1997


William Michael Treanor
*Georgetown University Law Center, wtreanor@law.georgetown.edu*

This paper can be downloaded free of charge from:
https://scholarship.law.georgetown.edu/facpub/1062


This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author. Follow this and additional works at: https://scholarship.law.georgetown.edu/facpub

Part of the Constitutional Law Commons, and the Property Law and Real Estate Commons

William Fischel's *Regulatory Takings* confronts one of the most difficult and significant questions in constitutional law: how should courts determine which government regulations run afoul of the takings clause of the Fifth Amendment, which requires the government to provide compensation when it takes private property? Broadly read, the clause would bar government regulations with redistributive consequences, thus rendering the modern regulatory state unconstitutional. This reading, championed by Professor Richard Epstein, has achieved great prominence in academic and political debates, but the vast preponderance of judges and academic commentators finds such a result both unattractive and unsound in terms of constitutional structure. None of the numerous alternative substantive readings of the clause that have been advanced, however, has won general acceptance (or anything close).

Fischel seeks to shift the terms of what has become a stalemated debate by advancing a political process theory approach to the clause. Stressing the need for judicial modesty in a system of democratic government and the limits of judicial capacity (particularly with regard to the federal bench), he argues that courts should "largely avert their eyes from the regulatory excesses of Congress and, for the most part, of state legislatures." But close judicial scrutiny of local regulations is appropriate for several reasons: (1) local government decisions, in contrast to decisions at the state and national levels, are particularly likely to fall on unrepresented outsiders; (2) local politics are peculiarly subject to process failure; and (3) courts alone can provide redress. Even so, the judicial role here is limited. Movable property does not need special judicial protection. Thus courts should focus their attention primarily on local regulatory unfairness that affects immovable property, the principal form of which is land.

The strongest part of Fischel's argument is the central premise that courts should in general defer to the political process, except where process failure is most likely. Others have in recent years advanced process theories of the takings clause (including myself), and Fischel has advanced this thesis previously. But, as he develops his point here, he gives it great richness and power. *Regulatory Takings* is, very simply, a tour de force.
Fischel masterfully draws on not only his native discipline of economics but also, among other things, legal history, political theory, jurisprudence, relevant empirical studies, the case law and intriguing background facts that he has uncovered about the leading cases, the enormous legal literature on takings, and his own experience on the Hanover, New Hampshire, Zoning Board.

As Fischel elaborates on his position, however, his claims are less compelling. In particular, he does not adequately explain why political appeals to state legislatures or the state electorate to overturn local decisions or to impose compensation requirements on local governments do not provide adequate nonjudicial redress for process failure at the local level. Similarly, in discussing actual takings cases, Fischel pronounces regulations unconstitutional with a frequency that is inconsistent with his broader claim that the judicial role should be limited. What this principally illustrates, however, is not analytic weakness but the intractability of the takings issue. As it probes that issue with sophistication and subtlety (and in a lucid style that is a pleasure to read), Regulatory Takings not only makes an important contribution to the literature on takings law and on land use; it makes a place for itself as a major work on the larger subject of property rights and the Constitution.

WILLIAM MICHAEL TREANOR
Fordham Law School
New York City