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The Constitution of Business

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Substantive due process is dead. We buried it in 1937. The Supreme Court then held that Congress and the states may regulate business as they please. No more claims that the contract clause gave bankers the liberty to work for a pittance or mine operators the privilege to sign workers to yellow dog contracts. Scarcely anyone mourns the absence. All know that there are good and bad reasons to regulate business. Which is which has been left to political actors.

In 1976 the Court considered the Black Lung Benefits Act, which required mine operators to pay for diseases caused long before the Act’s passage — often by operators other than the ones called on to pay. It said, as bluntly as a court ever does, that it was out of the business of reviewing the wisdom of statutes. Two years later the Court held that New York City could forbid Penn Central from building an office tower over Grand Central Station. The tower would spoil its aesthetics, injuring passersby — not to mention Ada Louise Huxtable, the architecture critic of the Times. In response to the railroad’s claim that this would take its valuable property, the Court replied that the Station still had some economic value, and that the city did not have to pay for the diminution caused by the restriction. Only a diminution to zero requires compensation, the Court replied. The combination of these cases seemed to many to confirm the promise of 1937. The regulation of personal liberties would receive close attention; the regulation of economic activity would receive none.


You may praise or regret this state of affairs; I happen to think it is fine.\(^3\) The objection to review of economic legislation is that there is neither constitutional warrant for the beast nor any way to tame it.\(^4\) Substantive due process is an oxymoron; the due process clauses govern *process*. Judges, when dealing with substance under other clauses, were to police the boundaries of other branches' power, not to review choices within those boundaries. The federal government needed a grant of power; states, the holders of residual powers of government, did not need a grant but were subject to express limits. Few of these mattered much; when Congress exercised its commerce and spending powers, it encountered even fewer. The most serious putative limit for state activities was the contention that the contracts clause of the Constitution forbids not only alterations of existing contracts but also the regulation of future ones. The Court rejected that position in *Ogden v. Saunders* in 1827,\(^1\) holding that legislatures may regulate deals not yet inked. Once you accept *Ogden*, the intellectual debate is over. And the turnabout of the Court in 1937 seemed at last to carry out the implications of *Ogden*.

3. Because the Constitution as a whole leaves in place the residual powers of government that the states brought to the Union. The Constitution does not supply states' powers (as it supplies the federal government's); it supplies only modest checks on powers states derive from their own charters. The states promptly granted monopolies and set about other forms of economic regulation without protest on constitutional grounds from the framers in their midst. The drafters of the Constitution believed that democracy within the states and competition among them — coupled with Congress's power under the commerce clause — would be the dominant checks on the regulation of economic affairs. Those who believe that the Constitution imposes strong substantive checks on legislation confuse the hoped-for effects of a federal and republican system of government with the minimum constitutional rules. One common device is to say that the drafters were concerned about protecting X (perhaps property or competition), and because the only way to protect X is to extirpate Y (monopoly, redistribution), the Constitution must contain such a rule. Yet there is a whopping difference between a substantive rule and an anticipated outcome of the structure of government. See Premier Elec. Constr. Co. v. National Elec. Contractors Ass'n, 814 F.2d 358, 364-65 (7th Cir. 1987); American Jewish Congress v. City of Chicago, 827 F.2d 120, 137-40 (7th Cir. 1987) (Easterbrook, J., dissenting).

I must add to the general approval of the Court's approach the proviso that all of this is implicit in the constitutional structure rather than in some "natural" separation between economic and personal rights. Economic liberties are a species of personal rights; they represent the resolution of competing (personal) claims to resources. They are antecedent to other liberties; a society without property is also a society without an established press that can speak in opposition to the government. See Lynch v. Household Fin. Corp., 405 U.S. 538 (1972); M. Friedman, Capitalism and Freedom (1968); Director, *The Parity of the Economic Market Place*, 7 J. Law & Econ. 1 (1964); Coase, *Advertising and Free Speech*, 6 J. Legal Stud. 1 (1977). The Constitution nonetheless protects speech in a way it does not protect property at large, and courts must respect the difference.

4. See Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461 (7th Cir. 1988), making both points. See also Lemke v. Cass County, 846 F.2d 469, 471 (8th Cir. 1987) (en banc) (separate opinion of Arnold, J.).

But there is a problem. The common perception that the Court dropped out of the business of regulation in 1937 is wrong. Indeed, it may be doing more today to control economic legislation than it ever did. Even in the heyday of substantive due process, when the Court invalidated minimum wage laws and much else besides, it tolerated many more regulatory statutes than it invalidated.\(^6\) Never forget that *Euclid,\(^7\) which sustained zoning, was a product of the 1920s written by Justice Sutherland.

Today the Court strikes down economic regulatory statutes every year. Rare is the Term in which the Court does not do in five or more statutes. The freedom of legislatures is as crimped today as it was in 1935. The constraints are different because the temper of the times is different: But, the Supreme Court still inquires into the wisdom of state legislation and strikes down laws that it finds unwise. The rules that bite the dust these days are not in the category James Madison and friends expected to encounter trouble — that is, those with a redistributive or monopolistic tinge. I shall not discuss in detail the sources for and justifications of the Court’s rules but instead alert you to the varieties of constitutional review. Dispelling myths about the way the Constitution works is an important part of a judge’s task.

I

The principal constitutional constraint on state laws these days is the commerce clause. It says: “Congress shall have the power . . . to regulate Commerce . . . among the several States.”\(^8\) You would think this to be what it says: a grant to Congress of the power to regulate business and prevent barriers to trade among the states. Structure supports text. The commerce clause is nestled between a grant of power to borrow money on the credit of the United States and a grant of power to establish rules of naturalization; judges have yet to claim either of these. Until shortly after the Civil War the Court treated the commerce clause the way it treats the naturalization clause. But building on a hint in a famous case in 1851,\(^9\) the Court gradually began holding that the grant

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8. U.S. Const. art. I, § 8, cl. 3.

of power to Congress withdrew power from states. Judges initially used their power (for what states lost federal judges gained) only to counter blatant discrimination: tariffs on imports from other states, prohibitions on trade, and the like. But it is part of the style of constitutional reasoning to treat likes alike. Statutes can be alike in effect as well as in terms. So the reasoning proceeds explicitly discriminatory statutes are forbidden; statutes neutral in terms may have the same effects as statutes that discriminate explicitly; if we do not forbid purportedly neutral statutes, states can evade the bar on discriminatory laws; therefore we must review statutes for adverse effects on interstate commerce.

This is clear enough in principle. States may regulate only their own residents and events within their borders; laws that benefit their citizens at the expense of out-of-staters are no more proper than efforts to levy taxes on the non-residents. But can we implement the principle in the domain of commerce? It is not so easy to apply an “effect” test to commercial laws. Suppose Wisconsin imposes a tax on margarine. This may be raw discrimination; Wisconsin makes butter but not margarine, and the tax may be designed to afflict those in Iowa who make margarine from corn oil. But it may also be designed to raise revenue. Perhaps it would have been imposed even if Wisconsin produced both butter and margarine; perhaps Iowa would have taxed margarine steeply but for its own interest groups, which arranged for freedom from taxation. Every tax both raises revenue and discourages the production and use of the thing taxed. To say that Wisconsin cannot tax margarine is to say that no state can tax anything, for every product moves in interstate commerce, and no product is made in perfectly equal amounts in each state.

How can we escape this trap? Easy. Courts just inquire whether the burden on interstate or out-of-state commerce is appropriate given the weight of the state’s interest. A case in 1970 sets up the test that is now routinely applied.11 Weigh in-state benefits against out-of-state injuries. Ask whether the “discrimination is demonstrably justified by a valid factor unrelated to economic protectionism.” Even if it is not, ask whether the state has “a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.”12 Look at all the weasel words: “valid factor,” “legitimate” purpose, “adequately served,” and “reasonable.” What are we to do when no one can quantify these effects and there is no metric for the weighing that we can measure? And when, as is always the case, there is no simple way to tell “how much is too much?” The effect of a balancing

approach (it is preposterous to call this a "test," as the Court is wont to do) is to compel the Court to determine whether the statute is wise — that is, if it is good social policy we excuse the effects on out-of-state parties, and if it is bad social policy we do not excuse them. This is fundamentally the method of substantive due process. It has become ubiquitous — unavoidably because in an integrated economy almost every statute affects people who live in other states.

The Court gave us an example recently in *CTS Corp. v. Dynamics Corp. of America.*\(^{13}\) Indiana passed a statute providing that anyone who obtained twenty-five percent of the stock of an Indiana corporation, over the opposition of the firm’s board, had to submit to a vote of the other shareholders the question whether he would be allowed to retain voting control of those shares. The statute was designed to discourage takeovers. The tender offer is a capital market transaction: a New Yorker sells his shares of a Delaware corporation to a Texan on an impersonal market. Indiana wanted to regulate the transaction for the benefit (it believed) of Indiana’s residents. The Court predictably asked whether this went too far.

Five years earlier the Court had considered an anti-takeover statute and concluded that takeovers generally assist investors.\(^{14}\) The Court therefore held Illinois’s anti-takeover statute unconstitutional. By 1987 the Court was having second thoughts — not only about the wisdom of takeovers for investors but also about the effects of takeovers on insider trading, honest markets, and the hometowns of the targets. It was therefore more willing to tolerate anti-takeover legislation, at least the relatively mild version of Indiana. (It reserved judgment about harsher versions.) No one should mistake what happened. The Court reevaluated the *wisdom* of the legislation, and this altered its constitutional judgment. This is not very different from what the Court was doing before 1937, though the source of constitutional power has changed. Justice Scalia noted the consequences and raised the question whether the adventure was permissible:

While it has become standard practice at least since *Pike v. Bruce Church* [citation omitted] to consider . . . whether the burden on commerce imposed by a state statute “is clearly excessive in relation to the putative local benefits,” such an inquiry is ill-suited to the judicial function and should be undertaken rarely if at all. This case is a good illustration of the point. Whether the control shares statute “protects shareholders of Indiana corporations” or protects incumbent management seems to me a highly debatable question, but it is extraordinary to think that the constitutionality of the Act should depend on the answer. Nothing in the Constitution says that the protection of entrenched management is any less important a “putative local benefit” than the protection of entrenched shareholders, and I do not know what qualifies us to make that judgment — or the

\(^{13}\) 481 U.S. 69 (1987).

related judgment as to how effective the present statute is in achieving one or the other objective — or the ultimate (and most ineffable) judgment as to whether, given importance-level x, and effectiveness-level y, the worth of the statute is "outweighed" by impact-on-commerce z.15

Justice Scalia concluded that the Court should leave such matters to Congress.16 He had a point, though none of the others addressed it. Whatever you think about tender offers, their regulation is part of corporate law and so fundamentally a legislative task, or perhaps one for the common law of the states.17 Courts can neither figure out their effects nor determine how much is too much — not without the same sort of superintendence of economic legislation practiced in the Bad Old Days of 1890-1937. And what goes for tender offers goes for milk, cement, scrap autos, and many of the other recent targets of scrutiny under the commerce clause.

Once we allow some legislation on a topic, judges cannot administer any system of selection free of their beliefs about the wisdom of the laws. One could say that only laws expressly discriminating — or intended to discriminate — against interstate commerce are forbidden. Such a system would come closer to permitting value-free adjudication. It is in fact the system we use for claims of racial and other discrimination. A demonstration that a law has an adverse effect on black persons or women does not state a constitutional claim.18 Only a law using race (sex, etc.) as a ground of decision — or one designed (intended) to have that consequence — calls for further analysis. I find strange the Court’s willingness to indulge in a more searching review under the commerce clause — even though that clause seemingly gives no powers to courts — than under the equal protection clause of the fourteenth

15. CTS Corp., 481 U.S. at 95 (Scalia, J., concurring).
amendment. Especially when competition among the states, and the supervision of Congress, would take care of most of the harm of protectionism while allowing judges to be agnostic about the wisdom of the laws they confront.

The extent to which the Court has been indulging its views about wise legislation became particularly evident in 1985. Alabama taxed out-of-state insurance companies at a higher rate than domestic companies. Congress had lifted the application of the commerce clause from the state regulation of the insurance business, so the commerce clause did not apply directly. The Court nonetheless declared that discrimination is such awful policy that the equal protection clause of the fourteenth amendment would do service for the commerce clause, when application of the negative pregnant in that clause had been forbidden by Congress. Nothing, the Court thought, could justify raw discrimination against non-residents.

So it seems. But consider. The Court’s decision was a direct challenge to Congress, which tried to enable states to pass just such laws; presumably the non-residents were represented in these debates, so we do not exactly have taxation without representation. And four justices — Rehnquist, Brennan, Marshall, and O’Connor, an odd quartet — dissented, thinking the statute perfectly respectable. They, too, had a good argument. Discrimination against out-of-staters gives an advantage to in-staters. It is forbidden to injure non-residents, but is it not legitimate to try to boost local businesses? This is like the question whether a glass is half empty or half full. Which way you look at it determines the outcome, and there is no right way to look at it.

The Justices have seen this point on weekends. When states subsidize local businesses, the Court sustains the subsidy, remarking that the promotion of enterprise is a worthy objective. And of course “enterprise” in this expression means “local” enterprise; states need not aid those who live in other jurisdictions, who did not pay the taxes with which the state does the promoting. When the state promotes local enterprise by taxing the competition, the Court takes a different view. Logically, this is a different view about means, but the Court expresses it as a different view about the objective: the promotion of local business, so beneficent when done with subsidies or tax breaks,

19. Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985). The Court might have turned to the privileges and immunities clauses, U.S. Const. art. IV, § 2, cl. 1; id. amend. XIV, §1, but it did not.

becomes scurrilous when done with real taxes. The choice of instrument is not logically related to the validity of the end in view, however. A uniform tax plus a subsidy for activity within a state can be made to have the same effect as a discriminatory tax. When the Court ends up saying that discriminatory taxes are bad because they hinder wholesome competition on the merits, it has either retreated to the *laissez-faire* view of Justice Peckham or enacted a constitutional version of the Sherman Act and applied it to the states. Neither is a satisfactory policy.

There may well be a way to understand these cases. Taxes can be drafted so that they fall on out-of-staters; the cost of subsidies paid for by taxes within a state are borne within that state whose "local business" is to be promoted. Just as states may devote their property taxes solely to the education and welfare of their residents, so may states tax for the support of local business. These taxes ultimately may injure the state, but if the voters want this, why should courts block the way? That minimum wages may injure the most needy workers — by increasing unemployment of those with the least human capital — is not a constitutional bar. So too with taxes to subsidize local business. Taxes to pay for subsidies burden the successful for the support of the failures, and by diminishing the gap between success and failure breed less success and more failure. Whether to have such a policy is for the state to decide — provided it does not load the burden on neighbors who cannot vote. Taxes that can be exported may do this. When there is no exportation, other states may choose other policies; the state with the superior policy will attract business and residents. This inter-jurisdictional competition makes it unnecessary to evaluate the wisdom of the rule; let the results speak for themselves.

So there could be a logical story behind the Court’s role. Unfortunately, it does not explain the cases very well. In the Montana Coal case of 1981, the Court allowed Montana to impose huge severance taxes on coal that would be exported rather than burned at home; the investors in the coal companies, and the users of coal — all out of state — bore these taxes. In the Alabama insurance case the Court struck down a tax that was surely paid wholly by Alabama citizens. (The insurance industry is so competitive that the four percent tax could not have been “exported.”) Perhaps the imposition of a code of morality on state laws does more to explain these cases than do principles of tax incidence; at all events, if the Court is trying to isolate and condemn beg-

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21. Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984). And see Shell Oil Co. v. City of Santa Monica, 830 F.2d 1052, 1056-60 (9th Cir. 1987), taking altogether too seriously the claim that a franchise tax violated the commerce clause.


gar-thy-neighbor policies while condoning policies that affect only local business, it has done an inept job. It is an object lesson in the difficulty of regulating economic affairs through constitutional law.

The difficulty of determining the real incidence of a tax has not, however, discouraged the Court from plunging headlong into the field of the taxation of interstate activities. In the last five Terms the Court has developed a slew of new principles reducing the states' power to levy taxes on people and transactions that cross state borders. There is not a single kind of state tax immune from inquiry.

Every state must apportion the income and assets of multi-state firms, so that it can tax the portion attributable to the state. There is no one right way to do this, any more than there is a right way to account for income and liabilities. Some states apportion by income; some by property; some use cash accounting and some accrual accounting; some roll in subsidiaries and some do not. Any of these methods, if applied by every state, would lead to decently accurate apportionment. The problem is that each state chooses the method that enhances its revenue; because the states differ, so do the methods of taxation.

Congress could deal with this by setting a uniform method. Any method is arbitrary, and political branches must make arbitrary choices. The commerce clause was designed for such things. As the economy becomes more integrated (with the decline in communication and transportation costs), the logical size of the governing unit increases. In a world economy the United States is the "state." But Congress has found the subject a hot potato, and the Court has stepped in. It, however, cannot impose a single accounting system on all the states. It has therefore devised a series of stopgap rules that look more like a Rube Goldberg machine than like a coherent vision of constitutional law.

I would have you turning to more stimulating reading, such as the Official Airline Guide, if I tried to recount what has happened. Masochists among you should consult American Trucking Associations, Inc. v. Scheiner, one of two cases decided in June 1987 by a badly divided Court. The Court said that states must adopt methods of taxation that, if adopted by every other state,

24. Indeed, one may see the constitutional plan as granting the powers of government to the smallest unit that can handle them, counting on competition among jurisdictions (plus the powers of exit and voice) to yield good results. These small units will offer different options; the ones that do best will flourish. Truly small units may achieve something close to the contractarian ideal. (The "governments" of condominium associations do, and some municipalities are not much larger.) A policy of allowing power to flow to the smallest unit consistent with success includes, however, an ambiguity that undermines later monitoring. What is "success," and how does it change? The commerce and defense powers come from recognition that the nation often is the right size. As markets grow (with the decline in transportation and communication costs), the optimal size of the governmental unit grows apace. The larger unit, though, produces greater opportunities for rent-seeking.

would not discriminate. That is, each method must be potentially neutral. The
difficulty, of course, is that states will not all adopt the *same* methods, so the
potential-neutrality rule will not produce actual neutrality.\textsuperscript{26} It will, however,
produce a great deal of litigation and substantial judicial control of state
systems for taxing businesses. One is entitled to wonder, as several Justices
did, whether the enterprise is suited to judicial resolution or supported by a
constitutional rule stronger than that supporting *Lochner*.\textsuperscript{27}

II

The Constitution contains two clauses designed to restrict the ability of
government to regulate business. One is the takings clause and the other the
contracts clause. The former applies only to the federal government, the latter
only to the states.\textsuperscript{28} The old Court, the Court of *Lochner*, did not rely much on
these, for good reason. The contracts clause does not apply to prospective
laws. Any contract must comply with laws predating its signing, and states

\textsuperscript{26} Suppose Iowa divides the firm's total revenues by the percentage of revenues earned in
Iowa and taxes the resulting fraction of the firm's income, and New York does the same with the
firm's property. Either rule would be tax-neutral if all states employed it. If the firm earns a
disproportionate share of its revenue in Iowa and has a disproportionate share of its property in
New York, it will be subject to "double taxation" — which it would not be if both states used the
same formula.

\textsuperscript{27} *Lochner* v. New York, 198 U.S. 45 (1905). None of this is to say that it is impossible
to support any particular decision or even many of them. See Hellerstein, *Constitutional
Clause Restraints on State Taxation; Purposeful Economic Protectionism and Beyond*, 85 Mich. L.

\textsuperscript{28} Though the Supreme Court has used the due process clauses of the fifth and fourteenth
amendments to apply each clause to the other sovereign. For some provocative speculations
about the rationale for the originally limited applicability, see McConnell, *Contract Rights and
Property Rights: A Case Study in the Relationship between Individual Liberties and Constitutional
Structure*, 76 Calif. L. Rev. 267 (1988). My own speculation is similar. The takings clause
applies only to the federal government because the states define "property." It is difficult, if not
impossible, to apply a takings prohibition to the sovereign with power to redefine property.
Sure, you can apply the rule to a physical occupation of something conceded to be "property";
thus the attractiveness of the "occupation" rule of cases such as *Loretto* v. Teleprompter
Manhattan CATV Corp., 458 U.S. 419 (1982). But you cannot apply the rule to redefinitions of
property, such as zoning and other regulation entail. The contract clause applies only to the state
governments because the framers thought that only the states posed substantial threats to contract-
ual relations; states, the founders believed, were prone to factional redistribution (such as debtor-
relief laws), especially when the detriment would be felt by lenders who lived out of state. The
federal government had been given express power to pass laws about debtors ("uniform" law about
bankruptcy — an important qualification), in light of Madison's view, expressed in Federalist
No. 10, that factionalism would not be a serious problem for the national government. And we
ought not forget that the Founders thought that the best protection against factionalism by the
national government lay in the limited powers of that government.
may be able to make certain classes of existing contracts unlawful. Contracts with effects on strangers (for example, contracts cartelizing a market or causing pollution) and contracts to sell noxious substances or commit murder come to mind. The Supreme Court had no trouble holding that a prohibition on the sale of liquor was neither a taking nor a violation of the contracts clause.29 There is a good argument that the contracts clause forbids only transfers of entitlements among parties to existing contracts.30 This is an important office, slighted too often,31 but not the kind of thing to stop the welfare state in its tracks. It could at most slow a program down a little, letting it take effect as existing contracts expired. As for the takings clause, the Court held over and over that government could regulate as long as it did not extinguish the important elements of value. These were the doctrines that impelled the Court to turn to “liberty” and substantive due process to obstruct economic regulation.

The contracts and takings clauses were not toothless, however; within their limited domain they were absolutes. If regulation went “too far” or if the state wanted to interfere with existing contracts, it simply had to pay up. It did not matter whether the regulation was wise; it only mattered whether the state wanted to pay the piper.

Beginning in 1934 with the Blaisdell case,32 however, the Court added a “reasonable regulation” exception to the contracts clause. The takings clause always had some reasonableness inquiry, but it grew by an order of magnitude after Blaisdell. Developments in the last few years have fused the contract and takings issues with the reasonableness of the law. As a result, a court cannot evaluate even what was once a straightforward question without examining whether it has a “good law” on its hands. For “good reason” the legislature can interfere with contracts, so the substantive due process inquiry becomes inevitable.

A case from last Term offers a splendid illustration. Keystone Bituminous Coal Association v. DeBenedictis33 dealt with a statute forbidding underground coal operators to remove so much coal that the land subsides. The coal operators had sold the surface to the householders about 70 years ago, with

31. See Chicago Bd. of Realtors v. City of Chicago, 819 F.2d 732, 742-45 (7th Cir. 1987).
deeds expressly reserving not only minerals but also the right to cause subsidence. The surface owners got a discount — though a slight one, considering that subsidence lay more than 50 years away. When subsidence appeared to be a threat, the surface owners got the legislature to pass a law against subsidence. They could vote; the coal companies could not, and most of the investors in these firms lived in other states. This changed the entitlements under the contracts of sale. The way to avoid subsidence is to leave pillars of coal in place, foregoing as much as half of the mineable coal. The only other option is to buy back the surface land at a price reflecting the greater value of firm ground, thus paying a second time for the privilege to cause subsidence.

Sixty years ago, in the Mahon case, Justice Holmes declared such a statute a taking. Not because it was unwise, but simply because it transferred a valuable privilege from one person to another. In 1987 the Court chose a different path, saying the statute was neither a taking nor an interference with contract. This was not because the law did not interfere; it did. It was not because the law did not transfer rights from mineral owners to surface owners; it did. It was powerfully redistributive. No, the Court said, this law is fine because it is fine. That is, the Court examined the purposes of the law, thought the protection of surface interests more compelling than either the mining of coal or the honoring of musty bargains, and gave the law its blessing.

Now it may be that the anti-subsidence rule would be a great advance. After all, with so much coal near the surface in the West, there is less need to destroy houses in the east by collapsing the land. Pennsylvania's object is not to prevent subsidence, however, for one who owns both surface and mineral interests may do as he pleases. The plan forbids subsidence only if some earlier contract separated these interests; it is therefore redistribution and nothing but. The Court approved this not by reexamining doctrine or looking at the law of excuses to break contracts. It engaged in an unabashed substantive review. The implication: if the Justices had liked the law less, it would have been unconstitutional.

The Court took exactly that path later in the Term. In Nollan v. California Coastal Commission, California told an owner of a beachfront house that before he could improve the house, he had to grant strangers permission to cross land abutting the beach. Strangers already could patrol up and down the beach, for the state owns the land seaward of the place reached at high tide; the state wanted to make it easier for people to reach and travel along the beach at high water — or to walk on firm land if they preferred. The usual way to get

such permission is to buy a path, called an easement, across the land; California wanted it for free. This time the Court was not so impressed with the state's plan. Indeed it called the proposal irrational constitutional. Because it was irrational it was a taking, and California had to pay.

All of this seems very strange. Why should the Court evaluate the wisdom of laws? If the state takes my house for a post office, I trust the Court would not debate whether the state needed this post office. It would ask only whether the state got its hands on my land. The genius of the takings clause is that it forces the political branches to evaluate the wisdom of conscripting private property; if the goal is worth the money, the state pays. The clause itself is policy-neutral; judges can be neutral, too. Today, though, the task of determining worth has been assumed by the Court. Judges, rather than willingness to pay, will determine which transfers proceed.

The function of the Contracts Clause is to forbid retrospective alteration of private deals that are otherwise legal. A contract for land allocates resources between people; a contract for wages sets remuneration for work already done; the state can legislate for the future. A sensible implementation of both takings and contracts clauses looks for redistribution among private actors. Redistribution causes problems; regulation that does not transfer rights or other property from A to B may go forward. The Court may administer this program without regard to the wisdom of the laws.

The Court's approach, by contrast, pays no attention to redistribution. Yet there is no other decent way to administer these clauses, short of substantive due process. Certainly the Court has not identified one. The Court has not begun to grapple with the enormous question that is unavoidable on its view: what set of rights is covered? No matter what the state acquires or extinguishes, it is always possible to draw a circle around some larger set of rights.

37. On this question I agree with Richard Epstein, see R. Epstein, Takings: Private Property and the Power of Eminent Domain (1985), although I do not agree with his broader thesis — which depends on a rejection of Ogden — that constraints on redistribution make the modern state unconstitutional. For its part, the Court occasionally, and almost randomly, recognizes the importance of redistribution. Compare Allied Structural Steel Corp. v. Spannus, 438 U.S. 234 (1978), with Ruckelshaus v. Monsanto Corp., 467 U.S. 986 (1984). This is not to criticize "the Court" as an institution, for the way in which it reaches decisions makes consistency impossible to achieve. See Easterbrook, Ways of Criticizing the Court, 95 Harv. L. Rev. 802 (1982).
38. Naive though this sounds to modern minds, regulation versus transfer is both administrable and consistent with the classical liberal understandings of the late eighteenth century. This approach also has the virtue of keeping the different clauses of the Constitution separate. Each has a distinct meaning. The Court's approach, in contrast, melds them. See Chicago Bd. of Realtors v. City of Chicago, 819 F.2d 732, 742-45 (7th Cir. 1987).
to show that the owner still has something left. Sometimes the Court plays this game with a vengeance, as in the Penn Central case where it pointed out that Penn Central had lost the right to build the tower but still had Grand Central Station left; sometimes it denounces the exercise as sophistry, as in Loretto v. Teleprompter Manhattan CATV Corp., observing that the state cannot take someone’s house just because it leaves the stereo gear behind. The Court can do this because in a jurisprudence looking through principles to the wisdom of the statute the rationale is less important, consistency the hobgoblin of small minds. In a transfer-based approach the question would drop out as irrelevant.

I have said that the Court feels free to intervene in economic affairs, but do not expect milk price supports to disappear next year. Conceptions of “the good” have changed. Adkins v. Children’s Hospital saw the minimum wage as a way for employees to exploit employers by collecting more than the value of the work, and so held the laws forbidden; fifteen years later, in West Coast Hotel Co. v. Parrish, the Court saw the same law as ending the employers’ exploitation of workers by paying them less than the labor was worth. Both visions are inaccurate; neither group exploits the other.

Lochner saw redistribution as a bad; now we see some redistribution as a good and dispute only who should receive it. (Even those who oppose many “welfare” programs approve of education at state expense; education is a much larger transfer of resources than any other public program.) Lochner called a high price a high price and condemned laws that increased prices; today courts invent reasons to justify price-increasing laws. Lochner saw laissez-faire as natural, and any deviation had to be justified; today many see regulation as natural and demand justification for free contracting.

All of these changes, however, simply affect which laws will be reviewed. Opinions on the wisdom of laws change; the process of having such

41. 261 U.S. 525 (1923).
42. 300 U.S. 379 (1937).
43. Minimum wage laws make unemployable persons who lack the skills to produce enough value to cover the minimum wage. And they do nothing to address monopsony power, which in the rare event it exists is the source of the power to “exploit” workers. Minimum wage laws instead eliminate a source of competition to unionized and higher-skilled labor, allowing these workers to raise the price for their services. They also lead to the substitution of capital for labor.
44. See, e.g., Williamson v. Lee Optical of Oklahoma Inc., 348 U.S. 483 (1955). United States v. Carolene Products Co., 304 U.S. 144 (1938), was one of the high water marks of the Court’s willingness to accept absurd “public interest” arguments in order to sustain a statute suppressing competition. See Miller, The True Story of Carolene Products, 1987 Sup. Ct. Rev. 397. Professor Miller also supports my thesis that substantive due process is on the rise, observing that a district court has had the temerity to declare the Carolene Products decision unconstitutional and restore filled milk to the market!
opinions remains the same. Judges condemn the novel, the experimental, the laws with effects or justifications mysterious to the generalist and "prudent" judiciary. Holmes and Hand, skeptics who did not care about the wisdom of the laws they reviewed, did not carry the day in their time and still are outsiders, for all the veneration they receive. They were passive judges at a time when passivity permitted "progressive" laws to take effect; contemporary approval of this posture should not cloud the fact that they would have approved other kinds of laws, and that the bulk of the judiciary then (as now) insists on more.

III

One form of due process scrutiny seems immune from the kind of criticism I am advancing: procedural due process. So it is, when the Court confines itself to enforcing notice and some kind of opportunity to be heard before the state deprives you of liberty or private property — the historical meaning of the clause. But in 1976 the Court declared that it would make a fresh judgment about the adequacy of process under every statute, going beyond the historical understanding when appropriate. The Court had in mind the application of Jeremy Bentham's felicific calculus: it would find out the optimal procedure and impose it.

The claim is essentially one of the social engineer. Judges do not ask whether the failure to extend notice and opportunity for hearing falls below an historical minimum. It is a claim to judicial control rather than to hold the legislature within bounds. The upshot is an indirect control of substance. If the Court disapproves of the substantive rule, it can impose a tax on the achievement of the legislature's objective by raising the procedural costs of achieving it. This will divert money from substance to process. If it approves, it will declare that the law furnishes all the process due. So in 1987 a Court skeptical about the ability to separate whistle-blowers from malingerers, took a bite out of a statutory scheme allowing the Secretary of Labor to reinstate workers pending the determination into which category they fell; in 1988 a Court confident that anyone posing a small risk of dishonesty should be separated from the banking business pronto sustained a statute that allowed such a separation without a hearing and postponed review for some months.

Anyone familiar with the civil service knows that the mountainous process necessary to fire a clerk has programmatic consequences; there are more surly or somnolent clerks, and the agency functions more slowly. Process affects not simply the implementation of the rules (that is, getting rid of inept clerks but rewarding good ones) but also the content of the rules (whether surly clerks will be deemed adequate). The effects are not simply on clerks; teachers, too, are protected by these rules and hard to replace with better ones, with effects on education. The nation cannot expel an illegal alien in less than five years, which rewards the alien for coming and makes new illegal immigration alluring. It is hard to introduce a new drug and hard to get rid of a dangerous one. Because change is so hard, agencies hesitate before promulgating new rules and scrutinize each more carefully. The effect of hearings and other procedural steps are pervasive. Process and substance are intimately linked; he who controls process controls much substance too.

IV

Judicial review of the wisdom of statutes is not limited to constitutional law. Courts must decide when federal laws preempt state laws. This offers ample opportunities to assess the wisdom of the choices underlying statutes.

Federal law usually does not say in so many words that the state cannot regulate. Instead there are federal objectives, and state laws may lead to achieving more or less of these federal objectives. Someone then may say that the state law unduly interferes with the federal law. That sets the stage for an assessment of the wisdom of the federal policy and the state policy; the wiser policy prevails.

There are almost too many examples to mention, but one that stands out is *Silkwood v. Kerr-McGee Corp.*, a case about nuclear contamination. Federal law establishes comprehensive regulation of the nuclear industry. Oklahoma decided to impose punitive damages on nuclear installations that did not observe safety precautions. The threat of damages would induce the firm to take extra care from the federal perspective, maybe an unjustifiably high level of care, with a concomitant increase in costs. Was the state law preempted? For many of the Justices, this depended on how they weighed the importance of the competing objectives, including safety, compensation for injury, and holding down the costs of service. The Court allowed the award of damages, and I happen to think that is right — though not because I think more safety is always better. I have been suggesting that the Court ought to keep to the resolution of 1937 and stay away from making its own judgments. In *Kerr-*

McGee that meant allowing liability. Five Justices took that position. In other cases the majority has been the other way. No matter which way the cases come out, however, implied preemption almost unavoidably fetches an assessment of the wisdom of competing sets of laws.

Antitrust law poses the problem in an especially stark way. Federal antitrust laws are designed to preserve competition. Much of the state regulatory system is designed to suppress competition — the state may believe the industry naturally monopolistic (as with local telephone switches) or may want to regulate for other reasons, some of them no more complex than to award favors to special interest groups. The federal policy of competition collides with the state policy of regulation or monopoly.

In 1943 the Court said that the state policy would prevail in such conflicts. In 1982 the Court seemed to take it all back holding in the Boulder case that regulation of cable TV could subject a municipality to treble damages. In response to the complaint of Justice Rehnquist in dissent that the Court was on the way to making all regulation of business illegal per se — for after all what is regulation except for a departure from the result of free markets? — the majority replied: Not to worry, we will strike down only unreasonable state and local laws. Necessary and useful laws will be okay. Shades of Lochner!

This was too much for Congress, which undid the decision in 1984. And the Court retreated in the face of this legislation, changing ground even for cases not covered by the new law. A potential calamity was averted. There are still many areas of overlap, however, and the Court will impose liability unless states use the “right kind” of regulation — which to the Court means active supervision, rather than loose guidelines or legal rules. Just last year the Court held illegal a state statute allowing sellers of liquor to fix resale prices; not enough supervision, the Court said, but if a state officer had approved the prices all would be fine. The Court insists on its position that some regulation is better than other kinds, and that it knows which is best for consumers. Needless to say, many economists think that the Court picked the wrong kind. Intensive price control regulation turns out to increase prices more than lax regulation — the latter kind leaves more room for competition to break out.

You may be interested to know the competing positions. Consistent with the position I took on the commerce clause, I think that he who is willing to pay the piper should be able to call the tune. Thus a state or municipality should be able to regulate or consent to monopoly as it pleases — provided the overcharge falls within the state. Other scholars have taken a much more interventionist pose. John Wiley, for example, would have the Court examine the state regulatory scheme to see if the process had been captured by interest groups. If it had been — if, in other words, the state had bad regulation instead of pro-consumer legislation — it would set the state law aside. How to tell whether something is pro-consumer legislation? We’ll just have to assess its wisdom. Watch out, minimum wage laws; move over, rent control statutes! Senator Sherman bequeathed us substantive due process.

The debate about the role of judges infects almost all questions of statutory construction. When dealing with an ambiguous text, does the court try to carry out the legislative compromise behind the text or instead try to channel the rule toward the most public-spirited outcome? Macey (after the spirit of Monaghan) proposes to “remand” statutes to Congress to get more public-regarding legislation. Of course, the interpretation may redefine public interest after the judges’ vision rather than the economists’ or the moral and political philosophers’, but this is the price we shall have to pay for progress.

The whole idea of construing statutes in accord with original intent, rather than in accord with structure and text, increases the judges’ freedom to implement views of good policy. I have developed this theme elsewhere and do not drone on. It may be comforting to you to know that conservative justices tend to emphasize structure over intent, and that the Court in recent years has been moving toward a more objective understanding of statutes. It is the sole counter-example to the trend I have been recounting.

The commerce clause, economic substantive due process, the Sherman Act — these and my other examples all show the Court developing rules designed to regulate businesses. Rules developed for other purposes spill over to business in ways that are indistinguishable from substantive due process. The application of the first amendment to speech proposing commercial transactions is a case in point. When Virginia allowed pharmacies to charge any price they wished but limited their advertising of these prices, the Supreme Court held that it had violated the Constitution. When Virginia allowed lawyers to compete for business but forbade them to do so by advertising, the Court interposed the first amendment. When Puerto Rico allowed casinos to serve all comers but forbade local advertising (but not sales pitches outside its borders), the Court saw no problem. When New York required regulated utilities to include in their billing envelopes messages from groups favoring sterner regulation, the Court held that the state had overstepped the bounds. When California regulated billboards to reduce visual clutter, the Court found a constitutional flaw. So too when South Carolina regulated the business practices of fund-raising enterprises.

The official standard for the regulation of commercial speech is that a court must inquire whether the regulation of commercial speech serves "substantial" public interests, whether the underlying activity could be prohibited, and whether the regulation is more extensive than necessary to cope with the problems at hand. You do not need a reminder that terms such as "substantial" and "more extensive than necessary" invite — guarantee, really — that decisions will depend on judges' views of the wisdom of the laws. How else are they to evaluate the gravity of the problem and "balance" the incommensurable costs and benefits? I shall not pursue the topic — not only because the problem is the same in principle as the ones I have discussed but also because there is an extensive literature showing the affinity between sub-

stantive due process and the Court's use of the first amendment to regulate the regulation of business.66

VI

All of this inevitably raises questions about competence and legitimacy. These were President Roosevelt's themes when attacking the Nine Old Men, and they are no less pressing now.

On competence: how can courts assess the wisdom of statutes? Economic wisdom lags far behind judicial decisions, and often is counterintuitive. Judicial decisions are bound to be full of error. This is not to exalt legislatures; it is to say that we should not expect systematic improvements from judges.

On justification: the initial problem is to ask where the power of judicial review comes from.67 Statutes are a source of positive law, and judges ought not question the rules that give them the power to act. The Constitution may limit these rules, but as Learned Hand continually emphasized, the Constitution sets the bounds for the political branches. Once judges see that the law at hand is the sort of statute that would be within the legislative power if wise, then judges are disabled from making the judgment whether it is wise. Anything else exceeds any plausible grant of power to courts. Remember that judicial review is not granted. It is inferred — inferred from the presence of rules, which must be obeyed because of a hierarchy. To run out of rules is to run out of authority to have the last word.

That, then, is the ultimate problem with review of regulatory legislation — the utter want of power to have the last word. That was a point hammered home in the 1930s by Hugo Black, Felix Frankfurter, and Robert Jackson, giants on and off the Court. George Santayana said that those who fail to learn from the past are condemned to repeat it. We are moving down a well-traveled path. I hope we have the foresight to see where we have been, and why we got off the path the last time.
