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Judicial Activism in the Regulatory Takings
Opinions of Justice Scalia

J. Peter Byrne*

If the question is whether the Court’s recent property rights decisions repre-
sent unwarranted judicial activism, my answer is an unequivocal “Yes!” Explain-
ing why requires some care. After all the jurisprudential battles of the recent past, it is
hard to state what makes a decision “activist,” let alone unwarrantedly so.

My stance is quite traditional. I want to suggest that judicial activism should
be understood as judicial enhancement of judicial power through expansion of
the scope of vague terms in the Constitution without serious engagement with
its text, history, or other limiting principles, joined with a disregard for the
constitutional primacy of democratic lawmaking by elected representatives,
both federal and state. In using this definition, I want to stand in the tradition
originating with Holmes’s dissents in substantive due process cases, finding
flower in liberals’ critique of the Court’s obstruction of New Deal legislation,
articulated, for example, by Robert Jackson, and finding fresh energy in the
criticisms of the Warren Court’s pursuit of social egalitarianism through constitu-
tional rulemaking. The value I uphold, following Brandeis, is the authority of
democratically elected legislatures to shape fundamental legal concepts when
new problems are encountered.

To analyze regulatory takings developments from this perspective, I shall
concentrate on the jurisprudence of a single, central justice. Justice Scalia is the
attractive choice, for several reasons. First, he has been the most vehement critic
of the Court when it has engaged in what he believes to be unwarranted judicial
displacement of the prerogatives of the legislative process. He gave a passionate
statement in his dissent in Planned Parenthood v. Casey, castigating the
“Imperial Judiciary” for basing constitutional decisions on “philosophic predilec-
tion and moral intuition.” Off the bench, he specifically has argued against
expanding constitutional protection of property rights through the Due Process
Clause. Second, he has eschewed any reliance on the text or original meaning
of the Takings Clause, frankly acknowledging in Lucas v. South Carolina

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* Professor of Law, Georgetown University Law Center. This essay presents in slightly modified
1. See, e.g., Adkins v. Children’s Hospital, 261 U.S. 525, 567-71 (1923); Adair v. United States, 208
5. Id. at 1000.
on Judicial Activism I (1985). Professor Epstein continues to believe that Justice Scalia unduly adheres
to “legal process” conservation. This observation clearly is true by comparison with Professor Epstein’s
bold willingness to use the Constitution to restore property and contract to primacy.

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Coastal Council\textsuperscript{7} that the unbroken interpretation of the clause before 1922 was that it embraced only expropriations and permanent physical invasions.\textsuperscript{8} He offered as authority for his views only a vague salute to a mythical "historical compact," which he neither identified nor explicated.\textsuperscript{9} Justice Scalia's frankness allows me to put to one side for a moment the tangled question of whether judges are unduly active when they seek to confine the Constitution to what they think it embraced in 1788 or 1868.\textsuperscript{10} Moreover, he has eschewed result orientation, which I want to contrast with activism as such, by adhering to a jurisprudence of rules that frequently prevents him from simply balancing his way to the outcome that seems to him most appropriate, all things being equal. This approach leads him to articulate principles of general significance, which convey what he takes to be the enduring values in the Constitution. Finally, his writing always engages us with his intelligence and rhetorical flair; he is fun to read and to argue with and about.

Rather than take you through each of Justice Scalia's opinions seriatim, I will describe what I believe are the three most salient thematic contributions he has made to regulatory takings doctrine and explain why each is significant. At the end, I will argue that this amounts to judicial activism by my measure.

1. Scalia revived the means-ends analysis of regulations of property use deployed in economic substantive due process decisions from the pre-1937 era. He transferred them to the Takings Clause and used that transfer alone to justify heightened scrutiny of fit between means and ends, so as to permit judicial supervision of the wisdom of legislative and administrative judgments, without offering any principled justification for doing so.\textsuperscript{11} Following this lead, lower courts frequently invalidate regulations because of their independent judgment that the legislative program will not "substantially advance" some government purpose. The most striking manifestation of this is the line of cases in the Ninth Circuit striking down rent control laws on the ground that they will not achieve their stated social objectives.\textsuperscript{12} One need not be a defender of rent control as a matter of legislative policy to be troubled by such a judicial role—one made easy by the Court's embrace of heightened standards of fit in some regulatory takings cases.

This doctrinal shift does not amount to a complete return to 1936. The scrutiny is only "intermediate," not "strict." Moreover, to date, the decisions do not impose a strong substantive restriction on the legislative objectives that can

\textsuperscript{7} 505 U.S. 1003 (1992).
\textsuperscript{8} Id. at 1014.
\textsuperscript{9} Id. at 1028.
\textsuperscript{10} ANTONIN SCALIA, A MATTER OF INTERPRETATION 43 (1997). Justice Scalia has offered the general opinion that modern jurisprudence gives less constitutional protection to property than the Framers intended.
\textsuperscript{12} See, e.g., Chevron USA, Inc. v. Cayetano, 224 F.3d 1030 (9th Cir. 2000), cert. denied, 532 U.S. 942 (2001). I should acknowledge that I was counsel to petitioner at certiorari stage.
be chosen, a characteristic feature of the old economic substantive due process. Interestingly, though, Justice Scalia himself urged in a concurring opinion in *Pennell v. City of San Jose*\(^{13}\) that a city has no business reducing a rent increase that otherwise is economically "reasonable" in order to respond to "hardship" of the tenant. This seems very close to stating that wealth redistribution is not a legitimate goal for legislation, a view underlying many of the *Lochner*-era cases. It is fair to note that more recently, in *City of Monterrey v. Del Monte Dunes*,\(^{14}\) Justice Scalia pointedly expressed no opinion as to the propriety of the substantially advance test, while indicating that whether any legislative purpose is legitimate is a question of law for a court to decide.\(^{15}\)

2. Scalia created the first "per se" test to condemn a restriction on an owner’s use, that is, that the government must pay compensation whenever it refuses to permit any economic use of the land, regardless of the public health or environmental justification for the restriction (unless the use prevented would amount to a common law nuisance).\(^{16}\) In a subsequent concurring opinion, he has expressed willingness to expand the scope of this per se rule, placing beyond consideration the extent to which the regulation has conferred economic value on the land while prohibiting development.\(^{17}\) He also has expressed willingness to abandon to some extent the "parcel-as-a-whole" rule, a development that would greatly increase the number of regulations condemned by the per se rule, by evaluating only the effect on parts of the parcel that cannot be developed, such as building set backs. We may learn something definitive here in the pending *Lake Tahoe*\(^{18}\) case, which brings a blunt per se challenge to temporary development moratoria. In general, Justice Scalia has favored this per se test over the *Penn Central*\(^{19}\) balancing test, in which the nature of the government interest must be weighed with factors of timing and public need.\(^{20}\)

3. Justice Scalia has indicated an assumption that "property," as used in the Takings Clause, has a static federal constitutional (dare I say "natural"?) meaning, apart from state property law.\(^{21}\) This would reverse the claim made often by the Court in due process opinions by Justices Stewart and Rehnquist, decisions viewed then as "conservative" and "restrained," that property rights are created and their meanings determined, not by the Constitution, but by

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15. *Id.* at 732 & n.2.
17. *See* Suitum v. Tahoe Reg’l Planning Agency, 520 U.S. 725, 747-48 (1997) (arguing that economic benefit to a regulated party from transferable development rights should only be used to determine whether there was adequate compensation for the taking, not to determine whether there was a taking at all).
20. *See* *id.* at 124.
independent sources of law, primarily state law.\textsuperscript{22} I would add my view that such subsidiarity in property norms will support the continued vitality of the private property law and system by permitting adjustment of rules to changing economic and social conditions. Such adjustments do not come only from common law revisions in property rights, but through statutes and regulations dealing with a wide range of topics from homeowners associations to historic preservation.

The signposts of Justice Scalia's view on the constitutional content of property may be found in several opinions. He has so indicated by 1) subjecting state nuisance law decisions to federal review in the takings context;\textsuperscript{23} 2) arguing that regulatory takings are not about protecting reasonable expectations regarding the scope of permitted uses at a point in time but about static substantive limits on what property rights must permit;\textsuperscript{24} and 3) hinting at denying a state court the authority to find public rights of access to state beaches by "custom" under state property law.\textsuperscript{25}

Besides greatly enhancing the reach of the Fifth Amendment, and thereby judicial power, the move to constitutionalize property greatly constricts states' law-making authority. States may not, without federal judicial leave, amend property rules to enhance efficiency or fairness, as they have done since Virginia abolished the fee tail soon after independence.\textsuperscript{26} Moreover, their administration of local land use regimes must be conducted with a firm view toward the attitudes of federal judges. Indeed, Scalia's regulatory takings opinions depict state and local legislators as relentlessly seeking to accumulate booty from defenseless property owners.\textsuperscript{27}

A great constitutional achievement of the Twentieth Century was the placement of questions of economic and social policy in the hands of elected representatives, rather than federal judges. But Justice Scalia's regulatory takings principles grow from a deep suspicion of modern environmental legislation. Complex restrictions in the service of apparently obscure ecological values seem to him threatening to a legal order based on individual rights and market activity. He fears that environmental law's concerns about the harms that traditional economic, or indeed personal, behavior cause our world will potentially empty the precious category of activities that we can pursue freely because they do not harm others. This seems to me to explain his embrace in \textit{Lucas} of nuisance law as the baseline for the police power; nuisance deals with

\begin{itemize}
\item \textsuperscript{22} See Phillips v. Wash. Legal Found., 524 U.S. 156, 164 (1998); Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972).
\item \textsuperscript{23} See \textit{Lucas}, 505 U.S. at 1030.
\item \textsuperscript{24} See \textit{Palazzolo}, 533 U.S. at 620.
\item \textsuperscript{25} See Stevens v. City of Cannon Beach, 510 U.S. 1207 (1994) (Scalia, J., dissenting from a denial of certiorari).
\item \textsuperscript{27} See, e.g., \textit{Palazzolo}, 533 U.S. at 619.
\end{itemize}
serious, measurable harm to discrete individuals that can be treated as exceptional, not pervasive degradation of natural systems that require us to change the way we live. In his opinions, Justice Scalia often has treated these broader ecological values with derision. In *Nollan*, he found them irrational.\(^{28}\) In *Lucas*, he insisted on characterizing concerns about beach erosion as solicitude for tourism.\(^{29}\) In *Palazzolo*, he characterized state concern for preservation of natural water bodies and wetlands as a search for free booty.\(^{30}\) In the last case, Justice O'Connor chastised him for an “inapt ‘government-as-thief’ simile . . . symptomatic of the larger failing of his opinion.”\(^{31}\)

Given that these environmental laws are firmly cemented in the people’s regard, repeatedly defeating attempts at repeal by political means, Justice Scalia seems to have persuaded himself that they often exceed traditional constitutional limits, even if these limits need to be newly articulated or rediscovered. His regulatory takings opinions reflect an attempt to erect a new constitutional dike against the floodwaters of environmentalism and the legal changes such concerns have prompted. I think that judges have no business using the Constitution to forestall widespread legislative change or insist on an obsolete legal paradigm.

Since *Lucas* in 1992, Justice Scalia has not written a regulatory takings opinion for the Court. The Chief Justice, who has always been in the majority, has assigned writing the Court’s opinion to himself or another justice whom he has viewed as less categorical or overtly ideological. While consistently finding for the property owner, many of these opinions have been maddeningly opaque regarding the governing principles of takings law. They have evinced, nevertheless, a determination to move slowly and not sweep aside social consensus. Advocates of judicial restraint should prefer even more that the salience of environmental restrictions on property use be debated and decided by the people at their most appropriate level of democratic decision-making.

In his vivid dissent in *Casey*, Justice Scalia held up as a caution the Court’s disastrous opinion in *Dred Scott*,\(^{32}\) where Chief Justice Taney sought to settle national turmoil by declaring firmly for slavery.\(^{33}\) With all respect, something analogous seems here afoot. The Court’s regulatory takings cases, glossed with Justice Scalia’s conceptual approach, seem to aspire to settle the nature of property rights in an ecological age. They argue that property owners cannot be forced to bear the costs of the gradual and widespread environmental harms that traditional uses may cause, even if the trend in statute and regulation is to prohibit uses that degrade the environment. Such a judicial stand, ironically, may vitiate the ability of private property to thrive by adjusting to new scientific and social consensuses.

\(^{28}\) *Nollan*, 483 U.S. at 838-41.

\(^{29}\) *Lucas*, 505 U.S. at 1022-23, 1025.

\(^{30}\) *Palazzolo*, 533 U.S. at 619 (Scalia, J., concurring).

\(^{31}\) *Palazzolo*, 533 U.S. at 636 n.* (O’Connor, J., concurring).
