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ARTICLE

Talk is Cheap: The Existence Value Fallacy

Donald J. Boudreaux, Roger E. Meiners, and Todd J. Zywicki

Recent developments in environmental law have heightened the importance of the concept of "existence value"--the value that individuals gain simply from the knowledge that certain environmental resources exist. These values are nonuse values; hence, they are said to be in the nature of a public good and will tend to be under-protected by the market. Because there is no market for such values, some lawyers, economists, and policy makers have proposed the use of "contingent valuation" studies to ascertain a value for these amenities. Contingent valuation studies ask respondents to state how much they would pay to preserve the environmental amenity in question. Contingent valuation studies have been criticized by both legal scholars and economists on various practical grounds. Here, the authors move beyond these practical problems and argue that the use of contingent valuation is conceptually flawed. They argue that an exploration of these conceptual problems reveals that the practical problems that have previously been identified are merely manifestations of more fundamental conceptual problems. They contend that contingent valuation studies are based on several fundamental misunderstandings about the nature of economic choice and the role of prices in a dynamic economy. Contingent valuation studies rest on the assumption that prices are absolute and static. In reality, prices are relative and dynamic. The authors argue that, because contingent valuation rests on a mistaken conceptual premise, it should be rejected as a policy-making guide. Because existence value, by definition, can be ascertained only through choice heuristics such as contingent valuation, the authors conclude that there is no basis in contingent valuation for political or judicial protection of existence value.

TAKINGS LAW SYMPOSIUM

Basic Themes For Regulatory Takings Litigation

J. Peter Byrne

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.

The Takings Jurisprudence of the Court of Federal Claims and the Federal Circuit

David F. Coursen

The Court of Federal Claims is the sole forum that may award more than ten thousand dollars to a claimant against the United States. As such, it provides a useful prism through which to examine the effects of the United States Supreme Court's takings decisions, which have historically been vague and uncertain. This uncertainty reflects the difficulty in determining when property that remains in its owner's possession nevertheless has been converted from private to public ownership. Mr. Coursen argues that the Court of Federal Claims/Federal Circuit's takings jurisprudence reflects and occasionally magnifies the lack of doctrinal coherence in takings law. However, Mr. Coursen discerns some practical principles regarding takings jurisprudence in the Court of Federal Claims/Federal Circuit. First, he finds that formal application of categorical

principles may result in finding a taking despite compelling equities to the contrary. A second principle, Mr. Coursen argues, is that the relevant parcel in a takings analysis should be defined in light of the facts of the case. A third principle is that there is a difference between expectations regarding regulation of use of property and regulation that alters ownership or title to property. The fourth principle articulated by Mr. Coursen is that the standard for determining economic impact is both qualitative and quantitative.

Does a Regulation that Fails to Advance a Legitimate Governmental Interest Result in a Regulatory Taking?

John D. Echeverria

Over the last two decades, the United States Supreme Court has repeatedly stated that a regulation results in a taking under the Fifth Amendment to the United States Constitution if it does not "substantially advance a legitimate state interest." However, the Court has never squarely relied upon this purported means-ends takings test to uphold a finding of a taking, except in the case of challenges to permit conditions involving physical occupations of private property. Upon careful analysis, Mr. Echeverria argues, it is apparent that this test (which essentially restates the traditional due process means- ends inquiry) is inconsistent with the language and original understanding of the Takings Clause, as well as with basic principles of modern takings doctrine. This Article asserts that a kind of means-ends analysis does play an appropriate and logical role in takings challenges to permit conditions involving physical occupations but that the analysis should be confined to that special context. Although the Court appears to be divided on the issue, this Article argues that the Court's recent decisions support the conclusion that the purported means-ends takings test does not in fact represent a legitimate general test for a regulatory taking.

Regulatory Takings: A Historical Overview and Legal Analysis for Natural Resource Management

Susan M. Stedfast

This Article provides a survey and analysis of existing regulatory takings case law. In addition, it sets forth the basic constitutional underpinning of takings claims. Discussed are takings cases dating back to the nineteenth century up through the late twentieth century, resulting in a summary of all major takings cases within United States Supreme Court jurisprudence. This summary addresses not only the outcomes of those cases, but also the reasoning employed by the courts with its reflections upon civic and policy considerations. Ms. Stedfast examines the development of police powers in the context of takings, as well as the balance that courts, particularly the Supreme Court, attempt to strike between the government's power and property owners' rights. The factors and guidelines utilized by the courts in deciding regulatory takings cases are drawn from the case law. Ms. Stedfast discusses takings cases concerning natural resources (e.g., trees, minerals), environmental values (e.g., scenic views, open space), and land use regulations.

Lucas v. South Carolina Coastal Council: The Categorical and Other "Exceptions" to Liability for Fifth Amendment Takings of Private Property Far Outweigh the "Rule"

Glenn P. Sugameli

The Takings Clause of the Fifth Amendment to the United States Constitution provides that private property cannot be taken for public use without just compensation. Continuing judicial and scholarly debate on this issue has focused on the Supreme Court's 1992 decision in Lucas v. South Carolina Coastal Council. This Article discusses the takings rule outlined by the Lucas decision as well as the categorical and other exceptions to liability for Fifth Amendment takings of private property. Mr. Sugameli argues that the exceptions described in Lucas far outweigh the liability "rule."

NOTE

Standing on Their Own Four Legs: The Future of Animal Welfare Litigation After Animal Legal Defense Fund, Inc. v. Glickman

Rob Roy Smith

Standing doctrine has represented the most formidable hurdle to animal welfare plaintiffs seeking to change the status quo. Without ever reaching the merits of their claims, the Court of Appeals for

the District of Columbia repeatedly found that animal welfare plaintiffs lacked standing to enforce various provisions of the Animal Welfare Act. All of that, however, is about to change. No longer will government action that regulates the lives of animals and determines the experience of people who view them be unchallengeable. This Note discusses the future of animal welfare litigation after Animal Legal Defense Fund, Inc. v. Glickman, examining the legal and political ramifications of this groundbreaking decision.

BOOK REVIEWS

In Defense of the Public Interest: A Review of The Takings Issue: Constitutional Limits on Land Use Control and Environmental Regulation

Timothy J. Dowling

Mr. Dowling reviews The Takings Issue, an examination of the case law that governs regulatory takings. Although the authors promise a "balanced" approach to this controversial issue, Mr. Dowling argues that the promise of balance is left unfulfilled. He critiques the authors' treatment of leading takings cases, their discussion of ripeness, and their concluding call for aggressive Supreme Court review of a host of takings issues.

Overstating the Case? A Review of Natural Capitalism: Creating the Next Industrial Revolution

Larry Edelman

Mr. Edelman reviews Natural Capitalism: Creating the Next Industrial Revolution, in which the authors suggest that conservation-based efficiency trends point the way to the economy of the future where ecological and economic goals will inevitably be reintegrated. Mr. Edelman highlights the four strategies set forth in the book as central to the concept of natural capitalism. He concludes that the book persuasively demonstrates that failure to invest in conservation adversely affects businesses' bottom line as well as the environment.