings and retroactivity doctrines and the judges have a duty, of course, to follow the law laid down. In this Section, this Article offers a few suggestions, hardly novel, about how such a judge may proceed. These are adaptations of the traditional "passive virtues," and others could add to the list.

First, it has been admirable and prudent for the court to seek a range of contemporary scholarly views about the character of these issues and the responses being discussed. Such analysis ought to have a broader perspective than can be gained in litigating individual cases. We can hope that whatever will be done will be done now with greater sensitivity and adroitness.

Second, perhaps because regulatory takings cases center on such an extraordinary exercise of judicial power, they are surrounded by a broad array of prudential doctrines designed to forestall or postpone judicial entry into the regulatory thicket. The best known among these is ripeness, whereby the court takes extraordinary care to await final agency action that indicates just what use will be permitted the landowner.[46] But ripe-

---

44. *See id.* at 521.

45. *See* Douglas W. Kmiec, *The Original Understanding of the Takings Clause is Neither Weak nor Obtuse*, 88 COLUM. L. REV. 1630, 1650-51 (1988); *see also* Nollan v. California Coastal Comm'n, 483 U.S. 825, 834-42 (1987); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 127 (1978).

46. *See* Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 187 (1985).

ness stands as well for a more general respect for agency responsibility and a determination not to require constitutional compensation when a lesser legal ruling can achieve justice for the parties.[47] This is analogous to the Supreme Court's preference for resolving cases short of constitutional decision.

Third, when a judge believes that a regulatory taking has occurred, the decision should be narrowly based on the particular facts of the case. The ad hoc, fact-bound nature of most takings cases facilitates and often requires this. But such an approach also provides some respite from the concerns that animate this Article. Narrow decisions that rest on peculiar facts displace less democratically authorized decision-making. The court should attempt to deal with a particular government decision rather than a substantive program or a class of decisions. This permits revision of a program to avoid excessive burdens or other constitutional flaws, without also eliminating the program. Such decisions also keep the constitutional razor further from legislative determinations, focusing less on the challenging statutory authorization and more on specific application. As a corollary, the court should scrupulously avoid denigrating legislative purposes.

Fourth, reasoning in regulatory takings decisions should remain within the categories *authorized* by the Supreme Court and not improvise. Here, I want to draw on Professor Sunstein's conditional praise for constitutional decisions with "shallow" reasoning; he points out that avoiding complete theorization of a constitutional problem will permit many competing theories to persist in legal and political discourse, thereby minimizing the costs of mistakes, such as backing the wrong theory.[48] This advice seems quite pertinent to regulatory takings cases, where many theories compete and all have been roundly criticized. An example of an unfortunate doctrinal innovation close to home was the Federal Circuit's embrace of the idea of "partial takings," which stimulated harsh critiques and has been uniformly

47. *See* Abbott Labs. v. Gardner, 387 U.S. 136, 148 (1967).
48. SUNSTEIN, *supra* note 24, at 18-19, 43-45.

rejected by other courts;[49] the case, *Florida Rock*,[50] surely could have been decided adequately under a standard *Penn Central*[51] analysis.

A much worse move would be for a court to aggressively promote the type of libertarian theory of the Takings Clause mentioned above. Such a course would have the goal of removing from political debate a host of questions concerning what is due a private owner when the public asserts through the national democratic processes its interests in how private property may be developed. It also would, of course, significantly raise the bar for tolerating retroactivity. Without doubt, I believe that such a legal development would be legally and normatively wrong. But what I want to emphasize is how destructive it would be to traditional and bipartisan notions of the separation of powers, to insist on judicial supremacy once again over the environmental and social policies of the nation. The consequences of this conflict cannot be predicted, but history suggests that they could be far-reaching and prolonged.

V. CONCLUSION

Constitutional adjudication has a political and jurisprudential complexity beyond that of statutory interpretation. Broad constitutional decisions forestall ordinary political processes and remove topics from popular arenas. Thus, they generate controversy different in kind from that incumbent upon difficult statutory cases, even when large sums or individual liberty is at stake. This controversy, which focuses on the legitimacy of the courts, is exacerbated when such decisions lack persuasive anchor in the Constitution's text or traditions. This is not to say that such decisions are never appropriate; rather, such decisions require great reflection and tact.

The Court of Federal Claims has a significant challenge before it. It should be congratulated for approaching this chal-

---

49. *See* Michael C. Blumm, *The End of Environmental Law? Libertarian Property, Natural Law, and the Just Compensation Clause in the Federal Circuit*, 25 ENVTL. L. 171, 180 (1995); Kendall & Lord, *supra* note 4, at 561-71.

50. Florida Rock Indus., Inc. v. United States, 18 F.3d 1560 (Fed. Cir. 1994).

51. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).

lenge by looking to broad themes and seeking counsel. Hopefully these comments will assist in the analysis of this challenge.