

PLSC 473: American Judicial Behavior

Christopher Zorn

October 20, 2015

Segal, etc.: *Institutional Aspects of SCOTUS Ideology*:

- Life Appointment
- No Reduction in Salary
- Little Progressive Ambition
- Difficulty of Removal
- Difficulty in Overturning Decisions +
- No Higher Court

Baum (2013): Why Ideology?

“...connections between issues and ideology may be either **“logical”** or **“social,”** that is, based on general premises that underlie liberalism and conservatism or on perceptions of the groups that support and benefit from competing positions.”
(2013, 93)

Ideology and the Takings Clause

“...nor shall private property be **taken** for **public use**, without **just compensation**.”

1. “Taking” = **regulation**
2. **Public use** requirement
3. **Amount** of compensation



Baum's Findings

- There were no clear ideological divisions from 1937-1979, but strong divisions from 1980-2011.
- Conservatives became more pro-claimant (i.e., anti-taking) while liberals became more anti-claimant (pro-taking).
- Decisions were also polarized from 1910-1936.
- "...it is clear that the Court moved from a period in which liberals and conservatives were equally likely to support takings claims to a period in which conservatives were far more favorable to those claims."

Change in...

- ...parties? (not really... but see below)
- ...legal issues? (less compensation cases, more on regulatory takings)
- ...policy issues? (More challenges to environmental policy)
- ...case salience? (Growth in salience → amicus briefs)

Table 2. Selected Attributes of Takings Cases, 1937–76 and 1977–2011 Terms (%)

Attribute	Terms		Change (% Points)
	1937–76 (<i>N</i> = 56)	1977–2011 (<i>N</i> = 57)	
Claimant:			
Indian tribe or Native American	5.4	7.0	+1.6
Other individual	12.5	8.8	−3.7
Individual or business (uncertain)	12.5	10.5	−2.0
Business	66.1	61.4	−4.7
Other	3.6	12.3	+8.7
Legal issue:			
Regulatory taking	17.9	50.9	+33.0
Other taking	28.6	22.8	−5.8
Public use	3.6	3.5	−.1
Compensation	37.5	8.8	−28.7
Other or mixed	12.5	14.0	+1.5
Political issue:			
Environmental policy	.0	33.3	+33.3
Other liberal policy	3.6	17.5	+13.9
Neither	96.4	49.1	−47.3
Salient case (front page of <i>New York Times</i>):			
Yes	10.7	17.5	+6.8
No	89.3	82.5	−6.8

Why? (continued)

During 1937-1979, liberal justices tended to be pro-claimant in cases not involving business, involving the military, and/or both.

Table 5. Selected Attributes of Nonunanimous Takings Decisions, 1937-79 Terms, by Ideological Orientation of Justices

Attribute	Ideological Orientation of Pro-claimant Justices Relative to Anti-claimant Justices	
	Liberal	Conservative
Claimant was not a business or business owner, or claimant's business was a small farm or ranch	7	1
Government activity in question was related to war or the military	10	5
Case had one or both of those attributes	13	6
Observations	14	14

Note.—Claimants are categorized on the basis of information in the Supreme Court's opinions and, where needed, information in lower-court opinions. In one "liberal" case there was some uncertainty about the claimant, but the information available from the court opinions in the case strongly suggests that he was an individual without any business. That case also fell in the war/military category.

Why?: The Justices

Table 6. Proportions of Votes Favoring Takings Claimants, Selected Justices, by Period

Justice	Terms Served	Terms		Change
		1937–79	1980–2011	
Brennan	1956–89	22.2	11.1	–11.1
Marshall	1967–90	25.0	14.8	–10.2
Stevens	1975–2009	44.4*	15.6	–28.8
Blackmun	1970–93	15.8	6.5	–7.3
White	1962–92	13.6	22.6	+9.0
Powell	1971–86	33.3	41.7	+8.4
Burger	1969–85	25.0	22.2	–2.8
Rehnquist	1971–2004	22.2	43.5	+21.3
O'Connor	1981–2005	...	39.0	...
Douglas	1939–74	32.5
Stewart	1958–80	29.2	... [†]	...
Scalia	1986–	...	56.7	...
Kennedy	1987–	...	42.9	...
Souter	1990–2008	...	18.8	...
Thomas	1991–	...	63.2	...
Ginsburg	1993–	...	25.0	...
Breyer	1994–	...	21.4	...

* Justice Stevens participated in nine cases prior to the 1980 term.

[†] Justice Stewart participated in only four cases in the 1980 term (voting for the claimant in one of the four cases).

Why?: Summary

- An “ideological redefinition” of Takings Clause litigation, which “had both logical and social sources.”
- Logical: “*Kelo* was part of the general conservative drive for a more expansive interpretation of the Takings Clause.”
- Social: “the identification of takings claims as a whole with conservative advocates.”
- Finally, “(U)nstable and contingent linkages between issues and ideology complicate explanations of justices choices that emphasize their policy preferences.”