

Judicial Self-Restraint and Judicial Activism in the Constitutional Protection of Property Rights

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Abstract

The standpoint of the Constitutional Court in recent years has been to principally apply the rational basis test to the restriction of property rights. This standpoint of property rights protection is consistent with the double standard of judicial review in the United States, which is supported by the participation-oriented, representation-reinforcing theory and the understanding of the role of the modern administrative state. At the same time, the observation of the overall practice of the constitutional interpretation reveals that there are also some cases deviating from the rational basis review and, in certain contexts, it is even significant judicial activism in the attitude towards the protection of property rights. What is the comprehensive picture of the constitutional protection of property rights? What is the underlying theoretical basis? What social factors affect the judicial attitude and its evolution? All deserve further exploration.

The purpose of this article is to observe and analyze the judicial review attitudes towards the protection of property rights under Taiwan's Constitutional Court decisions, including the premise of applying the rational basis test and the aspect of increasing the level of scrutiny and even active protection at the same time. Through the perspective of comparative institutional analysis, this article asserts that the overall outlook of the current constitutional protection of property rights in Taiwan has struck a more or less sound balance between judicial self-restraint and judicial activism and, likely, has struck a better balance than the one in the United States. However, those Court opinions deviating from the baseline of judicial self-restraint and leaning toward judicial activism lack clear and

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coherent reasoning. The exploration through comparative institutional analysis in this article would help to establish a comprehensive theoretic basis for adjusting the level of judicial scrutiny in the individual contexts when reviewing the infringement of property rights.

Keywords: property rights, judicial review, standard of review, judicial self-restraint, judicial activism, law and society