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Basic Themes For Regulatory Takings Litigation

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There is probably no area of law that is as fraught with confusion and inconsistencies as the regulatory takings doctrine. In this Article, Professor Byrne summarizes arguments, called “litigation themes,” that can be made to help circumnavigate the many pitfalls and quagmires that await takings litigators as a result of this confusion. The Article argues that the Fifth Amendment’s Takings Clause was never meant to apply to the regulation of property, but only to physical or legal appropriations. Professor Byrne suggests that the Due Process Clauses or the Equal Protection Clause are equally capable of resolving the conflicts that result from the regulation of property that have traditionally been examined under the Takings Clause. The litigation themes discussed in this Article are a means to shift regulatory takings arguments away from the Takings Clause toward the Due Process Clauses or the Equal Protection Clause.

I. INTRODUCTION

In my view, the Takings Clause\(^1\) ought not apply to regulations of resource use at all, but only to physical or legal appropriations.\(^2\) Serious unfairness in the administration of land use and environmental laws may raise constitutional concerns that can and should be addressed under the

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\(^1\) U.S. Const. amend. V ("nor shall private property be taken for public use, without just compensation").

Equal Protection Clause\(^3\) or substantive due process analysis.\(^4\) Of course, no litigator would directly advocate such a position while defending a particular land use regulation. But many of the arguments against any regulatory takings doctrine also support specific claims for a narrow reading of applicability of the doctrine to particular facts.

Thematic coherence is important in any litigation, but it is essential in regulatory takings litigation, where the law to be applied lacks doctrinal clarity and consistency. Because the Takings Clause contains no clear test or determinate prohibition directed at regulations, argument about its application must involve rhetorical appropriation of broad constitutional standards and jurisprudential meanings. Generally, property rights advocates have had the better of struggles to link the reach of the Takings Clause to attractive norms, invoking images of lonely, weak individuals seeking liberty and enjoyment of the fruits of their honest labor.\(^5\) Too often government lawyers woodenly defend regulations either as not hurting an owner too much or as not quite fitting within a doctrinal category. In fact, a challenged regulation will often appropriately serve important public purposes that need to be intelligently explained to the court. That is the core of any constitutional defense. In close or mixed cases, however, the litigation themes outlined in this Article may help persuade a doubtful judge that the government deserves the benefit of the doubt.

Moreover, consciousness of these themes will help provide coherence to the legal positions taken by a government entity that repeatedly defends against regulatory takings claims. The defense of takings claims should be pursued, to the extent possible, with a view toward narrowing the scope of the regulatory takings doctrine. Consistent with the specific litigation goals of a particular case, advocates should consistently make arguments that tend to move the law in the direction of this goal whenever

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\(^3\) U.S. CONST. amend. XIV ("nor shall any state . . . deny to any person within its jurisdiction the equal protection of the law").

\(^4\) See U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property without due process of law . . . ."); id. amend XIV ("nor shall any State . . . deprive any person of life, liberty, or property, without due process of law"). My sense is that the unfairness that bothered the Supreme Court in last term's decision in City of Monterey v. Del Monte Dunes at Monterey, Ltd., 119 S. Ct. 1624 (1999) (describing shifting and increasingly difficult standards), would best be resolved by finding a denial of procedural due process. Also, the most intuitively appealing argument for David Lucas in Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), was that he was forbidden to build on his lot, even though his neighbors on both sides had already built. Id. at 1031 (citing RESTATEMENT (SECOND) TORTS § 827 cmt. g (1977) as support for the proposition that "[t]he fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition (though changed circumstances or new knowledge may make what was previously permissible no longer so)"). This argument also raises interesting issues under the Equal Protection Clause.

\(^5\) Conservative public interest law firms choose plaintiffs who are sympathetic individuals, such as Bernadine Suitum, an elderly woman whose desire to build a retirement home was frustrated by the water protection rules of the Tahoe Regional Planning Agency. Mrs. Suitum attended argument in her case in the Supreme Court, sitting in the front row in a wheelchair. See Richard Lazarus, Litigating Suitum v. Tahoe Regional Planning Agency in the Supreme Court, 12 J. LAND USE & ENVT'L. L. 179, 189–90 (1997).
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possible. On the other hand, arguments that represent a diversion from the ultimate goal of narrowing the scope of the regulatory takings doctrine—or that actually detract from achieving this goal—should be avoided if possible.

This brief Article summarizes arguments that can be made in regulatory takings cases to advocate a narrow reading of the Takings Clause. Fortunately, many of this Article's arguments may appeal to conservative judges who might instinctively be sympathetic to strong property rights positions. The arguments highlight jurisprudential tensions between activist interpretations of the Takings Clause and traditional themes of conservative constitutional interpretation. In other words, the arguments point out the contradiction between expansive interpretations of the Takings Clause and traditional notions of judicial restraint and states' rights.

II. LITIGATION THEMES

A. The Narrow Language of the Takings Clause

The language of the Takings Clause shows that the clause applies only to physical appropriations and their functional equivalents; it does not support the view that the clause applies to regulations that limit permissible uses and diminish the value of property. The key word is “take.” A taking is an actual physical appropriation. Simple regulation does not take.

To borrow Professor Treanor's helpful metaphor, if a parent tells her daughter that she cannot play with her ball in the house, she has lost something of value, i.e., the right to play with the ball in the house. The parent has regulated what her daughter can do with the ball, but she has not “taken” it. The daughter is still free to play with it outside. The parent only “takes” her daughter's ball when she physically seizes it.

The point to be made in takings litigation is that the regulatory reach of the clause should be narrowly construed because it exceeds the scope of the Constitution's language. The regulatory takings doctrine is a creative judicial metaphor that treats a regulation as if it were a seizure. To maintain a vital link to the constitutional text, the application of the doctrine to regulations should be reserved for severe constraints on an owner's use of a resource that approach or resemble those that would result from a physical deprivation.

B. The Original Understanding of the Takings Clause

Legal scholars of all shades of political opinion recognize that the available evidence about the original understanding of the Takings Clause shows that the clause was intended to apply only to direct physical appro-

6 WILLIAM MICHAEL TREANOR, THE ORIGINAL UNDERSTANDING OF THE TAKINGS CLAUSE 3–4 (Environmental Policy Project ed., 1998). To borrow another example, used by Jo Evans (a Colorado environmentalist), if I reach out and remove your pen from your pocket, I have “taken” it. If, on the other hand, I instruct you not to use your pen to write on the walls, or to poke your neighbor, I have regulated your use of your pen, but I have not “taken” it.
The leading recent scholarship on this point includes the works of Professors John F. Hart and William Michael Treanor. Noted conservatives, including former Solicitor General Charles Fried and former judge Robert Bork, have explicitly acknowledged that the broad regulatory takings argument has no foundation in the original understanding of the Takings Clause.

Arguments for a reading of the Takings Clause that conforms to the original understanding represent a thoroughly conservative approach to constitutional interpretation. Thus, the original understanding argument is not only firmly rooted in constitutional history, it also contradicts the conventional view that a broad reading of the Takings Clause represents a "conservative" position. Reference to the strong evidence about the original understanding of the Takings Clause should, at a minimum, be helpful in persuading judges to avoid further expansion of the regulatory takings doctrine.

C. Regulatory Takings and the Tradition of Judicial Restraint

A related point is that a narrow reading of the Takings Clause is supported by the courts' traditional reluctance to avoid intervening in the policy judgments of democratically elected officials. Each time a nonelected federal court finds a regulatory taking, for example, it is trumping a determination by a branch of government that directly or indirectly reflects the popular will. Under our system of government, which is ultimately founded upon the consent of the people, such interference with political judgments is intended to be reserved for special and important circumstances. A broad conception of regulatory takings contradicts this tradition and threatens to bring the judiciary into contempt.

D. Regulatory Takings and Federalism

A key feature of the United States's political system is our federal structure, which helps ensure decentralized government that is responsive

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7 The apparent exceptions to this proposition tend to rely on unnaturally broad claims about what the Fifth Amendment means by "property." See Richard Epstein, Takings: Private Property and the Power of Eminent Domain 100–04 (1985). These exceptions are not supported by either contemporary legal practice or the early judicial interpretations of state and federal takings clauses.


10 Cf. Bowers v. Hardwick, 478 U.S. 186, 194 (1986) ("The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.").


12 Cf. Planned Parenthood v. Casey, 505 U.S. 833, 996, 1000 (1992) (Scalia, J., dissenting) (condemning activism of an "Imperial Judiciary" that makes decisions on the basis of "philosophical predilection and moral intuition").
to diverse needs in different parts of the country, increases opportunities for public participation in government decision making, and allows for innovation and experimentation.\(^\text{13}\) Property law, dealing with the scope and nature of ownership, is essentially state law.\(^\text{14}\) Also, land use decision making has long been recognized as a core function of state and local governments in our system of federalism.\(^\text{15}\)

The Takings Clause has traditionally been read to take account of the values of federalism. In particular, the Supreme Court has recognized that while determining the definition of "taking" is a question of federal law, underlying property interests "are defined by existing rules or understandings that stem from an independent source such as state law."\(^\text{16}\) An expansive notion of regulatory takings, on the other hand, tends to federalize the property issue by imposing a stricter, more uniform national standard upon the regulation of property, and by constraining local authorities from meeting the needs of local communities.

**E. Fiscal Impacts of Takings Awards**

A number of rather dramatic takings awards have already been entered against state and local governments in takings litigation.\(^\text{17}\) Even when local governments successfully defend against takings lawsuits, the mere cost of litigating these claims can be staggering to local governments. Large compensation awards and litigation costs for regulatory takings cases can have serious adverse effects on government finances, particularly at the local level.

Efforts to expand the regulatory takings doctrine threaten to impose even larger fiscal burdens on local governments. The problem is compounded by the fact that the actual fiscal impacts of incremental change in the concept of regulatory takings would be hard to predict or control. These consequences are exacerbated by the Supreme Court's ruling that property owners may always sue for damages, even when government is prepared to withdraw regulations found to effect a taking.\(^\text{18}\) The judiciary cannot responsibly ignore the potential consequences of their decisions on the fiscal health of states and, in particular, local governments. This argument was invoked by Justice Kennedy in his separate opinion rejecting the application of the Takings Clause to a statute imposing retroactive health care liability on a company: "The plurality opinion would throw one of the most difficult and litigated areas of law into confusion, subject-


\(^{15}\) Id.


\(^{17}\) See, e.g., City of Monterey v. Del Monte Dunes at Monterey, Ltd., 119 S. Ct. 1624, 1634 (1999) (upholding award of $1,450,000 for plaintiff developer).

\(^{18}\) See First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987).
ing States and municipalities to the potential of new and unforeseen claims in vast amounts."

The Court's blithe willingness to subject state and local governments to monetary claims for regulatory takings seems in tension with the rapidly developing case law under the Eleventh Amendment prohibiting suits for damages against states without their consent. The core rationale in these cases seems to be the incongruity of the Supreme Court's notion of federalism with the power of the federal government to subject the state to suits by citizens for money damages. As the Court said recently, "[p]rivate suits against non-consenting States—especially suits for money damages—may threaten the financial integrity of the States." In the Court's view, allowance of such suits must be balanced against other pressing public needs, and the balance should be struck by the state's political process. Regulatory takings actions brought against state governments seem to offend this principle more than do the claims at issue in the recent Eleventh Amendment cases.

F. Substantive Due Process Redux

The recent rise of an expansive view of regulatory takings unmistakably represents the revival of the doctrine of substantive due process under a different guise. In the late nineteenth and early twentieth centuries, the Supreme Court routinely struck down economic regulations on the ground that they violated the Due Process Clause. It has been nearly sixty years, however, since the Court has closely reviewed economic regulations under the substantive due process doctrine.

Under the banner of the Takings Clause, some courts are now engaging in the same type of close scrutiny of the wisdom or fairness of economic regulations once conducted, but since abandoned, in the

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20 U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State . . . .")
22 Alden, 119 S. Ct. at 2264.
23 Id. at 2264–65.
24 See Byrne, supra note 11.
26 See West Coast Hotel Co. v. Parrish, 300 U.S. 379, 397–400 (1937) (overruling Adkins).
substantive due process context.\textsuperscript{27} Again, concurring in \textit{Eastern Enterprises v. Apfel}, Justice Kennedy complained that "[t]he imprecision of our regulatory takings doctrine does open the door to normative considerations about the wisdom of government decisions."\textsuperscript{28}

The fall of the substantive due process doctrine is typically ascribed to the realization that democratically elected officials have the constitutional authority to adjust the benefits and burdens of economic life even when such decisions cause losses to owners of property. If that realization was well founded in the due process context, it is difficult to see why the same conclusion should not be reached in the takings context.\textsuperscript{29} Moreover, it is plainly illogical, indeed disingenuous, for the outcome of a constitutional challenge based on the same fundamental theory to vary depending upon the label attached to the claim. The similarities between the modern regulatory takings doctrine and the discredited doctrine of substantive due process should be helpful in persuading judges to adopt an appropriately narrow reading of the Takings Clause.

\textbf{G. Property Norms Necessarily Change}

Regulatory takings claims sometimes seem to rest on the premise that the adoption of new laws and regulations that affect property rights is an inherently unfair effort to change the rules in midstream. In fact, however, the definition and scope of property rights have constantly undergone change in this country as a result of court rulings, administrative actions, and legislation. A regulatory takings doctrine that tends to freeze property norms would not only be unprecedented, but would also impose substantial social, economic, and environmental costs by impeding the law's capacity to adapt to new conditions and values.

Many scholars have emphasized that American property law has constantly undergone change.\textsuperscript{30} Professor Joseph Sax noted recently that

\begin{quote}
[in eighteenth century America, the states abolished feudal tenures, abrogated primogenitures and entails, ended imprisonment for debt, and significantly reduced rights of alienation, as well as dower and curtsy. In the arid west, landowners' riparian rights were simply abolished because they were unsuited to
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\begin{footnotes}
\footnote{27 An interesting example is Judge Smith's latest decision in \textit{Florida Rock Industries, Inc. v. United States}, 45 Fed. Cl. 21 (1999). In finding a taking in the denial of a permit to dredge wetlands for mining, Judge Smith held that wetlands protection is not encompassed within the police power and that destroying wetlands poses no health or safety risk. \textit{Id.} at 28–31. It is striking how similar this is to the holding of the Supreme Court in \textit{Lochner} that a maximum working hours law for bakers does not advance the public health or safety and is not within the police power. 198 U.S. at 56–58. Both cases are replete with statements that the court will not substitute its judgment for that of the legislature. See, e.g., \textit{id.} at 57; \textit{Florida Rock Industries}, 45 Fed. Cl. at 40.}


\footnote{29 Cf. Dolan v. City of Tigard, 512 U.S. 374, 405–08 (Stevens, J., dissenting) (comparing modern expansion of regulatory takings doctrine with substantive due process).}

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the physical conditions of the area. As the status of women changed, laws abolished husbands' property rights in their wives' estates.31

There is substantial reason to conclude that property norms are appropriately undergoing substantial change in twentieth century America. Most importantly, the population of the United States has exploded over the last century, increasing the potential for conflict between different property owners and the capacity for individual property owners to degrade more limited common resources. Changing values and increased scientific understanding have concomitantly changed our attitudes about appropriate land uses. For example, wetlands were once viewed as wastelands to be filled at the quickest opportunity, but now society strives to stop their destruction in order to prevent flooding, maintain water quality, and conserve biological diversity.32 Because modern statutes tend to deal with resource problems by enacting regulatory structures rather than by amending the common law, the fact that a state is changing its property norms when it restricts how a resource may be used is sometimes obscured.

H. Regulatory Takings and Skewed Government Decision Making

A central function of government is to mediate between competing interests, such as between a property owner and the community, or between different individuals or groups of individuals. The risk of takings liability tends to skew government decision making in favor of those in a position to assert takings claims, at the expense of the community as a whole.33 While there are political costs to most decisions that politicians make, the risk of government takings liability and the resulting budget impacts exert an especially direct and powerful effect on government decision makers. For example, rejecting an application to develop wetlands may give rise to a takings claim, but granting such an application creates little, if any, risk of government financial liability. Even if the risk of takings liability is small, the potentially large size of any judgments, along with the costs of litigating takings claims, can significantly skew government decision making.

This, of course, is the goal of advocates of an expansive takings doctrine—to deter government regulation of resource use through the threat of constitutional liability. Many view the effect as benign, arguing that government will make better decisions if it must take into account the costs borne by the property owners from new regulation.34 The briefest reflec-

31 Sax, supra note 30, at 1448 (footnotes omitted).
33 See, e.g., First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 340–41 (1987) (Stevens, J., dissenting) (“Cautious local officials and land-use planners may avoid taking any action that might later be challenged and thus give rise to a damages action. Much important regulation will never be enacted, even perhaps in the health and safety area.” (footnote omitted)).
34 See, e.g., Erstein, supra note 7.
tion shows this view to be nonsense. Since government cannot directly capture the increased value of resources that accrues as a result of benign regulation, it will tend to give more weight to the costs of reimbursing landowners for the effects of the regulations. Costs that must be met from the Treasury will loom larger in decision making than even greater benefits that remain widely distributed across the polity.

III. Conclusion

Expansive judicial interpretation of the Takings Clause remains at odds with fundamental traditions of constitutional interpretation and is without basis in the text, purpose, or early interpretations of the clause. An expansive interpretation and application of the Takings Clause also imposes large liabilities on state and local governments, displacing their traditional roles in formulating land use policy and developing property law. To be effective, defense of regulation against takings claims should include arguments and rhetorical references that urge courts to adopt a narrow interpretation that is consistent with the original understanding and purpose of the Takings Clause.