
CHAPTER 1 INTRODUCTION

Attorney General Meese . . . had a specific, aggressive, and it seemed to me, quite radical project in mind: to use the takings clause of the Fifth Amendment as a severe brake on federal and state regulation of business and property.

—Charles Fried, Solicitor General for President Ronald Reagan.¹

The genesis for this Report, and the research that supports it, was an observation: Many of the changes in takings law that have taken place over the last 11 years correspond quite closely to a blueprint for takings doctrine proposed by Professor Richard Epstein in his now-famous book called *Takings, Private Property and the Power of Eminent Domain*. This observation, while by no means original, was, to us, both remarkable and troubling. After all, Epstein's work was almost universally criticized (if not ridiculed) by the legal academy and Epstein's proposed end result—the overturning of a century's worth of health, safety, and economic regulation²—would sink this country into a constitutional crisis as serious as that brought about by the economic due process jurisprudence of the *Lochner*-era³ Supreme Court.

How then is it that Epstein's work is having such a widespread influence on the development of takings law? What we found is a large and increasingly successful campaign by conservatives and libertarians to use the federal judiciary to achieve an anti-regulatory, anti-environmental agenda. Looking first at the courts and judges deciding the most important and influential takings cases, we noted several striking patterns. The vast majority of important victories achieved by developers in takings cases over the last decade have been decided by the same three courts: the United States Supreme Court, the Court of Appeals for the Federal Circuit and the Court of Federal Claims. Moreover, almost without exception, the judges on these courts ruling for developers were appointed to their respective courts by Presidents Reagan and Bush. Finally, the cases themselves showed remarkable activism by the jurists: in many cases, the

*“Attorney General
Meese . . . had a
specific,
aggressive, and it
seemed to me,
quite radical
project in mind.”*

— Charles Fried

The Project is not the first campaign mounted to influence the judiciary's interpretation of a constitutional provision, but it may well be the most comprehensive and expensive. It is certainly among the least defensible.

judges overcame seemingly insurmountable procedural and substantive hurdles to rule in favor of the developers.

Looking a bit deeper, we noted the political, more than the judicial or scholarly, background of many of these same judges and found that the appointment of these politically savvy jurists to their posts resulted, in many instances, from a concerted effort by conservatives and libertarians within the Reagan and Bush administrations to use the court system to further their attack on federal regulations. Even more remarkably, we discovered that the most activist judges on the Federal Circuit and the Court of Federal Claims—the federal courts with exclusive jurisdiction over most takings cases against the federal government—all recently have attended the same, all-expenses-paid, week-long summer seminar at a Montana resort hosted by a property rights group. Finally, we found that the same conservative foundations that funded these Montana seminars also bankroll takings litigation before the Federal Circuit.

Turning to the process by which takings cases work their way through the court system, what we found was equally notable. The Pacific Legal Foundation (PLF) and a dozen other “public interest” legal foundations located around the country represent developers free-of-charge in takings cases. PLF and others recruit and train an army of private practitioners to assist them in shepherding cases through the legal system. Large and powerful lobbies such as the National Association of Home Builders similarly devote significant resources both to litigating takings cases and promoting “procedural reform legislation” in Congress that would grease the wheels of takings litigation.

We refer to the sum of these parts—the deliberate appointment of activist conservative judges to critical positions on the federal judiciary; the activism of these judges in creating constitutionally protected development rights; and the combined efforts by developers, foundations, and non-profit organizations to guide takings cases through the court system—as the Takings Project (borrowing Charles Fried’s term), and this report is devoted to outlining its contours and chronicling its progress. The Project is not the first campaign mounted to influence the judiciary’s interpretation of a constitutional provision,⁴ but it may well be the most comprehensive and expensive. It is certainly among the least defensible.

The Takings Project is indefensible, first and foremost, because there is no good reason for federal judges to overturn popular and important health, safety, and environmental laws to protect developers. The development rights the Project seeks to create simply do not exist within the text or original meaning of the Constitution, and there is no theory of judicial review which justifies creating constitutional rights to protect a group—developers—that needs little assistance in the political process.

The Project is indefensible, also, because it depends upon a simultaneous narrowing of what is considered a “nuisance” and an expansion of what is considered property. The sponsors of the

Project, in other words, are seeking to allow the concept of property to expand into the twenty-first century while simultaneously freezing in time a concept that has been a fixture of property law for centuries—the principle that a property owner has no right to use his or her property in ways that injure his or her neighbors.

The Project is indefensible, finally, because it is not grounded in any consistent or coherent theory on the proper role of the federal judiciary in policing the legislative process. At the same time the Takings Project asks for what Richard Epstein called “a level of judicial intervention. . . far greater than we have ever had,”⁵ many of the Project’s strongest proponents are using cries of judicial activism to delay confirmation of President Clinton’s judicial appointments.⁶ At the same time the Takings Project seeks a dramatic expansion of the text and meaning of the Takings Clause, many of its proponents are relying on a narrow, textual interpretation of the Equal Protection Clause to attack all forms of affirmative action.⁷ The Project is indefensible, in other words, for its hypocrisy. The Project is hypocritical, moreover, because its promoters portray the Project as a “civil rights” issue and themselves as champions of the small landowner when the primary objective of the Project is, and has always been, the advancement of an anti-regulatory, anti-environmental political agenda.

The Takings Project is at an important juncture. A dozen years in, the Project’s promoters have won important victories, but remain far from achieving their ultimate objective. The expansive opinions of the Federal Circuit and the Court of Federal Claims are hindering the operation of important environmental laws including the Endangered Species Act and the wetland provisions of the Clean Water Act, but have yet to survive scrutiny by the Supreme Court. The Supreme Court, instead, has handed Project advocates important, but narrow, victories, containing both the foundation for a more dramatic expansion of takings law, and, potentially, the seeds of the Project’s defeat. The direction the Supreme Court will follow is at this point unknown and probably will depend on unknowable developments in the composition of the Court. The Supreme Court is so closely divided on takings issues that one appointment by President Clinton or his successor(s) could determine the ultimate outcome of the Project.

This Report proceeds in five Chapters. Chapter Two begins with a brief discussion of the text of the Takings Clause, the original intent of the Framers of the clause, and the gradual evolution of the takings doctrine over nearly two centuries. After a summary of takings law in 1985, when Professor Epstein’s book was published, Chapter Two turns to Epstein’s work. In particular, it examines Epstein’s argument that the Takings Clause itself renders zoning laws, rent control, and a wide variety of other laws regulating land use “constitutionally suspect or infirm.” Drawing upon a decade of scholarly criticism, the Report thoroughly refutes Epstein’s claim that his proposed result is compelled by or even consistent with the text of the Constitution. We conclude, as have many before us, that whatever value *Takings* may have as a polemic in support of

*The Supreme Court
is so closely
divided on takings
issues that one
appointment by
President Clinton
or his
successor(s)
could determine
the ultimate
outcome of the
Project.*

Epstein's reactionary political views, it is, indeed, as one law professor called it, a "travesty of constitutional scholarship."⁸

Chapters Three and Four summarize the Takings Project. Chapter Three begins with a brief discussion of how President Reagan's second term Attorney General, Edwin Meese, and his advisors seized upon Professor Epstein's blueprint for interpreting the Takings Clause as a vehicle to implement Reagan's attack on federal health, welfare, and environmental regulations. Chapter Three then turns to the most important legacy of the Reagan and Bush presidencies, the appointment of conservative activist judges to critical positions in the federal judiciary. Chapter Four identifies the individuals and groups that are most responsible for directing the Takings Project and summarizes the intense litigation, training and lobbying campaign these individuals and groups are waging to move takings cases through the court system.

Chapter Five documents the results of the Takings Project. The Chapter begins with a discussion of how the Supreme Court and lower federal courts have ignored innumerable procedural roadblocks in eagerly reaching out to hear the merits of "poster child" cases brought to them by conservative legal foundations. It then discusses three of the most important aspects of Professor Epstein's takings doctrine and traces the progress of those ideas into the nation's case law. The report finishes in Chapter Six with a summary of the status of the Takings Project in 1998 and a brief discussion of what opponents of the Project can do to prevent the Project from advancing further toward its objective of making all forms of land use regulation too expensive to enforce.

Endnotes

- ¹ CHARLES FRIED, *ORDER AND LAW: ARGUING THE REAGAN REVOLUTION — A FIRSTHAND ACCOUNT* 183 (1991) [hereinafter *ORDER AND LAW*].
- ² See RICHARD A. EPSTEIN, *TAKINGS, PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985) at 281 (“It will be said that my position invalidates much of the twentieth century legislation, and so it does”).
- ³ The Lochner-era is named for its most famous case, *Lochner v. New York*, 198 U.S. 45 (1905), in which the Supreme Court struck down a law establishing a 60-hour work week for bakery employees. During this period, which lasted roughly forty years from 1897 through 1937, the Supreme Court interpreted the Contract and Due Process Clauses of the Constitution to invalidate labor laws and other progressive social reform initiatives of that era. This era reached its zenith in the mid-1930’s, when the Court repeatedly struck down important provisions of President Roosevelt’s New Deal, and ended in 1937 when Justice Roberts, switched his vote and became the fifth justice necessary to uphold New Deal regulations. See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *NLRB v. Jones & Laughlin Steel Corp.* 301 U.S. 1 (1937).
- ⁴ For an inspiring account of the century’s most famous and, arguably, most successful constitutional litigation campaign, see RICHARD KLUGER, *SIMPLE JUSTICE* (1975) (discussing the NAACP’s constitutional litigation campaign leading, ultimately, to the Supreme Court’s landmark ruling in *Brown v. Board of Education*, 347 U.S. 483 (1954)).
- ⁵ See EPSTEIN, *supra* Ch.1, note 2, at 30–31.
- ⁶ Orrin Hatch, *Judicial Nominees: The Senate’s Steady Progress*, *WASH POST*, Jan. 11, 1998, at C9 (“Judicial activism from the left or from the right has plagued this nation, and we should reject nominees who will not apply the Constitution and statutes as written and will instead substitute their own personal preferences. Judges must understand their role in our constitutional system as impartial magistrates, not Monday-morning legislators.”); see also James E. Ryan & Douglas T. Kendall, *Property Rights: What Does the Constitution Say? Conservatives Favor Private Ownership Over Environmental Protections*, *ST. LOUIS POST-DISPATCH*, July 18, 1997 at B7 (critiquing Hatch’s simultaneous attack on judicial activism and promotion of the Takings Project).
- ⁷ See Douglas T. Kendall & James E. Ryan, *The Right Can’t Have It Both Ways*, *L.A. TIMES*, Feb. 8, 1998, at M5.
- ⁸ Thomas C. Grey, *The Malthusian Constitution*, 41 *U. MIAMI L. REV.* 21, 24 (1986).

CHAPTER 2

THE TAKINGS CLAUSE, TAKINGS DOCTRINE CIRCA 1985 & RICHARD EPSTEIN'S THEORY

CONSTITUTIONAL TEXT AND ORIGINAL INTENT

The Takings Clause states in its entirety: "nor shall private property be taken for public use, without just compensation." By its terms, the clause's scope is quite narrow: It applies only when the government "takes" private property and it does not prevent such takings, but rather requires that the government provide "just compensation" when takings occur. While the term "take" is not defined in the Constitution, it most naturally means an expropriation of property, such as when the government exercises its eminent domain power to acquire private property to build a road, a military base or a park.

This plain language interpretation of the clause is consistent with both the intent of the Framers of the Constitution and the opinions of the Supreme Court in the eighteenth and early nineteenth centuries. While there is considerable academic disagreement over the Framers' general views on property, there is little debate that the Framers believed that the Takings Clause only would prohibit actual expropriations of private property. Even justices like Antonin Scalia, who have applied the clause beyond its text and original meaning, start from a recognition that the Framers believed the Clause would only apply to actual expropriations of property.¹ Similarly, there is no dispute that until the second half of the nineteenth century, the Supreme Court steadfastly refused to extend the clause beyond actual expropriations. An 1870 opinion by the Supreme Court illustrates clearly the position the Court took during this era:

[the Takings Clause] has always been understood as referring only to direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. . . . [I]t is not every hardship that is unjust, much less that is unconstitutional; and certainly it would be an anomaly for us to hold an act of Congress invalid merely because we might think its provisions harsh and unjust.²

*"Justice Blackmun
is correct that
early
constitutional
theorists did not
believe that the
Takings Clause
embraced
regulations of
property at all..."*

— *Justice Antonin
Scalia*

THE EVOLUTION OF MODERN (PRE-1985) TAKINGS LAW

“all property in this country is held under the implied obligation that the owner’s use of it shall not be injurious to the community”
— *Mugler v. Kansas*

The notion that the Takings Clause may confine government actions beyond the purposeful expropriation of property emerged gradually over the next one-hundred years as the Supreme Court ruled on cases in which government action very closely resembled expropriations of property. The first of these cases, *Pumpelly v. Green Bay Company*, involved a state-authorized dam that flooded Pumpelly’s property. In requiring compensation, the Court noted:

[i]t would be a very curious and unsatisfactory result, if in construing a provision of constitutional law. . . it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it has not taken for the public use.³

To avoid this “curious and unsatisfactory” result, the Court ruled that, “where real estate is actually invaded,” a taking may be held to have occurred.⁴

Nearly fifty years later, in the 1922 case of *Pennsylvania Coal v. Mahon*, the Court expanded the reach of the Takings Clause again to encompass particularly oppressive regulations. *Mahon* involved the Kohler Act, a state law that prevented coal companies from mining coal that formed the support for the surface area. Pennsylvania law recognized this “support estate” as a distinct property interest, and Justice Holmes’ found the Act “purports to abolish what is recognized in Pennsylvania as an estate in land—a very valuable estate...”⁵ Justice Holmes declared that the Pennsylvania law had “very nearly the same effect for constitutional purposes as appropriating or destroying [the estate],” and, again relying on this analogy to an expropriation of property, declared that when regulations “go too far” they can be considered takings.⁶

At about the same time the Court, in *Pumpelly*, first expanded the reach of the Takings Clause beyond actual expropriations, the Court also clarified that the clause was not intended to interfere with legitimate attempts by legislatures to protect public health and safety. In doing so, the Court established a “nuisance exception” to takings liability. The exception originated in *Mugler v. Kansas*, a case involving a state law that prohibited the operation of breweries. The Court ruled in *Mugler* that “all property in this country is held under the implied obligation that the owner’s use of it shall not be injurious to the community”⁷ and that the Takings Clause does not require compensation for losses a property owner may sustain “by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.”⁸

Following *Mugler*, the Supreme Court applied the nuisance exception to justify a significant number of legislative prohibitions without compensation.⁹ The Court recognized that declaring an activity a nuisance falls within the province of the legislature, and that the legislature is not limited to outlawing only those activities that have been considered by courts to be common law nuisances.¹⁰ The Court also acknowledged that what is and is not a nuisance would change over time and that the legislature could declare that uses that were formerly commonplace are contemporary nuisances.¹¹

Justice Brennan summarized the status of takings law prior to 1985 in his opinion for the Court in *Penn Central Transportation Co. v. City of New York*.¹² As Justice Brennan noted, the question of what constitutes a regulatory takings (i.e. when a regulation was sufficiently akin to an expropriation) “has proved to be a problem of considerable difficulty” and the Court “quite simply, has been unable to develop any ‘set formula’ for determining when ‘justice and fairness’ require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.”¹³ Instead, the Court relied upon a balancing of three factors: (1) the economic impact of the regulation, (2) the extent the regulation interferes with “distinct investment-backed expectations,” and (3) the character of the government action.¹⁴ Under *Penn Central’s* balancing test, no one factor is alone determinative,¹⁵ and significant diminutions in property value are generally permissible without compensation.¹⁶

While not always simple to apply, the doctrine the Court devised in *Pumpelly*, *Mugler*, *Mahon* and *Penn Central* had a logic based on the text and the original meaning of the clause. The clause was applied primarily to prevent uncompensated expropriations of property. Where the clause was extended beyond expropriations, the Court was careful to limit the clause’s application to regulations that reasonably could be characterized as being akin to expropriations.

PROFESSOR EPSTEIN’S ANTI-REGULATORY BLUEPRINT

Enter Professor Epstein. In a theory first articulated in the late 1970s and, with a grant from a conservative foundation, printed in book form in 1985,¹⁷ Professor Epstein posited that the Takings Clause could be used as a tool to implement the Reagan administration’s crusade against federal regulations. Put another way, Epstein theorized that the Takings Clause renders unconstitutional any and all redistributions of wealth, and thus renders “constitutionally infirm or suspect many of the heralded reforms and institutions of the twentieth century: zoning, rent control, workers’ compensation laws, transfer payments, [and] progressive taxation.”¹⁸

While not always simple to apply, the doctrine the Court devised in Pumpelly, Mugler, Mahon and Penn Central had a logic based on the text and the original meaning of the clause.

The Takings Clause renders “constitutionally infirm or suspect many of the heralded reforms and institutions of the twentieth century: zoning, rent control, workers’ compensation laws, transfer payments, [and] progressive taxation.”

— *Richard Epstein*

Professor Epstein’s thesis is simple enough to describe. He contends that there is a natural right to property ownership, and that, based on the philosophy of John Locke, the government has only a very limited right to interfere with such ownership. Property ownership, in turn, consists of a bundle of rights, of which possession, use, and disposition are the most important. Any governmental interference with any of these rights, Epstein asserts, is a taking that must be compensated — “no matter how small the alteration and no matter how general its application.”¹⁹

To reach his result, Epstein suggested that the Supreme Court should revise then-standing precedent in several critical ways. First, and most importantly, Epstein argued that the Court should dramatically increase the number of regulatory actions that are subject to judicial review. Under *Penn Central*, the Court reviewed a very narrow category of cases under the Takings Clause; typically only those regulations that had a significant impact on the value of the “parcel as a whole.”²⁰ Epstein argued as follows: (1) that property ownership can be divided into “incidents” or “sticks in the bundle” (such as the right to use the property, the right to exclude others and the right to sell or grant property to one’s heirs) and that the Takings Clause “extends to each stick in the bundle as well as to the bundle itself,”²¹ and (2) that the Takings Clause protects against partial as well as total takings. In other words, according to Epstein, if the government interferes in any way with any of the sticks-in-the-bundle, the property owner has a potential takings claim.²²

Second, Epstein advocated a reconstruction of the nuisance exception to Takings Clause liability. As described above, the nuisance exception crafted by the Supreme Court in *Mugler* and subsequent cases was an evolving doctrine, defined by the legislature and changing with new notions of what constitutes an injurious use. Epstein advocated that the Court adopt a narrower, static definition of the nuisance exception that would, in essence, freeze the notion of what is a nuisance to the narrow category of injurious uses (generally involving physical invasions of neighboring properties) that historically have been recognized as a nuisance by common law courts.

Finally, citing favorably to the Supreme Court’s discredited opinion in *Lochner v. New York*, Epstein argued that courts should apply a form of heightened scrutiny to examine the link between the ends (purposes) of land use regulations and the means for achieving those ends.

EPSTEIN CRITIQUED

Although criticized (if not ridiculed) within the legal academy as “shallow,”²³ a “travesty of constitutional scholarship,”²⁴ and a failure as a matter of history, logic, philosophy and textual analysis²⁵ — *Takings* has been used as a legitimizing tool by those interested in using the Takings Clause to halt government regulation.²⁶ More importantly, as described in detail in Chapter Five, many of the

changes to takings doctrine that Epstein proposed now have found their way into federal case law, and the judges and justices making these critical alterations to constitutional law have relied extensively upon *Takings*.²⁷ It is therefore important to articulate, clearly and early in this report, the legion and severe flaws in Professor Epstein's work. These flaws render Epstein's work thoroughly unable to bear the intellectual weight that conservative and libertarian judges, activists and policy makers have tried to rest upon it.

Correcting John Locke

The principal reason *Takings* is both dangerous and disingenuous is that it purports to be a book about what the text of the Constitution says, but it is actually an extended description of what Professor Epstein wishes the Constitution said.²⁸ Most remarkable is Epstein's claim that his end result—the requirement of compensation for virtually any regulation that diminishes the value of property—is commanded by the text of the Constitution.²⁹ How Epstein reaches this point is difficult to follow, as his theory of interpretation is both elusive and internally inconsistent. He begins his book by contending that property is a natural right and that Locke's philosophy of limited government animates the Constitution. Both claims are controversial, and Epstein offers no evidence that the Framers believed property was a natural right (nor does he explain how such a belief is reflected in the Constitution), nor does he confront the vast body of scholarly literature that demonstrates that Locke was only one of several philosophers influential at the time the Constitution was framed.³⁰ What is truly amazing, however, is that after extolling the influence of Locke, Epstein seeks to "correct" a portion of Locke's philosophy that is inconsistent with Epstein's theory.

Specifically, Locke believed that property originally was owned in common as a gift from God. Individuals, according to Locke, could acquire private property by investing their labor in the property, and as a result, one could assert private property rights in the product of one's labor. These private rights, however, could only be exercised "where there is enough, and as good left in common for others."³¹ Locke's theory of property, which Epstein contends influenced the Constitution, thus provided for the right of each person to an equal share of property and precluded private acquisitions of property that would deprive others of this right. Instead of confronting this aspect of Locke, and explaining how it can possibly fit with Epstein's theory that individuals should be completely free to acquire as much property as possible, Epstein brushes it aside by "correct[ing]" Locke's philosophy to allow for the unfettered acquisition of private property. This correction, although done almost casually by Epstein, is a radical restatement of Locke's philosophy. As one commentator noted, it is "akin to a Christian claiming that Judaism is consistent with his religion, with a small correction of Judaism texts to embrace Jesus Christ as the Son of God."³²

*"Professor Epstein
is moved to
complete not
only the text of
the Constitution
by reference to
the Lockean
spirit, but
Locke's text
itself."*

— Charles Fried

Epstein's "Plain Meaning"

"My difficulty is not that Epstein's constitution would repeal much of the New Deal and the modern regulatory-welfare state but rather that these conclusions are not plausibly related to the original understanding of the takings clause."

— Robert Bork

Epstein's superficial and manipulative treatment of Locke, which occurs early on in *Takings*, gives a good preview of things to come. After explaining the philosophical foundations of his theory, Epstein then addresses constitutional interpretation directly. Contrary to generations of scholars who have struggled to make sense of the Takings Clause, Epstein suggests that the answer is easy: simply follow the ordinary language of the text. Epstein thus blithely contends, in a mere 12 pages of his 350 page book, that the language of the Takings Clause alone, which requires that "private property shall not be taken for public use without just compensation," renders suspect any interference with any strand in a property owner's bundle of rights—i.e., almost all social welfare and land-use regulation of the last sixty years. He recognizes that the key terms in the clause—private property, taken, public use, and just compensation—are not defined in the Constitution, but suggests that the terms can be concretely defined by looking to "the way these words [were] used in ordinary discourse by persons who are educated in the normal social and cultural discourse of their own time."

One has the immediate impression when reading this section of Epstein's book that it cannot be that simple, and one wonders why—if the answers are all in the plain language of the constitutional text—Epstein felt the need to begin his book with a discussion of natural rights and Locke's philosophy. The answers become clear in the ensuing chapters, as Epstein fails to adhere to the "plain language" approach he advocates and continually falls back on philosophical and natural rights arguments to support his theory. As Joseph Sax observed, Epstein's inexplicable shifts gives one the sense that Epstein is playing a game "whose rules only he knows."³³ Not surprisingly, Epstein's interpretive shell game "produces a Constitution that comports perfectly with his personal political philosophy."³⁴

An example should give a good idea of how Epstein accomplishes his task. Perhaps the most important question in takings law today is whether property owners should be compensated when a land-use regulation diminishes the value of a piece of property, but does not take away all value. True to his conservative values, if not to constitutional principle, Epstein argues that property owners of course must be compensated under such circumstances. According to Epstein, a "taking" has occurred whenever the government "diminish[ed] the rights of the owner in any fashion. . . no matter how small the alteration."³⁵

There is one problem with this contention: the word "take" does not mean "diminish" today, and there is no evidence that it ever did. The same is true with the word "alter"—it simply does not mean "take" and never did. There is thus no way to justify Epstein's conclusion as flowing from the text of the Takings Clause. On the contrary, it turns out that with regard to perhaps the most crucial and controversial issue in takings law, whether property owners should be compensated whenever regulations diminish but do not eviscer-

ate property values, Epstein's own anointed theory of constitutional interpretation—following the plain language of the text—leads to precisely the opposite result of that which he advocates. True to form, Epstein does not confront this obvious inconsistency, but ducks it; he never offers a definition of the term “take,” nor does he argue that his expansive notion of the reach of the Takings Clause is consistent with the ordinary meaning of the term “take.” Instead, he falls back on his philosophical argument that the Framers, in reliance on Locke (corrected, of course, to suit Epstein's theory), granted the government very limited power to interfere with private property. As observed by Professor Alexander, while Epstein's contention “is an argument for a broad construction of takings, it is surely not the argument of a textual literalist.”³⁶

The inconsistencies in Epstein's theory can be illustrated by another example. Epstein argues on the one hand that we should interpret the words of the Takings Clause according to the way those words were used by educated persons at the time of the framing of the Constitution. But then he suggests, on the other hand, that we should simply ignore what those same educated persons actually did in terms of regulating land, labor, or wages. It is therefore not important to Epstein that the framing generation allowed extensive land-use regulations and wage and price controls; Epstein is not at all concerned that his interpretation is inconsistent with the evidence regarding the Framers' original intent. Why, though, should we ignore what these educated persons did when trying to discern how these same educated persons would have interpreted the words in the constitution? After all, even Epstein acknowledges that historical sources “are exceedingly helpful in allowing us to understand the standard meanings of ordinary language as embodied in constitutional text.”³⁷ Historical sources, in turn, indicate quite strongly that the standard meaning of the phrase “take private property” did not encompass land-use regulations.³⁸

Epstein's Call For Judicial Activism

In short, Epstein's conclusions about the scope of the Takings Clause are at odds with the “plain language” method of constitutional interpretation which he advocates. His conclusions rest instead on vague, adulterated philosophical foundations that he fails to connect to the Constitution itself. The blatant and repeated inconsistency between his “plain language” approach and the radical results he reads into the Constitution, together with his occasional reliance on natural rights and his corrected version of Locke's philosophy, largely explain why *Takings* was received with such disdain by constitutional scholars. The book simply does not offer a principled means of interpreting the Takings Clause. Rather it offers an abundance of smoke and mirrors that advocates and judges sympathetic with Epstein's distaste of government regulation can use to provide some semblance of authority to their arguments about what the Takings Clause means. And this appears to be precisely what Epstein intended. In his book and in the op-ed pages of the *Wall Street Journal* in an article entitled “Needed: Activist Judges for

“The history presented in th[is] Article shows, to the contrary, that regulation of non-injurious uses of land was very common at the time of the nation's founding.”

— John Hart

Economic Rights,”³⁹ Epstein suggested that implementing his theory would require “a level of judicial intervention far greater than we now have, and indeed far greater than we ever have had.”⁴⁰

Epstein’s call for judicial activism has been answered in part by the Federal Circuit and the Supreme Court, both of which, as described later in this report, have expanded the scope of the Takings Clause in recent years, often along lines suggested in Epstein’s book.⁴¹ Epstein’s call has also inspired the constitutional litigation strategies of the current property rights movement, which increasingly has turned its attention to the federal judiciary as the means by which it will accomplish its agenda.⁴² Judicial activism, of course, is loudly decried by the same conservatives who comprise the property rights movement—Orrin Hatch, to cite one prominent example—on the grounds that unelected federal judges should not, without clear support in the Constitution, interfere with democratic law-making. This criticism, however, applies with perfect and ironic force to the expansion of the Takings Clause as such an expansion is without clear support in the Constitution or in the historical evidence regarding original intent. Indeed, prominent conservative legal scholars—including Robert Bork and Charles Fried—have strongly criticized the Takings Project on just this basis.⁴³

Nor can this particular brand of judicial activism be justified on the ground that federal courts would simply be correcting defects in the legislative process. Constitutional scholars have defended judicial protection of “discrete and insular minorities” against claims of judicial overreaching by arguing that it is appropriate, and indeed enhances the democratic operation of government, for federal courts to protect those who are shut-out from the normal political process because of systemic prejudice or a denial of access to power.⁴⁴ Judicial intervention, in other words, might be appropriate to correct a legislative process that does not pay sufficient attention to the needs and concerns of “discrete and insular” minorities. With regard to most property owners, and certainly with regard to developers, it is quite difficult to justify federal court intervention on the ground that such groups or individuals have limited access to or are routinely shortchanged by the political process.

In the end, then, Richard Epstein and the promoters of the Takings Project are calling for federal judges to interfere substantially with a plethora of democratically-enacted and democratically-supported legislative measures, even though such a result is not commanded by the language of the Constitution, not explained by reference to the Framers’ intentions, and not justified by any coherent constitutional theory. This call for heightened judicial protection, moreover, is made on behalf of a group that generally does quite well in the legislative process. It is difficult to imagine a less compelling agenda for the federal judiciary.

“In what follows I shall advocate a level of judicial intervention far greater than we now have, and indeed far greater than we ever have had.”

— *Richard Epstein*

Endnotes

- ¹ See *Lucas v. South Carolina Coastal Comm'n*, 505 U.S. 1003, 1028 n.15 (1992) (“Justice Blackmun is correct that early constitutional theorists did not believe that the Takings Clause embraced regulations of property at all. . . .”); see also, *id.* at 1056—58 (Blackmun J. dissenting); EPSTEIN, *supra* Ch. 1, note 2, at 26—29 (recognizing historical evidence that the many of the Framers thought the Takings Clause was limited in application to physical expropriations but concluding that there is no need “to take into account the actual historical intentions of any of the parties who drafted or signed the document”); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 825 (1995); ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990) at 230 (“My difficulty is not that Epstein’s constitution would repeal much of the New Deal and the modern regulatory-welfare state but rather that these conclusions are not plausibly related to the original understanding of the takings clause.”).
- ² *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 551—52 (1870).
- ³ 80 U.S. (13 Wall.) 166, 177—178 (1872).
- ⁴ *Id.* at 181.
- ⁵ 260 U.S. 393, 414 (1922).
- ⁶ *Id.* at 414—15.
- ⁷ *Mugler v. Kansas*, 123 U.S. 623, 665 (1887).
- ⁸ *Id.* at 669.
- ⁹ See *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) (prohibition on operation of a gravel pit); *Miller v. Schoene*, 276 U.S. 272 (1928) (infected cedar trees); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (prohibition on brickyards); *Murphy v. California*, 225 U.S. 623 (1912) (pool halls); *Powell v. Pennsylvania* 127 U.S. 678 (1888) (ban on sale of oleomargarine); see also *Chicago, Burlington & Quincy Ry. Co. v. Illinois*, 200 U.S. 561 (1906) (no compensation required when railroad forced to tear down and rebuild an unsafe bridge).
- ¹⁰ *Goldblatt*, 369 U.S. at 593; *Hadacheck*, 239 U.S. at 411; *Reinman v. City of Little Rock*, 237 U.S. 171, 176 (1915) (declaring it “beside the question” whether a livery stable was a common law nuisance and noting that the legislature could “declare that in particular circumstances . . . a livery stable shall be deemed a nuisance in fact and in law. . .”).
- ¹¹ *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386 (1926).
- Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even a half century ago, probably would have been rejected as arbitrary and oppressive. . . while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation.
- Id.* at 387.
- ¹² 438 U.S. 104 (1978).

¹³ *Id.* at 123—24.

¹⁴ *Id.* at 124.

¹⁵ *Id.* at 130—31 & n. 27.

¹⁶ *See Euclid*, 272 U.S. at 384 (permitting 75% diminution in value); *Hadacheck*, 239 U.S. at 405 (permitting 92.5% diminution in value from \$800,000 to \$60,000); *see also* *Concrete Pipe & Prod. of Cal., Inc. v. Constr. Laborers Pension Trust for So. Cal.*, 508 U.S. 602, 645 (1993) (rejecting a takings claim based on allegations that an employer’s “with-drawal liability” from a multi-employer pension plan required payments of “46% of shareholder equity,” on the grounds that “our case have long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking.”).

¹⁷ EPSTEIN, *supra* Ch.1, note 2, at xi (recognizing “a generous grant from the Institute for Educational Affairs”).

¹⁸ *Id.* at x.

¹⁹ *Id.*

²⁰ *See Penn Central*, 438 U.S. at 130—132.

²¹ EPSTEIN, *supra* Ch.1, note 2, at 58.

²² *See id.* at 57, 62.

There is no hierarchy among incidents, no degrees of ownership. There is a partial taking of property if possession is removed, and use and disposition remain; if use is removed, and possession and disposition remain; or if disposition is removed, and use and possession remain. Nor is there a requirement that the loss of the incident be total; partial losses of single incidents may determine the measure of damages, but may not negate the taking. Any deprivation of rights is a taking, regardless of how it is effected or the damages it causes.

Id. at 62.

²³ Thomas Ross, *Taking Takings Seriously*, 80 NW U. L. REV. 1591, 1592 (1987).

²⁴ Thomas C. Grey, *supra* Ch.1, note 8, at 24. Earlier in Grey’s article he notes that, in many respects, *Takings* “belongs with the output of the constitutional lunatic fringe.” *Id.* at 23.

²⁵ *See* Joseph L. Sax, *Takings*, 53 U. CHI. L. REV. 279, 279 (1986). For additional evidence of the disdain with which scholars received *Takings*, *see* text and notes below and Laurence H. Tribe, *AMERICAN CONSTITUTIONAL LAW* §9—6, at 606 n.6 (2d ed. 1988) (“the gaps, flawed assumptions and argumentative elisions in Epstein’s reactionary interpretation of the Fifth Amendment [are] too numerous to address fairly here . . .”); Martin S. Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 556, 567 (1995).

²⁶ *See* Ross, *supra* Ch.2, note 23, at 1592, 1603; Treanor, *supra* Ch. 2, note 1, at 815 (“[a]lmost certainly, in recent years Professor Richard Epstein has influenced political discourse about the Takings Clause more than any other academic”); Ed Carson, *Property Frights (property rights)*, REASON, May 1, 1996, at 29; (“Richard Epstein provided the intellectual framework for the property rights movement. . . . Public interest law

firms, such as the Institute for Justice, Pacific Legal Foundation, and the Northwest Legal Foundation, used Epstein's work to launch a property rights renaissance in the courts.")

- ²⁷ See e.g., Michael C. Blumm, *The End of Environmental Law? Libertarian Property, Natural Law, and the Just Compensation Clause in the Federal Circuit*, 25 *Env'tl L.* 171, 193 (1995) ("[w]hat is even more remarkable about *Florida Rock* is that its 'partial takings' doctrine seems to have come directly from Professor Epstein's book").
- ²⁸ See BORK, *supra* Ch.2, note 1 at 230 (1990) ("Epstein has written a powerful work of political theory, one eminently worth reading in those terms, but has not convincingly located that political theory in the Constitution"). As Professor Sax observed in his review, "the book purports to be constitutional theory, but it makes no effort to come to terms with more than a century of constitutional law development." Sax, *supra* Ch.2, note 25, at 280.
- ²⁹ See EPSTEIN, *supra* Ch.1, note 2, at 31.
- ³⁰ See Treanor, *supra* Ch.2, note 1 at 823—24 ("Epstein's equation of Lockean ideology with the political thought behind the Takings Clause is incorrect. While it would be wrong to say that Locke had no influence on the founding generation, it is equally incorrect to describe Lockean liberalism as *the* ideology of the framing."); Flaherty, *supra* Ch.2, note 25 at 567 ("if the past two generations of historical work have settled upon any point, it is that Lockean philosophy was *not* dominant in the eighteenth century. . . .")(emphasis in original).
- ³¹ See EPSTEIN, *supra* Ch. 1, note 2, at 10—11 (citing JOHN LOCKE, *OF CIVIL GOVERNMENT*, ¶27 (1690)).
- ³² *Id.* See also Charles Fried, *Protecting Property—Law and Politics*, 13 *HARV. J.L. & PUB. POL'Y* 44, 48—49 (1990). Fried, Solicitor General during Reagan's presidency, wrote with regard to Epstein's "correction" of Locke that "Locke himself. . . was insufficiently Lockean" for Epstein, and thus "Professor Epstein is moved to complete not only the text of the Constitution by reference to the Lockean spirit, but Locke's text itself." *Id.*
- ³³ Sax, *supra* Ch.2, note 25, at 280.
- ³⁴ *Id.* at 282.
- ³⁵ Epstein, *supra* Ch.1, note 2 at 57.
- ³⁶ Larry Alexander, *Takings of Property and Constitutional Serendipity*, 41 *U. Miami L. Rev.* 223, 225 (1986).
- ³⁷ EPSTEIN, *supra* Ch.1, note 2, at 29.
- ³⁸ See John F. Hart, *Colonial Land Use Law and Its Significance For Modern Takings Doctrine*, 109 *Harv. L. Rev.* 1252, 1258 (1996) ("Today's doctrine of regulatory takings only makes sense as a reading of the Takings Clause if, as the Court has said, land use regulation was confined to injurious uses when the Fifth Amendment was adopted, with regulation of noninjurious uses coming much later. (citation omitted). The history presented in the Article shows, to the contrary, that regulation of non-injurious uses of land was very common at the time of the nation's founding. This prevalence implies that the Framers did not address regulation in the Takings Clause because they did not regard regulation as a form of taking.") (citation omitted).

³⁹ Grey, *supra* Ch.1, note 8, at 22 n2 (quoting the article).

⁴⁰ See EPSTEIN, *supra* Ch.1, note 2, at 30.

⁴¹ See, eg., James L. Huffman, *Judge Plager's "Sea Change" in Regulatory Takings Law*, 6 *FORD. ENVTL. L.J.* 597, 600—10 (1995) (praising Judge Pager's opinion in *Florida Rock*, but suggesting that it could have been improved by an even closer adherence to the doctrine outlined by Professor Epstein); see also James L. Huffman, *A Coherent Takings Theory At Last: Comments on Richard Epstein's Private Property and the Power of Eminent Domain*, 17 *ENVTL. L.* 153 (1986).

⁴² See, eg., Fried, *supra* note 32, at 48 ("The text and inspiration for some of the boldest of the recent litigation efforts has been Richard Epstein's celebrated book, *Takings*.); Ed Carson, *supra* Ch.2, note 26; Mark Pollot, *GRAND THEFT AND PETIT LARCENY: PROPERTY RIGHTS IN AMERICA*, at 161 (1993) ("If lasting change is to come in property rights protection, it will come from court actions that resolve questions that are presently unresolved. Legislation is too open to change whereas judicial rulings of constitutional dimension cannot be changed by the legislature.").

⁴³ BORK, *supra* Ch.2, note 1, at 223, 230—231 ("[t]hough I am more in sympathy with [Epstein's] political ends than I am with the objectives of the ultraliberals, I do not think they establish satisfactorily that those ends may be reached through the Court"); see Fried, *supra* Ch.2, note 32, at 48—51. See also, Deborah Graham, *Conservative Academics: Rising Stars*, *Legal Times*, Mar. 18, 1985, p.1. ("Epstein has gained a certain amount of disfavor among some conservatives because they think he favors judicial activism."). In a typically superficial passage in his book, consisting of one and one-half pages, Epstein asserts that his theory does not "depend upon a belief in judicial activism in cases of economic liberties," because the consequences of his theory "are necessary implications derived from the constitutional text and the underlying theory of the state that it embodies." EPSTEIN, *supra* Ch.1, note 2, at 30—31. As explained above, Epstein's theory most certainly is not a necessary implication of the constitutional text. What "theory of the state" the text embodies, in turn, is a matter of serious scholarly debate, utterly ignored by Epstein, who inexplicably argues just pages before this assertion that constitutional terms should not be interpreted with reference to their purposes or the values served by them.

⁴⁴ The most famous explication of this political process theory of judicial review is John Hart Ely's *DEMOCRACY AND DISTRUST* (1982).

CHAPTER 3

THE ORIGINS OF THE TAKINGS PROJECT

MEESE JUSTICE AND THE "RADICAL PROJECT" TO THWART ENVIRONMENTAL LAWS

Extreme theories on Constitutional law are routinely expounded by law professors and, just as routinely, remain where they are formed: in the relative obscurity of academic law journals. In normal times, Epstein's theory would have met the same demise. But these were not normal times. Epstein's book was published in 1985, shortly after the reelection of Ronald Reagan to a second term in office: A heady time for conservatives and libertarians, particularly those interested in the development of constitutional law.

By 1985 a dramatic shift in the ideology of the federal judiciary was already well underway. In the Supreme Court, for example, Presidents Nixon, Ford and Reagan (in his first term) had named six of the nine then-sitting justices and the most liberal remaining justices (Blackmun, Brennan and Marshall) were aging, each approaching his 80's. With Reagan reelected and Republicans in control of the Senate, the writing was on the wall: conservatives would be able to complete a fundamental shift in the composition and ideology of the federal judiciary.

1985 thus represented a time of opportunity for conservative legal scholars and political operatives. It was a time not only to envision the end of a period of liberal judicial activism, but also a time to construct the blueprint for a new era of using the court system to further their political agenda. In the minds of many of the conservatives and libertarians that congregated in Washington at the beginning of President Reagan's second term in office, Professor Epstein's theory became that blueprint. Epstein became the "most requested speaker" at Federalist Society meetings throughout the country,¹ the choice of the Heritage Foundation to be a Supreme Court justice, and among the most influential intellectual leaders of the Reagan Revolution.² As one administration official commented in early 1985: "Epstein's ideas have begun to gain currency. . . a movement is forming around. . . a lot of the thoughts he's been in the forefront in promoting."³

*"Epstein's ideas
have begun to
gain currency... a
movement is
forming around...
a lot of the
thoughts he's
been in the
forefront in
promoting."*

*— Reagan
administration
official*

Within the Takings

*Clause, “a
revolution in, or
perhaps more
accurately, a
revisiting and
restoration of
economic liberty
is a prospect.”*

— *Edwin Meese*

At the center of this movement within the Reagan administration was second term Attorney General Edwin Meese III. To Meese, one of Reagan’s closest and most trusted advisers,⁴ the Reagan Revolution meant “[t]aking the Constitution, taking principals of free markets, taking the ideals of individual liberty, and translating them into action.”⁵ At a conference on economic liberties that he convened at the Justice Department in 1986, he called on conservatives throughout the country to “join us in what we would describe as a little constitutional calisthenics.”⁶ Within the Takings Clause, he argued, “a revolution in, or perhaps more accurately, a revisiting and restoration of economic liberty is a prospect.”⁷

As Charles Fried, the Solicitor General at the Justice Department during Meese’s tenure wrote in a now-famous passage:

Attorney General Meese and his young advisors—many drawn from the ranks of the then-fledgling Federalist Societies and often devotees of the extreme libertarian views of Chicago law professor Richard Epstein—had a specific, aggressive, and it seemed to me, quite radical project in mind: to use the Takings Clause of the Fifth Amendment as a severe brake upon federal and state regulation of business and property.

As Fried makes clear, the Takings Project had little to do with protecting individual landowners; the objective from the start was to further the Reagan Administration’s attack on health and safety regulations. In Fried’s words:

The grand plan was to make government pay compensation as for a taking of property every time its regulation impinged too severely on a property right—limiting the possible uses for a parcel of land or restricting or tying up a business in regulatory red tape. If the government labored under so severe an obligation, there would be, to say the least, much less regulation.⁸

Meese and his advisors laid the groundwork for the current Takings Project through a number of important measures. They convened conferences on “economic liberties” to discuss the strategies for reinvigorating the Takings Clause.⁹ They argued for developers and against the government position in Supreme Court cases including *Nollan v. California Coastal Commission*.¹⁰ And they issued the takings Executive Order (E.O. 12630), which required that “government decision-makers evaluate carefully the effect of their administrative, regulatory, and legislative actions on constitutionally protected property rights.”¹¹

RESHAPING THE FEDERAL JUDICIARY

The most important legacy of Meese’s radical project, however, stems from the effort, started in earnest during Meese’s term as attorney general and continued during the Bush presidency, to

appoint conservative activist judges to spots on the three federal courts—the U.S. Supreme Court, the Federal Circuit Court of Appeals, and the U.S. Claims Court—that control the direction of federal takings law. To read Professor Epstein’s theory on the Takings Clause into the U.S. Constitution, the promoters of the Takings Project needed judges on these courts that were willing to join in Meese’s “constitutional calisthenics”—i.e., conservative judges that, like Epstein, did “not believe in judicial restraint.”¹²

The Reagan and Bush administrations accomplished this transformation in the federal judiciary largely by delegating the responsibility for screening and choosing judges to members of the Federalist Society. As the New York Times reported:

President Ronald Reagan and President George Bush essentially turned over the privilege of selecting judges to lawyers in the conservative wing of the Republican party, who embarked on a crusade to remake the federal courts¹³

During Reagan’s second term in office, Assistant Attorney General Stephen Markman, who chaired the Washington Chapter of the Federalist Society, oversaw Meese’s judicial appointment process, with assistance from Society co-founders Liberman and Calabresi.¹⁴ Under Meese’s guidance, Markman and his assistants applied what one commentator termed “. . . the most systematic ideological or judicial philosophical screening of judicial candidates since the first Roosevelt administration. . . .”¹⁵ Similarly, President Bush delegated primary control over judicial selection primarily to the White House Counsel’s office, which, in the words of the Wall Street Journal was “an all-star team of the Federalists Society.”¹⁶ C. Boyden Gray, the White House Counsel and a Federalist Society member,¹⁷ delegated primary responsibility for selecting judges to Society co-founder, Lee Liberman,¹⁸ who evaluated the “ideological purity” all of Bush’s candidates for federal judgeship.¹⁹

The Rise of the Federalists

The Federalist Society was formed in 1982 by four law students—David McIntosh, Lee Liberman, Steve Calabresi and Spencer Abraham—at three top law schools, Harvard, Yale and the University of Chicago, with the immodest mission to “reorder priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law.”²⁰ Like Epstein, the Society’s principal target is federal regulation adopted during and since the New Deal. Indeed, the Society’s disdain for FDR’s New Deal is such that Society members routinely hiss whenever President Roosevelt’s name is mentioned.²¹

The Federalist Society was supported by conservative foundations as part of a much larger effort to develop a network of faculty, students and alumni at universities around the country to oppose and reverse progressive curricula and political

To read Professor Epstein’s theory on the Takings Clause into the U.S. Constitution, the promoters of the Takings Project needed judges on these courts that were willing to join in Meese’s “constitutional calisthenics.”

While promoted as a procedural reform to improve the handling of claims against the United States, the FCIA gave the Reagan and Bush Administrations a remarkable opportunity to shape these two critical courts.

thought at the nation's campuses. The Institute for Education Affairs and the Olin Foundation funded the Federalist Society's first symposium at Yale Law School. During the same few years, IEA and Olin also helped establish conservative newspapers, such as the Dartmouth Review, at universities across the country and IEA bankrolled Professor Epstein in publishing *Takings*.²²

Less than four years after its inception, the Federalist Society had chapters across the country, thousands of members and a \$400,000 annual budget. By the end of Reagan's second term, Steve Calabresi, one of the groups founders, was able to claim that "more than half of the 153 Reagan-appointed Justice Department employees and all 12 assistant attorney generals are members or have spoken at Federalist Society events."²³

The Federal Circuit and the Court of Federal Claims

The Federal Circuit Court of Appeals and the Court of Federal Claims were both created in 1982 and vested with the exclusive jurisdiction to hear takings claims against the federal government seeking over \$10,000 in money damages.²⁴ This jurisdictional grant gives these courts a singular ability to shape the development of takings law. In particular, subject only to the discretionary review of the Supreme Court, these courts have the power to determine the viability of critical environmental laws including the wetlands provision of the Clean Water Act, the habitat protection provisions of the Endangered Species Act, and the rail banking provision of the Rails-to-Trails Act. The Takings Project's most important victories stem from the Reagan and Bush Administrations' careful shaping of the ideological composition of these two critical courts.

The Federal Courts Improvement Act

Early in his first term, while Republicans controlled the Senate, President Reagan ushered through Congress the Federal Courts Improvement Act of 1982 (FCIA).²⁵ The Act replaced the former Court of Claims and Court of Custom and Patent Appeals with a new U.S. Claims Court (now known as the Court of Federal Claims) and established the Federal Circuit Court of Appeals to hear appeals from the Claims Court.

While promoted as a procedural reform to improve the handling of claims against the United States, the FCIA gave the Reagan and Bush Administrations a remarkable opportunity to construct these two critical courts. While the active commissioners on the former Claims Court automatically became judges on the new court, the statute provided that their terms would all expire, at the latest, on October 1, 1986.²⁶ Thus, by the middle of his second term, Reagan was able to appoint every judge on the Court of Federal Claims, including the Chief Judge. Similarly, while appellate judges from the former Court of Claims and Court of Customs and Patent Appeals initially filled the 12 judgeships on the Federal Circuit, the majority of these judges retired or took senior status rather than presiding over

a dramatically expanded roster of cases. As a result, Presidents Reagan and Bush had the opportunity to make 11 appointments to the Federal Circuit and to name 8 of the 11 judges currently serving on the court.²⁷

The Federal Circuit Court of Appeals

Presidents Reagan and Bush used their 11 appointments to the Federal Circuit to create the nation's most activist conservative court on takings issues. They accomplished this by appointing judges who were well trained as political operatives. For example, Judge Randall Rader was appointed to the Federal Circuit after serving for nearly eight years as Judiciary Committee counsel to Senator Orrin Hatch (R-Utah). Judge Robert Michel, similarly, was appointed to the bench after serving as a top aide and counsel for Senator Arlen Specter (R.-Penn.). Judge Robert Mayer served as deputy to the current Ninth Circuit Court of Appeals judge Alex Kozinski during Kozinski's controversial stint as director the Special Counsel's office at the Merit Systems Protection Board.²⁸

The most activist and influential Reagan/Bush appointee has been S. Jay Plager. Plager, who lists Federalist Society membership on an official biography,²⁹ was appointed to the bench by President Bush in 1989, after several years at the forefront of President Reagan's attack on federal environmental, health, and safety regulations. At the end of Reagan's second term, Plager simultaneously served as Administrator of the OMB's Office of Information and Regulatory Affairs,³⁰ and as Executive Director of Reagan's Vice-Presidential Task Force on Regulatory Relief.³¹

At OMB, Plager headed a staff of 60 employees who were responsible for ensuring that the benefits of regulations promulgated by federal agencies outweighed the costs of the regulation to industry.³² With the advent of Reagan's Executive Order on takings, Plager's office at OMB was also given a central role in assessing the takings implications of new federal regulations.³³ As Executive Director of the of the Vice President's Task Force on Regulatory Relief, Plager served as the conduit between industries seeking relief from regulatory burdens and the administration officials empowered to grant such relief.³⁴

The Court of Federal Claims

Presidents Reagan and Bush followed a similar pattern in filling slots on the Court of Federal Claims. As Clint Bolick, the Litigation Director for the Institute for Justice, has noted:

The Claims Court is a place where the Reagan and Bush Administrations have been able to place top-notch conservative judges without getting much attention. That is the result of liberals being somewhat asleep at the switch and the Administrations' being extremely sophisticated in their selection and placement of judges.³⁵

Plager was appointed to the bench by President Bush in 1989, after several years at the forefront of President Reagan's attack on federal environmental, health, and safety regulations.

Judge Smith, who calls Professor Epstein one of his intellectual heroes, is the judiciary's most vocal cheerleader for the Takings Project.

Most notably, Reagan appointed Loren Smith, a member of President Nixon's Watergate defense team and general counsel to Reagan's 1976 and 1980 presidential campaigns, as Chief Judge of the Court of Federal Claims.

Judge Smith, who calls Professor Epstein one of his intellectual heroes,³⁶ is the judiciary's most vocal cheerleader for the Takings Project.³⁷ The "darling of conservative members of Congress,"³⁸ Judge Smith has regularly accepted invitations to testify on behalf of property rights legislation. In the 104th Congress, for example, Judge Smith testified in favor of the provisions of Senator Dole's Omnibus Property Rights Bill of 1995, arguing that the bill was necessary to "correct[] procedural and structural problems faced by [takings] litigants." While disclaiming any opinion on the substantive provisions in the bill, Judge Smith asserted that Congressional action was needed to protect "some of the most vital interests of any free society" and to free himself and his colleagues from the burden of "the appearance of anti-democratic law-making in order to honor their oath and decide a takings claim."³⁹ This term, Judge Smith has testified in favor of procedural reform bills that would expand his court's jurisdiction to hear takings cases.⁴⁰

Judge Smith has also championed property rights on the lecture circuit.⁴¹ Between 1995 and 1996, for example, Judge Smith was reimbursed by the Federalist Society for speeches to at least six Society chapters.⁴² The year before, the same year Judge Smith awarded a coal company \$300 million in a takings case because the government would not allow strip mining of an environmentally sensitive property,⁴³ Judge Smith was flown to Tucson, Arizona to give a speech to the National Coal Lawyers Association.⁴⁴ His introduction to a symposium conducted by the National Legal Center for the Public Interest, an umbrella group for conservative legal foundations, is characteristic of Judge Smith's clarion calls for judicial activism in favor of property owners:

[t]he reason takings jurisprudence is such a challenge for the judiciary and the legal system, however, is that the other protections for our economic liberty have vanished; thus, takings law has become the only area where citizens can seek any redress from the legal system for government intrusion. . . . This puts enormous strain on takings doctrine and the courts. The cases are asked to do the work the Framers assigned to all three branches, and perhaps most importantly to the States and their tripartite governments. . . . But for good or ill, this task has devolved on the courts, and they must do their job to make the Fifth Amendment's takings guarantee as real as other constitutional protections we hold so dear.⁴⁵

Judge Smith's most lasting accomplishment may well stem from his intense lobbying of behalf of himself and President Reagan's other appointees to the Claims Court. Under the FCIA, Claims Court judges were appointed to 15-year terms. This provision created both the opportunity for Reagan to appoint every judge on the Claims

Court and the downside that a successor with very different views on the constitutionality of efforts to protect the environment could similarly remake the court and reverse the direction of its jurisprudence.

Because of Judge Smith's lobbying effort, however, President Clinton's opportunity to remake the Claims Court never really materialized. Shortly after being named Chief Judge, Judge Smith lobbied and ultimately convinced the federal judiciary's Administrative office, headed by Chief Justice Rehnquist, to recommend significant changes to the tenure system for Claims Court judges.⁴⁶ As a consequence of these reforms, Claims Court judges that request, but do not receive reappointment automatically receive "senior status" and can continue to hear cases. This tenure system makes it difficult for the Clinton Administration and future presidents to significantly alter the Court's ideology.⁴⁷

The Supreme Court

Presidents Reagan and Bush were also very successful in appointing justices to the Supreme Court that are sympathetic to the Takings Project. Takings cases in the Supreme Court in recent years have been very contentious and very close. In each case, Reagan and Bush appointees, typically led by Justice Antonin Scalia, have formed the block necessary for a property-owner victory.⁴⁸ For example, in the Court's 1994 decision in *Dolan v. Tigard*, Chief Justice Rehnquist (Reagan's choice to be Chief Justice) was joined by four Reagan and Bush appointees (O'Connor, Scalia, Thomas and Kennedy) in siding with the landowner. Similarly in *Lucas v. South Carolina Coastal Council*, the same five justices constituted five of the six votes received by *Lucas*. As a result of these appointments to the high court, when President Bush left office in 1993, six of the nine then-sitting justices were very sympathetic to arguments made by property owners.⁴⁹

Not surprisingly, the justice leading the Supreme Court in revising takings doctrine has been Antonin Scalia. Scalia, a colleague of Professor Epstein's at the University of Chicago Law School, had served as the faculty advisor to Lee Liberman and David McIntosh in founding the Federalist Society.⁵⁰ Liberman, then at the Justice Department, helped prepare Scalia for Senate confirmation hearings. During his first term on the bench (the term he authored the Court's opinion in *Nollan*), Scalia hired Liberman and Gary Lawson, two of the five co-founders of the Federalist Society, to be his law clerks.⁵¹ Calabresi, a third Society founder, clerked for Scalia the following year.⁵²

At the end of President Bush's term in office, therefore, judges sympathetic to the Takings Project dominated the Federal Circuit and the Court of Federal Claims, and held a solid majority on the Supreme Court. The stage was set for success in the litigation campaign to use those judges to advance the Takings Project.

Takings cases in the Supreme Court in recent years have been very contentious and very close. In each case, Reagan and Bush appointees, typically led by Justice Antonin Scalia, have formed the block necessary for a property-owner victory.

Endnotes

- ¹ Grey, *supra* Ch.1, note 8, at 23.
- ² Graham, *supra* Ch.2, note 43 at 1 (“Epstein, 42, is among those academicians mentioned most frequently as having the potential to be a major influence in Reagan’s second term, influence that might land him a judicial appointment. In fact, Epstein — along with Bork and Scalia — was mentioned as a possible Supreme Court appointee in a recent poll of leading conservatives.”).
- ³ *Id.*
- ⁴ See HERMAN SCHWARTZ, PACKING THE COURTS, THE CONSERVATIVE CAMPAIGN TO REWRITE THE CONSTITUTION 31 (1988).
- ⁵ See Major Policy Statements of the Attorney General, Edwin Meese III, 1985—1988 at 183 (address to the Conservative Political Action Committee Conference, 2/19/87).
- ⁶ See *id.* at 142 (address to the First Annual Department of Justice Conference on the Constitution, Economic Liberties, and the Extended Commercial Republic, June 14, 1986).
- ⁷ *Id.* at 141.
- ⁸ ORDER AND LAW, *supra* Ch.1, note 1 at 183 Meese himself does not dispute the existence of the grand plan. Confronted with Fried’s account of his “quite radical project,” Meese bristled and commented defensively: “maybe it is a radical departure from the regulatory mess we are in right now, but it’s not a radical departure from the constitution.” Tom Castleton, *Claims Court Crusader: Chief Judge Puts Property Rights Up Front*, LEGAL TIMES, Aug. 17, 1992, at 1.
- ⁹ See Major Policy Statement of the Attorney General, *supra* Ch. 3, note 5, at 142.
- ¹⁰ See Brief for the United States as Amicus Curiae Supporting Reversal, 86—133, at 22- 23; DOUGLAS KMIEC, THE ATTORNEY GENERALS LAWYER at 125 (1992).
- ¹¹ See Executive Order 12630 (March 15, 1988) at 1(b) President Reagan promoted his Executive Order as necessary to ensure federal agency compliance with *Nollan* and *First English*, but, as many commentators have noted, the Order goes far beyond the mandates of those cases. See Glenn P. Sugameli, *Takings Issues in Light of Lucas v. South Carolina Coastal Council: A Decision Full of Sound and Fury Signifying Nothing*, 12 VA. ENV’T L.J. 439, 442—447 (1993) (collecting authorities). Ultimately, E.O. 12630 was used as the framework for the property rights legislation that came close to becoming law during the 104th Congress. See *id.*
- ¹² Graham, *supra* Ch.2, note 43 at 1.
- ¹³ Neil A. Lewis, *A Republican Senator Forces the Administration to Rethink Strategy on Judicial Appointments*, N.Y.TIMES, Dec. 9, 1994, at 1986. see also Roger J. Miner, Remark, *Advice & Consent in the Theory and Practice*, 41 AM. U. L. REV. 1075, 1080—81 (1992) Roger Miner, a Judge on the Second Circuit Court of Appeals describes the remarkable rise of the Federalist Society from obscurity to prominence as follows:

The force of history and attachment to the coattails of political

winner have catapulted [Federalist Society members] to positions of power, first as law clerks, then as movers and shakers in the office of the Attorney General and now in the office of the President. This has been accomplished not by acquiring political power, but by co-opting it.

Id. at 1081.

¹⁴ See Crocker Coulson, *Federalist Papers*, NEW REPUBLIC, Dec 1, 1986, at 23.

¹⁵ Sheldon Goldman, *Reagan's Second Term Judicial Appointments: The Battle at Midway*, 70 JUDICATURE 324, 326 (1987); see also, DAVID G SAVAGE, TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT 422—23 (1993).

¹⁶ Paul A. Gigot, *Supreme Court: An Emerging Case of Poetic Justice*, WALL ST. J., Jan. 27, 1989.

¹⁷ See Al Kamen & Ruth Marcus, *A Chance to Deepen Stamp on Courts*, WASH POST, Jan. 29, 1989, at A1. Gray is now on the Society's Board of Trustees. See FEDERALIST SOCIETY FOR LAW AND PUBLIC POLICY STUDIES, 1996 ANNUAL REPORT (1997).

¹⁸ See Miner, *supra* Ch. 3, note 13, at 1081—82 (Murray Dickman was the Attorney General's point man on judicial nominations Obviously he deferred to Ms. Liberman. The present Attorney General [(Thornburgh)] seems to be little more than a conservative adjunct of the White House Counsel's office." (citations omitted)).

¹⁹ See Miner, *supra* Ch. 3, note 13, at 1080—81 ("Lee Liberman . . . examines all candidates for ideological purity. It is well known that no federal judicial appointment is made without her imprimatur."); see also Amy Singer, *A Federalist in the White House*, Am. Law., Oct. 1991, at 87.

²⁰ Federalist Society 1997—1998 Pamphlet on Student Division Membership and Benefits.

²¹ See Neil A. Lewis, *Conservative Outsiders Now at the Hub of Power*, N.Y. TIMES, Mar. 29, 1991, at B16; Peter Swire & Simon Lazarus, *Reactionary Activism: Conservatives and the Constitution*, New Republic, Feb. 22, 1988, p.17 (discussing an October 1987 Federalist Society conference on "Constitutional Protections of Economic Activity" where Professor Epstein served as the Keynote Speakers and argued that the Takings Clause "invalidates much of the 20th Century legislation" including "modern zoning, landmark preservation, and rent control statutes. . .").

²² See, JEAN STEFANIC & RICHARD DELGADO, NO MERCY, HOW CONSERVATIVE THINK TANKS AND FOUNDATIONS CHANGED AMERICA'S SOCIAL AGENDA 109 (1996).

²³ Neil A. Lewis, *Conservative Outsiders Now at the Hub of Power*, N.Y. TIMES, Mar. 29, 1991, B16.

²⁴ See 28 U.S.C. §1346, 1491 (1994).

²⁵ Federal Courts Improvement Act of 1982, Pub L. No. 97—164 (1982).

²⁶ 28 U.S.C. §171 (1994). Unlike most federal judges, who receive lifetime appointments, Court of Federal Claims judges are appointed for terms of 15 years. See 28 U.S.C. §172 (1994).

²⁷ See Huffman, *supra* Ch.2, note 41, at 599 n14 ("because the Federal Circuit was a new court in 1983, most of its members were appointed

during the Reagan and Bush Administrations, thus creating somewhat more philosophical agreement among its members than exists on other courts of appeals”).

²⁸ Terence Moran, *Nominee’s Pentagon Speech Questioned*, LEGAL TIMES, May 18, 1987 at 6.

²⁹ See 1996 Judicial Staff Biography 851-852.

³⁰ See generally SUSAN J. TOLCHIN & MARTIN TOLCHIN, *DISMANTLING AMERICA—THE RUSH TO DEREGULATE* (1983).

³¹ *Former Hoosier Dean to be Nominated to Court*, UPI, Oct 2, 1989, available in LEXIS, UPI File; see also Steven Waldman, *Watching the Watchdogs*, NEWSWEEK, Feb. 20, 1989.

³² See Robin E. Folsom, *Executive Order 12630: A President’s Manipulation of the Fifth Amendment’s Just Compensation Clause to Achieve Control over Executive Agency Regulatory Decision Making*, 20 B.C. ENVTL. AFF. L. REV. 639, 650—659 (1993) (discussing the Role OMB’s Office of Information and Regulatory Affairs (OIRA) played in implementing Reagan’s Executive Orders on cost/benefit analysis (E.O. 12,291) and takings (E.O. 12,630)).

³³ E.O. 12,630 at Section 5(b), 53 Fed. Reg. 8859 (1988), reprinted in 5 U.S.C. §601 (1988) (requiring that agencies identify and address takings implications in submissions to OMB); Folsom, *supra* Ch. 3, note 32, at 687 (“the [Takings] Order adds weight to the cost-side of proposed regulations that have takings implications. This allows an opportunity for OMB to prevent agencies from implementing any regulations with takings implications”).

³⁴ Folsom, *supra* Ch. 3, note 32, at 649 (“[t]he Task Force worked together with American industries to determine which regulations were overly burdensome to those industries and needed to be relaxed”).

³⁵ W. John Moore, *Just Compensation*, 1992 NAT’L J. 1404, 1406.

³⁶ David Helvarg, *Legal Assault On the Environment*, THE NATION, Jan 30, 1995, at 126.

³⁷ With his handlebar mustache and affinity for performing magic tricks, Judge Smith has shown what one reporter called a “clear penchant for the limelight” Tom Castleton, *Claims Court Crusader: Chief Judge Puts Property Rights Up Front*, LEGAL TIMES, Aug. 17, 1992, at 16. See also Loren Smith, *Introduction to National Legal Center for the Public Interest’s Seminar on Regulatory Takings*, 46 S.C. L. REV. 525, 525 (1995) (“[t]he National Legal Center for the Public Interest asked me to write this introduction to this symposium on regulatory takings. Why should I have been asked? Maybe because they knew I would accept? Possibly. Or perhaps it was because the court upon which I serve hears all money claims. . . against the federal government? Likely reason. Or perhaps because I have been associated with the Center in the past as an author and speaker? That’s it!”).

³⁸ Terry Carter, *The Court Conjurer*, AM BAR. ASS’N. J. at 73 (1997).

³⁹ Statement of Loren Smith on The Omnibus Property Rights Act of 1995 (S 605) before the Senate Committee on the Judiciary, April 6, 1995 at 2—4.

- ⁴⁰ Statement of Loren A. Smith on H.R. 992, The Tucker Act Shuffle Relief Act of 1997, Sept. 10, 1997.
- ⁴¹ In addition to the speeches discussed above, see *Lawyers Chapters Focus Attention on Judicial Activism, Local Self-Government*, THE FEDERALIST PAPER, (The Federalist Society for Law and Public Policy Studies) May 1997, at 3 (reporting on a speech Judge Smith gave to the Society's Sacramento chapter entitled "Life, Liberty and Whose Property" in which Judge Smith "touched upon the Takings Clause as well as the importance of property rights in preserving democracy and free expression").
- ⁴² See Loren A. Smith, 1995 Financial Disclosure Report (filed June 14, 1996).
- ⁴³ *Whitney Benefits v. U.S.*, 30 Fed. Cl. 411, 416 (1994) (ruling that Whitney Benefits was entitled to compound interest on an early judgment by Judge Smith awarding Whitney \$60 million for the taking of the right to strip mine coal. See 18 Cl. Ct 394 (1989), *modified*, 20 Cl. Ct. 324 (1990), *aff'd* 926 F.2d 1169, *cert. denied*, 502 U.S. 952 (1991), raising the governments liability to over \$300 million.
- ⁴⁴ See Loren A. Smith, 1994 Financial Disclosure Report (filed July 17, 1995).
- ⁴⁵ Smith, *supra* Ch. 3, note 37, at 525; see also, *Claims Court Crusader*, *supra* Ch. 3, note 37, at 1 (quoting Judge Smith:"to the extent that New Deal jurisprudence became identified with basically saying economic rights don't exist . . . then its contrary to the Constitution and has to be ignored.").
- ⁴⁶ See 28 U.S.C. 178 (b) (1995). Terry Carter, *U.S.. Claims Court Anxious To Secure Further Respect*, L.A. DAILY JOURNAL, Jan. 3, 1992, at 1.
- ⁴⁷ While President Clinton can, if he chooses, appoint judges to take the positions of the Reagan appointed judges whose terms are expiring, he cannot remove the Reagan-era judges (including Judge Smith) from the bench or prevent these judges from hearing cases and drawing a federal salary equal to that of a judge in active service. see 28 U.S.C. §178(e).
- ⁴⁸ See Robert Meltz, *The Property Rights Issue*, Cong Res. Service, No. 95—200A (Jan. 20, 1995)("votes in several of the Court's recent land use/taking cases make unequivocally plain that where a justice stands on the taking question may depend largely on his or her political philosophy."); Richard J. Lazarus, *Counting Votes and Discounting Holdings in the Supreme Court's Takings Cases*, 38 Will.& Mary L. Rev. 1099 (1997).
- ⁴⁹ President Clinton may have succeeded in shifting the balance in takings cases to 5 to 4 by replacing Justice White, who typically sided with property-owners, with Justice Ginsberg, who, at least in *Dolan*, sided with the City of Tigard It is too early to tell whether President Clinton's appointment of Justice Breyer to replace Justice Blackmun—an impassioned supporter of land use regulation—will have any impact on the Court's Takings Clause jurisprudence.
- ⁵⁰ See Al Kamen, *Scalia's Federalists From Justice*, WASH POST, Dec. 12, 1986, at A23.
- ⁵¹ See *id*; W. John Moore, *Right For Now*, NAT'L J., at 594.
- ⁵² See Kamen, *supra* Ch. 3, note 50, at A23.

CHAPTER 4

THE TAKINGS PROJECT

With supportive judges sitting in critical places in the federal judiciary, a large and still-growing collection of corporations, non-profit law firms and think tanks has assembled to assist developers in bringing takings cases through the court system and to these judges.

THE COURTHOUSE LAWYERS

At the center of the Takings Project is a nationwide network of non-profit legal foundations that bring takings cases free-of-charge to their clients. At least 12 active organizations—the Pacific Legal Foundation, the Mountain States Legal Foundation, the Institute for Justice, the New England Legal Foundation, the Defenders of Property Rights, the Southeastern Legal Foundation, The Northwestern Legal Foundation, the Oregonian's in Action Legal Center, the Texas Justice Foundation, the Stewards of the Range, the Landmark Legal Foundation and the Washington Legal Foundation—with a combined budget in excess of \$15 million, litigate takings cases on behalf of property owners.¹

These non-profits act as the highest profile courthouse lawyers in the Takings Project. Dubbing property rights the “civil rights issue of the 90’s,”² they have adopted what Charles Fried termed an “ACLU-type constitutional litigation strategy” for turning Professor Epstein’s flawed theory on takings law into the law of the land.³ As one participant declared: “I look upon us as the bearers of the torch of the civil rights movement. . . . I see us as successors to Martin Luther King and Thurgood Marshall.”⁴ This labeling is particularly ironic because many of the same groups leading the Takings Project—most prominently the Pacific Legal Foundation and the Institute for Justice—are simultaneously fighting to limit or dismantle the civil rights laws and Supreme Court opinions that represent an important part of Marshall and King’s life work.⁵

The leading force in this litigation campaign is the Pacific Legal Foundation (PLF). Formed in Sacramento in the early 1970’s by aides to Governor Ronald Reagan, PLF has spent, in their words “a quarter of a century devoted to defending property rights, the free

“I look upon us as the bearers of the torch of the civil rights movement.

. . . I see us as successors to Martin Luther King and Thurgood Marshall.”

— *Richard Samp, Washington Legal Foundation*

PLF has either represented the plaintiff or assisted the plaintiff in obtaining Supreme Court review in each of the last four important regulatory takings cases heard by the Supreme Court.

enterprise system, and the concept of limited government.”⁶ PLF’s goal, like Epstein’s, is to use the Takings Project as a way to “get rid of the regulatory state established under F.D.R.’s New Deal.”⁷

Begun with a single office and a \$100,000 budget, PLF has grown with the Takings Project. It is now a national organization with offices in 5 states, a budget of over \$4 million and a litigation docket consisting of 60 of the most important takings cases from around the country.⁸ PLF only represents a small number of plaintiffs in the time-consuming and expensive early stages of litigation.⁹ Typically, PLF will monitor cases from around the country, weigh in with an amicus brief as a case reaches a federal appellate court or a state supreme court, and then, if the case has a sympathetic plaintiff and presents an important issue upon which PLF desires Supreme Court review, PLF will assist the landowner in petitioning the Supreme Court to review the case.¹⁰

The campaign has been a remarkable success for PLF. PLF has either represented the plaintiff or assisted the plaintiff in obtaining Supreme Court review in each of the last four important regulatory takings cases heard by the Supreme Court,¹¹ and the property owner has prevailed in each of the cases. These cases, in turn, have set the stage for even more dramatic victories in the Federal Circuit and other federal courts. As PLF Founder and past-President Ronald Zumbrun has boasted “[w]e see the 90s as our decade. . . . We have the weapons—court precedent, experienced personnel, and credibility.”¹²

The Institute for Justice has also been playing an increasingly large role in takings litigation. The Institute was founded in early 1991 by William Mellor, a Reagan Administration official and a former litigator for the Mountain States Legal Foundation,¹³ and Clint Bolick, a veteran of the Meese Justice Department and a former assistant to Supreme Court Justice Clarence Thomas when Thomas chaired the EEOC. The Institute spends its more than \$2 million annual budget to convince conservatives that “‘conservative judicial activism’ is neither an oxymoron nor a bad idea.”¹⁴

The Institute’s Center for Private Property Rights both litigates cases on behalf of property owners and supports property owners in cases brought by other groups.¹⁵ The Institute distinguishes itself from other legal foundations by being able to claim that it is not just inspired by Professor Epstein, Epstein is a regular contributor. In three recent Supreme Court takings cases, *Lucas*, *Dolan* and *Suitum*, Professor Epstein has co-authored an amicus brief on the Institute’s behalf.¹⁶

A third organization, the Defenders of Property Rights (DOPR), distinguishes itself as “[t]he nation’s only legal defense foundation dedicated exclusively to the protection of property rights.”¹⁷ Founded by the husband and wife team of Roger and Nancie Marzulla, two veterans of both Mountain States Legal Foundation and the Meese Justice Department,¹⁸ DOPR boasts that it has won

13 of the 15 property rights cases in which it has acted as lead counsel and has assisted property owners in 61 other cases.¹⁹

The non-profit law firms that are working takings cases through the courts coordinate with each other through regular meetings in Washington DC hosted by the Heritage Foundation. Edwin Meese, who started the Takings Project more than a decade ago, continues to play an important role in overseeing its progress. According to three published reports, Meese, now a Ronald Reagan fellow at the Heritage Foundation, Co-Chair of the Board of Trustees of the Federalist Society and a Board Member of the Defenders of Property Rights, oversees regular meetings at the Heritage Foundation that coordinate the participants in the Takings Project.²⁰

The legal foundations are assisted in litigating takings cases by an army of pro bono lawyers from private law firms. This pro bono network amplifies the forces marshaled by the legal foundations.²¹ For example, in 1993, Washington Legal Foundation reported that forty-eight law firms, including top Washington DC law firms such as Arnold & Porter and Covington & Burling, donated pro bono services to WLF.²²

The largest player in organizing this effort is the Federalist Society. The Society has expanded its efforts to attract practicing lawyers in recent years and now has a lawyers' division with 59 chapters and 18,000 members.²³ A central focus of this expansion has been the establishment of a pro bono resources network that links conservative lawyers who wish to litigate on behalf of conservative and libertarian causes with legal foundations such as PLF, which conduct such litigation.²⁴ The Society reports that over 1,000 members have joined this network.²⁵

The Institute for Justice runs a similar network dubbed the Human Action Network or HAN. HAN is comprised of over 300 lawyers that have participated in the Institute's lawyer and law student training programs. HAN seeks to "broaden our movement's impact exponentially" by enlisting lawyers and law students trained by the Institute to bring cases that further the Institute's ideological agenda.²⁶

A final important player in guiding takings cases through the courts are the associations representing developers. The largest player in this industry-based effort is the National Association of Home Builders (NAHB). With 190,000 members, a \$48 million budget,²⁷ a staff in excess of 350, and 850 affiliated state and local associations nationwide,²⁸ the NAHB is one of the nation's best organized and most powerful lobbying organizations. The NAHB has always filed amicus briefs in support of property owners in important takings cases and supported local associations in litigating cases.²⁹ In several recent high-profile cases, however, the NAHB has delved more directly into the fray by bringing a series of cases as plaintiffs on behalf of its members.³⁰

Edwin Meese, who started the Takings Project more than a decade ago, continues to play an important role in overseeing its progress.

TRAINING LAWYERS AND JUDGES

The non-profit organizations leading the Takings Project also devote considerable resources to training the pro bono counsel, counsel for developers and private practitioners that assist them in litigating takings cases, and to training and rewarding the judges that provide them with critical victories in takings cases.

Lawyer Training

The most important actor in the lawyer training effort is again the Federalist Society. The Society's Lawyer's Division operates a practice group on "Environmental Law and Property Rights" to discuss topics such as "the 'takings' implications of zoning and major federal pollution laws," and conducts workshops training lawyers on bringing takings cases.³¹ The tenor of these workshops can be gleaned from the report filed by the Chicago Daily Law Bulletin on a 1992 Federalist Society conference entitled "Takings and the Environment: The Constitutional Implications of Environmental Regulations."³² The Bulletin described the seminar as "a national revival meeting for takings lawyers" and went on to report:

Environmental takings are hot and the specialty bar knows it. They've tasted blood, and they want flesh. Throw them a bone and they'll bite off your arm. They're bigger now and, thanks to recent court rulings, they've got teeth.³³

The Bulletin explained this fervor as follows: "[i]ts like they've been a suppressed religious cult for years and suddenly gained legitimacy and mainstream currency."³⁴

The PLF also conducts takings training seminars in venues across the country discussing topics such "Getting Into State Court," "Trying a \$200 Million Dollar Regulatory Taking Case," and "Proving Denial of All Economically Viable Use." While billed as non-partisan events and often co-sponsored by prominent legal organizations such as the American Law Institute and the American Bar Association, these seminars have a decided ideological slant. Several participants in an October 1996 PLF training seminar in Washington DC event described the seminar as a "property rights rally" where opposing views were repeatedly deemed "bullshit" by the conference chair.³⁵

Finally, the Institute for Justice plays an important supporting role. The Institute hosts "Policy Activist Seminars" each year for practicing lawyers intended to "develop a whole new network of conservative legal crusaders across the country."³⁶ These seminars seem to be having the intended impact: Edwin Meese, a speaker at the Institute's 1995 seminar declared the seminar to be "one of the more important events in the conservative movement."³⁷ A recent attendee reported leaving the seminar "considerably energized and looking eagerly for someone to sue."³⁸

Several participants in an October 1996 PLF training seminar in Washington DC event described the seminar as a "property rights rally" where opposing views were repeatedly deemed "bullshit" by the conference chair.

Training Judges

Conservative and libertarian non-profits are also devoting significant resources to keeping conservative activist judges in the fold. A number of non-profit organizations, including the Manhattan Institute's Center for Judicial Studies, the Liberty Fund and George Mason University's Law and Economics Center, host all-expense paid judicial seminars that discuss libertarian views on topics including property rights.³⁹

The most significant judicial training program, both in its popularity among judges and in its focus on property rights, are the programs for federal judges run by the Foundation for Research on Economics and the Environment (FREE).⁴⁰ FREE is a Montana-based non-profit that promotes "free market environmentalism," a doctrine that relies on free market and private property rights as the best protectors of the environment. Perhaps the leading legal academic proponent of free market environmentalism is FREE trustee James Huffman. Huffman, in turn, is Professor Epstein's most consistent proponent and one of the few academics to vocally promote judicial activism on behalf of property owners.⁴¹

Since 1992, FREE has offered summer seminars for federal judges. The seminars provide judges with free travel and accommodations at a ranch resort near Bozeman, Montana to obtain their presence at lectures that, in their words, "emphasiz[e] property rights, market processes and responsible liberty."⁴² As FREE explains:

Our seminars in environmental economics and policy provide federal judges economic, scientific and ethical insights when they hear environmental cases. We explain how secure property rights, entrepreneurial innovations and the market process can improve environmental policy.⁴³

The seminars also provide time for "cycling, fishing, golfing, hiking and horseback riding."⁴⁴

FREE boasts that nearly one-third of the federal judiciary has either attended or asked to enroll in a future FREE seminar and that, in 1996, nearly 150 federal judges applied for 54 seminar openings. FREE's seminars have been particularly popular with the judges appointed to the bench by Presidents Reagan and Bush. Seventy-eight of the 109 federal judges (72%) attending FREE's seminars, and 27 of 36 appellate court judges (75%) were appointed by Presidents Reagan and Bush (see graph, page 36).

The seminars have also been very popular with the judges on the Federal Circuit and the Court of Federal Claims that are revolutionizing federal takings law. Judges Michel, Mayer, Newman, Rader and Plager of the Federal Circuit, and Chief Judge Smith, and Judges Futey, Robinson, Turner, Yock from the Court of Federal Claims have all attended FREE Seminars; Judges Plager and Michel have each attended two FREE seminars since 1992.⁴⁵

The seminars also provide time for "cycling, fishing, golfing, hiking and horseback riding."

Proponents of the Takings Project, most notably the National Association of Homebuilders, have turned to the Project's congressional supporters for legislation designed to grease the wheels of the Takings Project.



SOURCE: FREE invitation to federal judges (on file with Community Rights Counsel)

FREE's judicial seminars are funded by the same foundations — the Olin Foundation, the Carthage Foundation, the Sarah Scaife Foundation and the M.J. Murdoch Foundation — that are funding groups such as the Pacific Legal Foundation, the Defenders of Property Rights and the New England Legal Foundation to litigate takings cases in courts such as the Federal Circuit. So, for example, the Olin Foundation simultaneously funded the New England Legal Foundation to litigate on behalf of the property owners in the landmark Federal Circuit case, *Preseault v. United States*,⁴⁶ and FREE to provide judicial seminars for several of the Federal Circuit judges that decided to hear the *Preseault* case "en banc" and ruled in favor of the NELF.⁴⁷ Similarly, the M.J. Murdoch Foundation has been both a large contributor to FREE⁴⁸ and the Pacific Legal Foundation,⁴⁹ which has appeared before the Federal Circuit as an amici in the seminal *Florida Rock* and *Loveladies Harbor* cases.⁵⁰ Finally, through the Carthage Foundation, Richard Mellon Scaife is the largest single contributor to FREE⁵¹ and PLF,⁵² and one of the largest supporters of the Defenders of Property Rights, "[t]he nation's only legal defense foundation dedicated exclusively to the protection of property rights."⁵³ Through the other foundation Scaife heads, the Sarah Scaife Foundation, Scaife is also one of the largest contributors to NELF.⁵⁴

PROCEDURAL REFORM LEGISLATION

This term in Congress, proponents of the Takings Project, most notably the National Association of Homebuilders, have turned to the Project's congressional supporters for legislation designed to grease the wheels of the Takings Project.⁵⁵ In particular, the NAHB drafted⁵⁶ and turned the full force of its lobbying capability behind the Private Property Implementation Act of 1997 (H.R. 1534).⁵⁷ H.R. 1534 (and its Senate companion bill, S. 1204) would expand the

jurisdiction of the federal courts over takings claims, eliminate procedural requirements that encourage judicial restraint (such as the requirement that potential litigants “exhaust” non-judicial relief before bringing suit), and require the government to pay the legal fees of developers who win in court. Despite the strong opposition of the Judicial Conference of the United States, 37 state Attorneys General, the American Planning Association, the National Governors Association, the National Conference of State Legislatures, the National League of Cities and the U.S. Conference of Mayors, H.R. 1534 passed the House of representatives on October 22nd by a 248 to 178 vote. The Senate equivalent, S. 1204, has now garnered 31 co-sponsors.

Equally notable simply for its audacity is Sen. Orrin Hatch’s (R-Utah) Citizens Access to Justice Act of 1997 (S. 1256) and its companion bill in the House, H.R. 992. Hatch’s takings bill would add to S. 1204 provisions that would significantly expand the jurisdiction of the Court of Federal Claims and other federal district courts to hear takings cases against the federal government, giving takings plaintiffs the opportunity to forum shop between their local federal district court and the Court of Federal Claims.⁵⁸ Moreover, to “assure uniformity in property rights law,” Hatch’s bill would vest in the Federal Circuit exclusive appellate jurisdiction to hear takings cases against the federal government from every district court in the nation. While declaring, in other words, that “a judicial activist on the left or the right, is not, in my view, qualified to sit on the federal bench,”⁵⁹ Hatch’s legislation would reward the nation’s most activist court on property rights with significant new powers to shape the direction of takings law in this country. (As this Report was going to print, the Senate Judiciary Committee voted Senator Hatch’s proposed takings legislation out of committee on a 10-8 party line vote and the House of Representatives passed H.R. 992.)

BANKROLLING THE TAKINGS PROJECT: THE FUNDING VISION OF WILLIAM SIMON AND RICHARD MELLON SCAIFE

Finally, a word about the sponsors. While the Takings Project has received funding from every major conservative foundation and a wide variety of corporations, developers and individuals, the campaign is, to a remarkable extent, the funding vision of two prominent conservatives philanthropists: William Simon, now president of the Olin Foundation, and Richard Mellon Scaife, chair of the board of both the Carthage and the Sarah Scaife Foundations. These two funders have helped start or maintain virtually every non-profit organization playing an important role in the Takings Project. In many, if not most cases, these foundations are the organizations’ largest single contributors.

Hatch’s legislation would reward the nation’s most activist court on property rights with significant new powers to shape the direction of takings law in this country.

**1993-95 Grants by Olin, Scaife and Carthage
Foundations to Principal Takings Project Participants**

Grantee	Olin	Scaife	Carthage	Totals
Defenders of P. Rights			\$250,000	\$250,000
Federalist Society	\$470,000	\$350,000	\$50,000	\$870,000
FREE	\$25,000		\$200,000	\$225,000
Institute for Justice	\$125,000	\$195,000		\$320,000
New England Lgl Fndn	\$35,200	\$100,000		\$135,200
Pacific Lgl Fndn	\$50,000	\$375,000		\$425,000
Washington Lgl Fndn	\$275,000		\$1,600,000	\$1,875,000
Totals	\$980,200	\$1,020,000	\$2,100,000	\$4,100,200

SOURCE: FoundationAnnual Reports, 1994-97 Foundation Grant Indices.

Simon, the Secretary of Treasury under Presidents Nixon and Ford, wrote a blueprint for organizing the conservative agenda in his 1978 book "Time for Truth." In it, Simon argues that "[f]unds generated by business (by which I mean profits, funds in business foundations and contributions from individual businessmen) must rush by multimillions to the aid of liberty. . . to funnel desperately needed funds to scholars, social scientists, writers and journalists who understand the relationship between political and economic liberty."⁶⁰ Since then Simon, first at the Institute for Educational Affairs (IEA) (which Simon helped found in 1978 with Irving Kristol)⁶¹ and now as the President of the Olin Foundation, has worked to transform that vision into reality. At IEA, Simon simultaneously granted money to Epstein to help publish Takings and helped start the Federalist Society. The foundation he now runs, the John M. Olin Foundation, grants over \$20 million to conservative causes each year. Among Simon's regular grantees are: the Cato Institute's Center for Constitutional Studies, the Federalist Society, FREE, George Mason's Center for Law and Economics, the Institute for Justice, the Landmark Legal Foundation, the Pacific Legal Foundation and the Washington Legal Foundation.⁶²

Richard Mellon Scaife's support for the Takings Project has been even more extensive both in length and breadth. The Wall Street Journal has called Scaife "the financial archangel for the [conservative] movement's intellectual underpinnings"⁶³ and this title fits the role he has played in the Takings Project. In the 1980's, the Sarah Scaife Foundation was among the largest foundation funders of the Federalist Society, the Institute for Educational Affairs and many of then-fledgling conservative legal foundations. For example, in 1987, the Foundation awarded \$60,000 to both the Federalist Society and the Institute for Education Affairs, \$110,000 to the Pacific Legal Foundation and the Washington Legal Foundation and \$25,000 to the Southeast Legal Foundation.⁶⁴

In the 1990s, Carthage has been the single largest contributor to FREE, the Defenders of Property Rights, and the Washington Legal Foundation, and a generous contributor to the Landmark Legal Foundation⁶⁵ and the Pacific Legal Foundation.⁶⁶ The Sarah Scaife Foundation regularly funds the Cato Institute's Center for Constitu-

tional Studies, PLF, NELF, Southeastern Legal Foundation, Landmark Legal Foundation, the Federalist Society, the Institute for Justice, and George Mason’s Law and Economics Center.⁶⁷

Endnotes

- ¹ See NATIONAL DIRECTORY OF NON-PROFIT ORGANIZATIONS (1997-98 ed); THE RIGHT GUIDE, A GUIDE TO CONSERVATIVE AND RIGHT-OF-CENTER ORGANIZATIONS (1997) [hereinafter THE RIGHT GUIDE]; see also Roger K. Newman, *Public-Interest Firms Crop Up on the Right, Suits with Agendas*, NAT'L L.J. Aug. 26, 1996, at 22 ("funding from upwards of 500 corporations and foundations provides a \$3.5 million annual budget [for the Washington Legal Foundation], matched only by that of the Pacific Legal Foundation"); Institute for Justice webpage <<http://www.instituteforjustice.org>> (Institute's FY 1996 budget exceeds \$2 million); see also DAVID HELVARG, THE WAR AGAINST THE GREENS, at 21—22 ("[t]he Defenders [of Property Rights] works closely with the Federalist Society, the Competitive Enterprise Institute, and the Washington Legal Foundation, three members of a nationwide network of twenty-two pro-business, public interest law firms that do anti-environmental lawsuits and litigation on a pro bono basis, providing the anti-green movement with tens of millions of dollars in free legal services.").
- ² See Nancie G. Marzulla, *The Property Rights Movement: How it Began and Where It is Headed*, in LAND RIGHTS: THE 1990'S PROPERTY RIGHTS REBELLION (Bruce Yandle ed., 1995).
- ³ See Charles Fried, *Protecting Property—Law and Politics*, 13 HARV J. L. & PUB. POL'Y 44, 48—49 (1990).
- ⁴ Richard Perez-Pena, *A Rights Movement that Emerges From the Right*, NY. TIMES, Dec. 30, 1994, at B6 (quoting Richard Samp of the Washington Legal Foundation).
- ⁵ See The Right Can't Have It Both Ways, *supra* Ch. 1, note 7.
- ⁶ PACIFIC LEGAL FOUNDATION, 1996 Annual Report.
- ⁷ David Helvarg, *Legal Assault on the Environment*, THE NATION, Jan 30, 1995, at 126 (quoting Jim Burling, PLF's Litigation Director).
- ⁸ See PACIFIC LEGAL FOUNDATION, 1996 ANNUAL REPORT (1997).
- ⁹ See Jack Woodward, *David v. Goliath: Pacific Legal Foundation is Changing Regulatory Law in the United States*, Undated PLF Pamphlet; Robert P. King, *Property Rights Crusaders Move in on Florida Growth Laws*, THE PALM BEACH POST, May 29, 1997, at 1A "We only take precedent-setting cases. . . [o]ur effort is to change the law." *Id.* (quoting Richard R. Bradley, PLF's Director of Strategy and Development).
- ¹⁰ Maura Dolan, *Giving the Right Their Day in Court*, L.A. TIMES, Feb. 8, 1996, at A1 ("Foundation lawyers comb newspapers looking for cases that have a chance of going to the U.S. Supreme Court and in which they can offer friend-of-the-court arguments. Like-minded conservatives also refer cases, and the group occasionally represents people who call with problems").
- ¹¹ The four cases are *Nollan v. California Coastal Comm'n*, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), *Dolan v. City of Tigard*, 512 U.S. 374 (1994) and *Suitum v. Tahoe Reg'l Planning Agency*, 117 S. Ct. 293 (1997).
- ¹² H. Jane Lehman, *Owners Aren't Giving Ground in Property Battles*, CHICAGO TRIBUNE, Feb. 9, 1992, at 1.

- ¹³ Institute for Justice web site, visited Feb 6, 1998, <http://www.instituteforjustice.org>. (staff biography).
- ¹⁴ See Institute for Justice, *supra* Ch.4, note 13, The Court of Public Opinion (quoting George F. Will Mar. 7, 1993). see also William H. Mellor, III, *Can Washington Change?*, REASON, August 18, 1996, at 26 (“the more propitious focus for libertarians should be away from issues defined by Washington politics and on such matters as establishing a rule of law conducive to a society of free and responsible individuals. Whether the issue is economic liberty, property rights, or the First Amendment, the Constitution provides a means to check Washington’s real-world impact”).
- ¹⁵ See Institute for Justice, *supra* Ch.4, note 13, Electronic Brochure, Institute for Justice Approach: Private Property Rights.
- ¹⁶ See, *Suitum v. Tahoe Regional Planning Agency*, No 96-243, Brief of the Institute for Justice as Amicus Curiae in Support of Petitioner (Nov. 29, 1996); *Dolan v. Tigard*, No 93-518 (Brief of the Institute for Justice as Amicus Curiae in Support of Petitioner (Jan. 13, 1994); *Lucas v. South Carolina Coastal Council*, 91-453 Brief of the Institute for Justice as Amicus Curiae in Support of Petitioner (Jan. 2, 1992).
- ¹⁷ THE RIGHT GUIDE, *supra* Ch.4, note 1 AT 122.
- ¹⁸ Margaret Kriz, *Taking Roots in Property Rights*, Nat’l J at 2133 (October 6, 1996).
- ¹⁹ THE RIGHT GUIDE, *supra* Ch.4, note 1 AT 122.
- ²⁰ See James Andrews, *Conservative Law Groups Adopt the Liberal Model*, CHRISTIAN SCIENCE MONITOR, Oct 3, 1994 (Meese conducts monthly meetings of “the growing field of conservative and libertarian lawyers who battle for property rights and against the regulation they consider harmful to economic growth”); Roger K. Newman, *Public Interest Law Firms Crop up on the Right*, NAT’L L J., Aug. 26, 1996, at A22 (“One of the behind-the-scenes forces in coordinating such legal campaigns has been Edwin Meese III. . . . He chairs a monthly meeting in Washington of representatives of upwards of a dozen groups that network, exchange ideas and discuss what each is doing.”); see also HELVARG, *supra* Ch.4, note 1, at 21—22 (“[A] nationwide network of twenty-two probusiness ‘public interest’ law firms . . . coordinate through an annual meeting sponsored by the Heritage Foundation”).
- ²¹ See Newman, *supra* Ch.4, note 20, at A22 (“Conservative law firms. . . tak[e] advantage of millions of dollars of pro bono time offered by law firms.”); FEDERALIST SOCIETY 1996 ANNUAL REPORT 8 (1997).
- ²² See William G. Castagnoli, *What is the WLF and Why Is It Challenging the FDA?*, MED. MARKETING & MEDIA, Apr. 1995 at 27, 28, 32.
- ²³ See FEDERALIST SOCIETY, 1996 ANNUAL REPORT 4, 10 (1997).
- ²⁴ See *id.* at 8 (listing the Institute for Justice, the Pacific Legal Foundation and the Washington Legal Foundation as among the organizations that have taken advantage of the Society’s “pro bono apparatus”).
- ²⁵ See *id.*
- ²⁶ As takings challenges have become more viable, there has developed an increasingly lucrative for-profit practice in representing property owners, encouraging the founders of the more prominent legal foundations to

establish for-profit affiliates to litigate takings cases on behalf of fee-paying developers, *see Love Your Work?*, LEGAL TIMES, Nov. 24, 1997, at 3 (“Noted environmental and property rights lawyer Roger Marzulla has left the D.C. office of Akin, Gump, Strauss, Hauer & Feld to open shop with his wife Nancie Marzulla. Marzulla & Marzulla, launched [early this month,] is sharing space with the nonprofit Defenders of Property Rights, where Nancie Marzulla doubles as President. The new firm is primarily representing smaller clients in litigation against the government.”); THE RIGHT GUIDE, *supra* Ch.4, note 1, at 253 (PLF also contracted the Sacramento firm of Zumbrun, Best & Findley for management and legal services. The firm was paid \$212,661. The firm is affiliated with PLF president, Ronald Zumbrun, who is paid as an independent contractor through the firm.).

²⁷ NATIONAL DIRECTORY OF NON-PROFIT ORGANIZATIONS (1997—1998 Ed.).

²⁸ DIRECTORY OF ASSOCIATIONS AT 100 (1997 Ed.).

²⁹ *See* Brief Amici Curiae of the National Association of Home Builders and the Building Industry Legal Defense Foundation in Support of Petitioner, at 1 *Suitum v. Tahoe Regional Planning Agency*, No. 96—243, 1997 U.S. LEXIS 3233 (listing “myriad” of Supreme Court cases in which the NAHB has appeared as an amicus on behalf of developers); Steve Ketch, *Builders Seek Protection of Property Rights*, CHIC. TRIB., Jan. 25, 1987 (“[t]he [NAHB] has a litigation program that aids local associations in certain cases where suits to protect property rights are involved.”).

³⁰ *See* National Ass’n of Home Builders v. City of Los Angeles, No. 96—55274, 1997 U.S. App. LEXIS 13877 (9th Cir. June 9, 1997); National Ass’n of Home Builders v. Chesterfield County, No. 95—3213, 1996 U.S.App. LEXIS 18838 (4th Cir. June 30, 1996); *see also* National Ass’n of Home Builders v. Babbitt, 949 F.Supp. 1 (DC Cir. 1996).

³¹ THE FEDERALIST SOCIETY, MEMBERSHIP & BENEFITS (nd.).

³² Terry Carter, *A National Revival Meeting for Takings Lawyers*, CHICAGO DAILY LAW BULLETIN, Apr 2, 1992 at 2.

³³ *See id.*

³⁴ *Id.*

³⁵ Letter from Julia Levin, *National Heritage Institute*, and Enrico Nardone, *National Audubon Society*, to Charles Alan Wright, President, *The American Law Institute* (Oct 24, 1996) (on file with CRC).

³⁶ Institute for Justice, *supra* Ch.4, note 13.

³⁷ *Id.*

³⁸ *Id.* (quoting J. Stanley Marshall, Chairman, THE JAMES MADISON INSTITUTE).

³⁹ *See* Alliance For Justice, *Justice For Sale* 70—82 (1993).

⁴⁰ FREE was founded and is directed by John Baden a “free market environmentalist,” who along with Richard Epstein serves as an adjunct scholar at the libertarian Cato Institute *See* *Cato Institute* webpage (<http://www.cato.org/>). Baden is a vocal proponent of strong constitutional protection of property rights. According to Baden “property rights are under siege” from environmental regulations such as the Endangered Species Act, *see* John Baden, *Property Protection and Property Rights in Harmony*, SEATTLE TIMES, Mar. 30, 1993, at A7 and “[t]he Constitution requires due compensation when government takes or restricts private owners’ property.” John A. Baden, *A Green Campaign Speech For A*

Better Environment, SEATTLE TIMES, Nov. 13, 1996, at B5. Baden's other credentials include editing *Environmental Gore*, see ENVIRONMENTAL GORE (John A. Baden ed., 1994), a collection of essays critiquing Vice President Gore's EARTH IN THE BALANCE which includes an essay by Nancy Marzulla arguing that property rights are the "underpinning" of all the rights protected by the constitution and that private property rights should be society's "central organizing principle." See *id.* at 219—21 (quoting Gore's EARTH IN THE BALANCE).

- ⁴¹ See James L. Huffman, *A Coherent Takings Theory At Last: Comments on Richard Epstein's Private Property and the Power of Eminent Domain*, 17 ENVTL. L. 153, 177 (1986) ("Epstein is on the right track in urging judicial activism . . ."); James L. Huffman, *Judge Plager's "Sea Change" in Regulatory Takings Law*, 6 FORD. ENVT'L L.J. 597, 609 (1995) (praising Judge Plager's opinion in *Florida Rock*, but suggesting that it could have been improved by an even closer adherence to the doctrine outlined by Professor Epstein). Huffman also serves as a board member of the Oregonian's in Action Legal Center, a the non-profit property rights group with a mission to "protect Constitutional rights of landowners . . . through litigation," that litigated *Dolan v. City of Tigard* before the Supreme Court. See THE RIGHT GUIDE, *supra* Ch.4, note 1 at 251—52.
- ⁴² FREE invitation to federal judge dated Jan 7, 1996 (on file with CRC)("Conference and travel expenses are paid and time is provided for cycling, fishing, golfing, hiking, and horseback riding"). See also FREE webpage<<http://www.free-eco.org/free>>.
- ⁴³ See FREE, *supra* Ch.4, note 42 (web page).
- ⁴⁴ FREE invitation to federal judge dated Jan 7, 1996 (on file with CRC).
- ⁴⁵ *Id.*; Judges Financial Disclosure forms (copies on file with CRC).
- ⁴⁶ In 1994, the Olin Foundation gave \$50,000 to the New England Legal Foundation, the Plaintiff's counsel in *Preseault*, for "property rights litigation" JOHN M. OLIN FOUND. INC., 1994 ANNUAL REPORT (1994).
- ⁴⁷ In 1995, the Olin Foundation gave \$25,000 to FREE to support their judicial seminars, see JOHN M. OLIN FOUND. INC., 1995 ANNUAL REPORT (1995). FREE attendees, Judges Plager, Mayer, Newman and Rader provided four of the six votes for *Preseault*. *Preseault* 100 F.3d 1525 (Fed. Cir. 1996); Judges Financial Disclosure Forms (copies on file with CRC).
- ⁴⁸ M.J. Murdoch Charitable Trust, 1993 Grants Approved by Classification (\$78,000 grant to FREE); 1995 Annual Report (\$150,000 grant to FREE in 1995).
- ⁴⁹ 1994 Foundation Grant Index at 330 (\$200,000 grant from Murdoch to PLF in 1992); 1994 Annual Report (\$200,000 to PLF in 1994); 1996 Annual Report (\$200,000 to PLF in 1996).
- ⁵⁰ See SARAH SCAIFE FOUNDATION, 1995 ANNUAL REPORTS 9 (1995) (reporting grants to PLF of \$200,000 and \$175,000, respectively). Sarah Scaife Foundation's 1995 Annual Report makes special note of PLF's work in litigating property cases: "[f]or more than twenty years, the Pacific Legal Foundation has supported the preservation of individual and economic freedoms as set forth in the Constitution. Its successes in litigating property rights cases ensure its position as a leader in strengthening these guarantees for the general public." *Id.* Scaife granted \$200,000 to PLF "to enable the Pacific Legal Foundation to continue its work." *Id.*

- ⁵¹ See *CARTHAGE FOUNDATION 1993—96 ANNUAL REPORTS* (1993, 1995 & 1996) (reporting grants to FREE of \$100,000 in 1993, 1995 & 1996, 1993 Foundation Grants Index at 655 (\$100,000 grant to FREE in 1990).
- ⁵² *1994 FOUNDATION GRANTS INDEX* at 327 (in 1991, Carthage granted \$75,000 to PLF); *1993 FOUNDATION GRANT INDEX* at 307 (in 1990, Carthage granted \$275,000 to PLF).
- ⁵³ See *THE RIGHT GUIDE*, *supra* Ch.4, note 1 at 122.
- ⁵⁴ The question of whether Federal Circuit judges, by attending these seminars, actually violate the ethical restrictions imposed by the Ethics Reform Act of 1989 appears to be an open one. See 5 U.S.C. §7353 (a)(2)-(b)(1). The law provides that judges, shall not “accept anything of value from a person . . . whose interests may be substantially affected by the performance or nonperformance of the individual’s official duties” unless the gift is permitted under “reasonable exceptions” established by the Court’s ethics office. See *id.* The Court’s ethic’s office, the Administrative Office of the United States Courts, in turn, has approved judges attending educational seminars unless “the sponsor, or source of funding, is involved in litigation, or likely to be so involved, and the topics covered in the seminar are likely to be in some matter related to the subject matter of such litigation.” Advisory Committee on Codes of Conduct, Advisory Opinion No. 67. The questions of whether the required inquiry into the “source of funding” for the seminars reaches to the foundations funding FREE, and whether the foundations that simultaneously fund FREE and litigation in the Federal Circuit are “involved” in litigation within the meaning of the ethics rule have not, to date, been addressed by the Administrative Office.
- ⁵⁵ The proponents of the Project turned to procedural reform after spending much of the 104th Congress trying, unsuccessfully, to pass legislation changing the substantive standards applicable to takings cases. See Allan Freedman, *Property Rights Advocates Climb the Hill to Success*, CONGRESSIONAL QUARTERLY, Oct. 25, 1997.
- ⁵⁶ See John Brinkley, *Lobby Gave Landowner Property Rights Measure*, VENTURA COUNTY STAR, Nov 5, 1997, at A1 (“Rep. Elton Gallegly said his bill to give landowners expedited access to federal courts was written for the benefit of ‘ordinary landowners,’ but, in fact, its author was an attorney for the National Association of Home Builders.”); see also Jim Vande Hei, *Home Builders, Pressured By GOP, Stay Out of N.Y.*, ROLL CALL, Oct 23, 1997 at 1 (“According to documents obtained by Roll Call, officials of the Home Builders wrote Rep. Elton Gallegly’s (R-Calif.) private property bill, a top issue for the association that hit the House floor yesterday”).
- ⁵⁷ See Freedman, *supra* Ch.4, note 55, at 2591 “It is a classic tale of Washington influence and how a single association responsible for \$295,250 in campaign contributions in the first six months of 1997 and \$57,500 in soft money contributions to both parties mobilized support with a small army of lobbyists . . .” *Id.*
- ⁵⁸ See *The Citizens Access to Justice Act of 1997*, S 1256, §5 (1997).
- ⁵⁹ Anthony Lewis, *The War on the Courts*, NY TIMES, Oct. 27, 1997 at A23. Even though President Clinton has generally appointed more moderate, older, more experienced jurists to the bench than his predecessors, the Senate confirmed just 17 judges in 1996—the lowest election-year total in over 40 years—and 36 judges in 1997. Lewis calls “the campaign by

the far right to block President Clinton's appointments to the Federal Courts" "as important as any political effort in this country today." *Id.*

- ⁶⁰ STEFANIC & DELGADO, *supra* Ch. 3, note 22, at 90 (quoting WILLIAM E SIMON, A TIME FOR TRUTH (1978)).
- ⁶¹ *See* STEFANIC & DELGADO, *supra* Ch. 3, note 22, at 110. According to Stefanic and Delgado, the IEA was formed by the John M. Olin, Sarah Scaife, JM, and Smith Richardson foundations to serve as a clearinghouse for corporate philanthropy, linking conservative scholars and thinkers seeking funding with corporations and foundations wishing to further a conservative public policy agenda. *See id.* at 109—110. In 1990, the IEA merged with the Madison Center and became the Madison Center for Educational Affairs. *Id.*
- ⁶² *See* JOHN M. OLIN FOUND., INC. 1996 ANNUAL REPORT.
- ⁶³ PHIL KUNTZ, CITIZEN SCAIFE, WALL STREET JOURNAL, OCT 25, 1995.
- ⁶⁴ FOUNDATION GRANT INDEX, 18TH EDITION, (1989) AT 651-52.
- ⁶⁵ *See* CARTHAGE FOUNDATION, ANNUAL REPORT 1993-1996.
- ⁶⁶ *See* 1993 FOUNDATION GRANTS INDEX AT 307 (\$275,000 in grants in 1990).
- ⁶⁷ *See* SARAH SCAIFE FOUNDATION, INC., ANNUAL REPORTS 1994-1996.

CHAPTER 5 THE RESULTS

To this point, this Report has focused entirely on Professor Epstein's theory that the Takings Clause could be used to roll back decades of health and safety regulation and the campaign by anti-regulatory ideologues to transform Professor Epstein's polemic on the Constitution into a body of case law. In this Chapter, we turn to the results of that campaign. For what is most remarkable about the Takings Project is not that it exists, but rather that it is succeeding. The combined efforts of the Takings Project have succeeded in creating in the federal courts a sympathetic environment for developers and a hostile environment for communities seeking to defend efforts to regulate land use. This judicial environment, in turn, has produced a transformation in takings law that bears startling similarities in both form and substance to Professor Epstein's blueprint.

JUDICIAL ACTIVISM FOR THE TAKINGS PROJECT

Professor Epstein's book *Takings* was a call for judicial activism; or, as Epstein put it: "a level of judicial intervention far greater than we have now, and indeed far greater than we ever had."¹ Judges on the Supreme Court and the Federal Circuit, led by Justice Scalia and Judge Plager, have answered Epstein's call and have reached across seemingly insurmountable jurisdictional and procedural barriers to take and decide key takings cases.²

Supreme Court

The *Nollan v. California Coastal Commission*³ case provides a good early example. Nollan addressed a regulation that required developers of beachfront lots to obtain a permit from the California Coastal Commission if they wished to substantially increase the surface area of development on such lots. Typically, when granting such a permit, the Commission demanded a concession from the landowner to mitigate the burdens the development imposed upon the community. In particular, in *Nollan*, the Coastal Commission demanded that the Nollans allow the public to pass along the beach below a sea wall that separated the Nollan's house from the ocean.

What is most remarkable about the Takings Project is not that it exists, but rather that it is succeeding.

Judges on the Supreme Court and the Federal Circuit... have answered Epstein's call and have reached across seemingly insurmountable jurisdictional and procedural barriers to take and decide key takings cases.

To reach the merits, the Supreme Court had to overcome a number of important procedural obstacles. As an initial matter, the Court ignored serious questions about whether the Nollans even owned the beachfront passageway that the state allegedly “took” through its regulation. As California argued in *Nollan*, California only sought a passageway on land that was frequently below the mean high tide mark and, thus, arguably state property.⁴ Responding to this aspect of the *Nollan* case, Eban Moglan, then a law clerk to Justice Thurgood Marshall, now a law professor at Columbia University, wrote:

Not content with granting [Supreme Court review] in all takings cases in which the state wins, the Court has now moved on to granting review in takings cases which aren't cases at all.⁵

The Court also had to ignore the fact that, while their permit appeal was pending, the Nollans built their proposed house without a permit. Under California law, this illegal, unilateral action by the Nollans waived their right to challenge the conditions imposed on their development permit. California raised this point in seeking dismissal, and, as even the Meese Justice Department admitted, it is “settled beyond dispute” that a litigant must follow state procedures in raising a federal constitutional claim, and that unless the state procedures are unreasonable, failure to do so will deprive the Supreme Court of jurisdiction.⁶ The Court, however, simply denied California’s motion on this point without comment and proceeded to address the merits of the Nollan’s claim.

Lucas v. South Carolina Coastal Council, a 1992 case involving a development restriction imposed by South Carolina’s 1988 Beachfront Management Act,⁷ provides an even stronger example.⁸ The first hurdle cleared by Justice Scalia’s opinion was ripeness. South Carolina had amended the Beachfront Management Act before the Supreme Court reviewed the case and, under the new Act, Mr. Lucas could have applied for a special permit to build on his seaside lots. As a result, Lucas’ permanent takings claim—the only claim he had prevailed upon at trial and the only claim he appealed to the Supreme Court—was not ripe because Lucas had never applied for a permit under the new Act. Justice Scalia conceded this point, concluding in the first pages of his opinion that Mr. Lucas’ permanent taking claim was not ripe. Instead of dismissing the case, however, the Court addressed a question that had not even been briefed by the parties—whether Mr. Lucas has suffered a temporary taking between 1988, when the initial Act was passed, and 1990, when the Act was amended.

This creative hurdling of the ripeness barrier created another procedural problem: standing. As Justices Blackmun and Stevens pointed out in dissent, Lucas had not built on his property for 18 months before the ban on development went into effect and had testified at trial that he was “in no hurry” to build on his vacant lot, “because the lot was appreciating in value.”⁹ As importantly, the trial court had made no findings of fact that Lucas had any plans to

use the property between 1988 and 1990. In short, after a trial on the merits on his claims, including his temporary takings claim, Lucas had not shown that he was injured in any way by not being able to construct a residence from 1988 to 1990. As a result, Lucas lacked the “injury-in-fact” predicate necessary to have standing to bring a temporary takings claim. As Justice Scalia had opined just days before in denying standing to an environmental organization in *Lujan v. Defenders of Wildlife*, “‘some day’ intentions—without any description of concrete plans, or indeed even any specification of when the some day will be—do not support a finding of the ‘actual or imminent’ injury that our cases require.”¹⁰

Justice Scalia responded by arguing that *Lujan* was decided at the summary judgment stage while Lucas’ claim for a temporary taking was decided “at the pleading stage.”¹¹ This, however, as Justice Blackmun points out, was simply not the case: Lucas had a trial on the merits of his claim for “damages for the temporary taking” of his property and failed to demonstrate any imminent or concrete plans to build on or sell the lot.¹² In short, Lucas did not (and probably could not) show that he had any intention of building on his property between 1988 and 1990, and, therefore, under a 17-day old Supreme Court case, he lacked standing to even bring his temporary taking case before the Supreme Court.

Moreover, Scalia’s willingness to ignore the trial court record on the issue of standing contrasts markedly with his strict adherence to the trial court’s finding that South Carolina’s development restriction had rendered Lucas’ property “valueless.” Four justices, including Justice Kennedy, noted the painfully obvious truth: a beachfront lot on the Isle of Palms in South Carolina is not “valueless,” even if you can’t build a house on it. But this factual finding was critical to Scalia’s ruling for Lucas and Scalia ignored the State’s plea to re-examine it. For the first time in the case, Scalia became a stickler for procedural detail: ruling that because the State had not challenged the erroneous factual predicate in opposing Supreme Court review, the Court would “decline to entertain” the state’s argument on this point.¹³

Richard Lazarus, the Attorney for the Coastal Council before the Supreme Court, aptly summarizes the Court’s disposition of *Lucas* as follows:

[t]he majority surmounted a range of obstacles to reach the merits of the case, including ripeness, standing, and the sheer improbability of the lower court’s factual findings. . . [T]he Court’s generosity towards the landowners contrasts sharply with its refusal to consider the state government’s challenge to the trial court’s finding of fact. . . [t]he Lucas majority was clearly determined, and impatient, to issue a ruling favorable to the landowner.¹⁴

“The court presses on to decide the issue, and as it does, it ignores its jurisdictional limits, remakes its traditional rules of review and creates simultaneously a new categorical rule and an exception. . .”

— Justice Harry Blackman

The Federal Circuit

Judges on the Federal Circuit and, in particular, Judge Plager, have displayed an even greater determination to reach takings cases over jurisdictional and procedural hurdles. The best example is the Federal Circuit's decision that it had jurisdiction to hear the claim asserted in *Loveladies Harbor v. United States*.¹⁵ In *Loveladies*, the developer filed suit in the Court of Federal Claims at the same time it had pending in federal district court in New Jersey a suit seeking similar relief for the same alleged taking. This violated 28 U.S.C. section 1500, which states that "[t]he United States Court of Federal Claims shall not have jurisdiction of any claims for or in respect to which the plaintiff or his assignee has pending in any other court . . ."¹⁶

As the government forcefully noted in seeking dismissal, the plain words of section 1500, and recent Federal Circuit precedent, prohibited the Federal Circuit from hearing *Loveladies'* claim. Indeed, just a year before, in *UNR Industries v. United States*, the Federal Circuit sitting in banc engaged in "a comprehensive effort to set out the proper interpretation" of section 1500.¹⁷ In *UNR*, the court concluded that "[c]orrectly construed, section 1500 applies to all claims on whatever theories that 'arise from the same operative facts.'"¹⁸ The court expressly "overruled" *Casman v. United States*,¹⁹ and other cases which had excused adherence to section 1500 where the claims in the two suits seek different forms of relief, finding *Casman* inconsistent with the plain language of section 1500.

To reach the merits of *Loveladies'* takings claim, Judge Plager convinced five other judges to reverse course again. Finding the plain language of section 1500 was no longer so plain, Judge Plager resurrected the *Casman* exception. Plager noted that while the Supreme Court had affirmed the *UNR* opinion, the Court had declined to reach the question of "whether two actions based on the same operative facts, but seeking completely different relief, would implicate S. 1500."²⁰ From this, Plager concluded that the "Supreme Court took exception to our efforts" and that therefore, "anything we said in *UNR* regarding the legal import of cases [like *Casman*] whose factual bases were not properly before us was mere dictum."²¹ Plager then proceeded to apply the *Casman* exception to the *Loveladies* case (even though *Loveladies'* actions sought roughly the same relief), and used *Loveladies* to significantly advance the Takings Project.

A three judge dissent took on every aspect of Judge Plager's opinion. As an initial matter, the dissent decried the majority's decision to even revisit the court's opinion in *UNR*.²² The dissent reminded Judge Plager that the Supreme Court had affirmed *UNR*, and that the Supreme Court "said nothing by way of disapproval of our ruling on *Casman*."²³ The dissent also noted that "at the very least, one would expect reversal of our so recent in banc precedent to be supported by some compelling reason," but that such "special justification" was "missing from today's undertaking."²⁴

*"at the very least,
one would expect
reversal of our so
recent in banc
precedent to be
supported by
some compelling
reason."*

— Judge Robert
Mayer

On the merits, the dissent decried Judge Plager's "judicial revision" of section 1500.²⁵ The dissent reminded Judge Plager that "it is axiomatic that courts cannot extend their jurisdiction in the interest of equity" and reiterated the logic of the *UNR* opinion:

[I]n *UNR* we concluded that section 1500 should be applied according to its plain words, and that instrumental to such application was a single, coherent definition of the word "claim" as referring only to the facts underlying the petitioner's action against the government. . . . We overruled *Casman* because it was in conflict with this interpretation.²⁶

Finally, the dissent criticized Judge Plager's "machinations" in fitting *Loveladies'* claim into the newly resurrected exception created in *Casman v. U.S.* As the dissent notes, the majority "ignores the words of the complaints" in which *Loveladies* requested almost the same relief in both actions, "substituting instead its understanding of what *Loveladies* must have intended by the several suits."²⁷

The dissent concluded with a rhetorical question. Noting that only a year before "nine of the ten judges hearing [*UNR*] said that *Casman* was unsound and inconsistent with section 1500," the dissent wondered "why six of them now think otherwise."²⁸ Judge Plager appears to answer the dissent's question in the final pages of his opinion:

[t]he nation is served by private litigation which accomplishes public ends, for example, by checking the power of the Government through suits brought under the APA or under the [T]akings [C]lause of the Fifth Amendment. Because this nation relies in significant degree on litigation to control the excesses to which Government may from time to time be prone, it would not be sound policy to force plaintiffs to forego monetary claims in order to challenge the validity of Government action. . . .²⁹

This portion of *Loveladies* suggests that, in Judge Plager's mind, the "sound policy" of hearing cases that "control the excesses" of government trumps the need to respect precedent or the plain language of the laws written by Congress.³⁰

THE PROGRESS SO FAR

To illustrate the substantive success of the Takings Project, it is necessary to recall the status of takings law in 1985. At that point, *Penn Central Transportation v. New York City* and its progeny defined the law of regulatory takings and, under *Penn Central*, a regulatory takings was generally not found unless the market value of a "parcel as a whole" was decreased by 90% or more. Even then, a regulation could be saved from a takings challenge by proof that the regulation was necessary to prevent a broadly defined category of nuisances.

This portion of Loveladies suggests that, in Judge Plager's mind, the "sound policy" of hearing cases that "control the excesses" of government trumps the need to respect precedent or the plain language of the laws written by Congress.

Since 1980, the Supreme Court has adopted the first of Epstein's two prongs; the Federal Circuit has adopted a version of both prongs.

As outlined above, Professor Epstein's proposed rewrite of the Takings Clause required several significant revisions to Supreme Court takings doctrine, including the recognition of "partial takings," a radical revision of the nuisance exception and a closer look at the link between the means and ends of land use regulation. The Takings Project has succeeded in introducing each of these concepts into the constitutional dialogue. Preliminary and tentative versions of these doctrinal shifts have gained a foothold in the Supreme Court, and, extrapolating from these tentative steps, the Federal Circuit and other lower federal courts have adopted bolder, more fully realized versions. This much success for a theory at the fringe of constitutional theory is troubling and significant. The success is troubling in that the doctrines are premised upon a textual reading of the Takings Clause that, as demonstrated above, cannot withstand serious scrutiny. The success is significant in that, cases decided already—particularly the Federal Circuit's decision in *Florida Rock Industries v. United States*³¹—are already impacting important laws such as the wetlands provision of the Clean Water Act³² and, in that, if fully successful, the Takings Project puts all modern land use laws at risk.³³

The Partial Takings Doctrine

The most critical and expansive aspect of Professor Epstein's theory is his notion that the Takings Clause permits (and, indeed, demands) judicial oversight and interference with all regulations that impact property value, even those regulations with minor or even minute impacts. It is this aspect of his theory, his "partial takings" doctrine, that permits the clause to "invalidate[] much of the twentieth century legislation."

Professor Epstein's partial takings theory thus depends on two critical doctrinal points: first, the notion that property can be divided into a bundle of rights, including use, disposition and possession and that each stick in the bundle is protected by the Takings Clause; and second, that any infringement on any stick in the bundle, including for example a partial loss of use, is a taking and must be compensated as such. Since 1980, the Supreme Court has adopted the first of Epstein's two prongs; the Federal Circuit has adopted a version of both prongs.

The Supreme Court

In recent years, the Supreme Court has adopted a takings jurisprudence that looks at the impact of regulation on individual strands in the bundle of property rights. In *Penn Central*, the Supreme Court reiterated its traditional focus on the "parcel as a whole," declaring that "[t]aking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."³⁴ Chief Justice Rehnquist was alone in his dissent in that case, which argued that the regulation at issue caused a taking of one strand: the owner's air rights.³⁵ Beginning with *Loretto* in 1982, however, the Court as a body began to move away from this focus

on the parcel as a whole and towards an assessment of the impact of regulation on a single strand.³⁶

The first and least surprising of these cases, *Loretto v. Teleprompter Manhattan CATV Corp.*,³⁷ was decided in 1982, while Epstein was still penning *Takings*. In *Loretto*, the Court ruled that when the government extinguishes the right to exclude by permanently occupying property, a per se takings occurs. While *Loretto* edged the Court toward a bundle of rights analysis by finding a taking primarily based on the impact the regulation had on one strand in the bundle, it did not represent a full-scale adoption of the concept.³⁸ The strand in *Loretto*, after all, was the right to be free of physical invasions and, as the Court noted, permanent physical invasions had always been treated differently.³⁹

A much larger step toward adoption of a “sticks in the bundle” approach to takings law came in the Court’s 1987 opinion in *Hodel v. Irving*.⁴⁰ In *Hodel*, a group of Native Americans challenged a federal law which extinguished their right to pass on to their heirs small, extremely divided interests in larger parcels. The Court found a taking despite recognizing the law had a minimal economic impact and did not interfere with investment-backed expectations. Central to the Court’s analysis was the “extraordinary” nature of the government regulation: that is, that it “amounts to virtually the abrogation” of the landowners rights in one strand of the bundle of property rights.⁴¹

The Court took the final and perhaps most important step in *Lucas*, where the Court ruled that complete abrogation of the right to use property can constitute a taking. With *Lucas*, the Court’s adoption of the first prong of Epstein’s theory was essentially complete.⁴² The Court has declared that each of the critical strands in the bundle—the right to use, exclude others from and dispose of property—is protected by the Takings Clause and that abrogation or elimination of a single strand in the bundle is a taking.⁴³

The Court has not yet, however, moved beyond the finding that a taking occurs for a complete loss of one strand to the second and most radical aspect of Professor Epstein’s theory: the notion that a partial (as opposed to a complete) infringement of a property interest can be a taking. Indeed, even in recent opinions, the Court has firmly rejected such a notion, particularly with regard to partial deprivations in the right to use property. In *Lucas*, for example, the Court reaffirmed that the *Penn Central* balancing test applied for regulations that restrict, but do not abrogate, the economic use of property.⁴⁴ In *Concrete Pipe & Products of California v. Construction Laborers Pension Trust*, a unanimous Court reaffirmed that under *Penn Central* “mere diminution in value of property, however serious, is insufficient to demonstrate a taking.”⁴⁵ Finally, in several recent cases, the Court has reaffirmed Justice Holmes’ recognition in creating the regulatory takings doctrine 70 years ago in *Mahon* that “government hardly could go on if to some extent values incident to property could not be diminished without paying for every such

The Court has not yet, however, moved beyond the finding that a taking occurs for a complete loss of one strand to the second and most radical aspect of Professor Epstein’s theory.

change in the general law.”⁴⁶ Each of these statements is directly at odds with Epstein’s partial takings theory.

The Federal Circuit

One would expect that these clear statements by the Supreme Court would have settled the partial takings issue at least until the Court itself decided to revisit the issue. Instead, it is here that the Federal Circuit has been its most adventurous. Drawing on the general pro-developer tenor of much of Justice Scalia’s opinion in *Lucas*, and *dicta* concerning the difficulty in determining the property interest at issue in taking cases,⁴⁷ Judges Plager and Rader of the Federal Circuit made a version of Professor Epstein’s partial takings doctrine the law of the land—at least with respect to Federal government regulations.

In *Florida Rock*, the plaintiff, a commercial mining company, alleged that a decision by the Army Corps of Engineers to deny a permit to mine the limestone underlying a 98-acre track of wetlands deprived the property of all economic value and, thus, constituted an uncompensated taking of private property. After rejecting the Plaintiff’s “total takings” argument because of uncontested evidence that the property maintained a resale value of at least twice the \$1900 per acre price Florida Rock originally paid, Plager raised a question neither party had briefed or argued. In his words:

[t]he question remains, does a partial deprivation resulting from a regulatory imposition, that is, a situation in which a regulation deprives the owner of a substantial part but not essentially all of the economic use or value of the property, constitute a partial taking and is it compensable as such?

The obvious answer to this question is: “only if the regulation fails the *Penn Central* balancing test.” After all, *Lucas* and the Court’s unanimous opinion in *Concrete Pipe* reaffirmed that *Penn Central*’s three factor inquiry still applies where a regulation diminishes but does not abrogate the permissible uses of property.⁴⁸ *Penn Central* was, in other words, binding Supreme Court precedent, and application of *Penn Central*’s balancing test to the facts of *Florida Rock* would have disposed of the case. As Chief Judge Nies argued succinctly in dissent, “[w]hile the Supreme Court may rethink and change its rulings, this court is not free to adopt positions in conflict with decisions of the Court.”⁴⁹

But Judge Plager did not consider himself so bound by Supreme Court precedent. Noting that *Lucas* had carved out an exception to the *Penn Central* balancing test, Plager felt free to disregard *Penn Central* completely. In its place, Plager established with a rule that the government may have to compensate a landowner for any regulation that causes a diminution in the value, unless there is a “reciprocity of advantage” by which landowner receives “direct compensating benefits” from the regulation.⁵⁰

“[w]hile the Supreme Court may rethink and change its rulings, this court is not free to adopt positions in conflict with decisions of the Court.”

— Judge Helen Nies

Judge Plager reached this ruling following precisely the two-step blueprint drafted by Professor Epstein. Plager began, as Epstein suggested,⁵¹ by erasing the distinction between regulatory takings and physical invasions.⁵² Thus, according to Plager, the Takings Clause treats both the same: whenever government action impinges in any way on an owner's property, the court must look further to find whether a takings has occurred.⁵³ In doing so, Plager ignored two century's worth of binding Supreme Court decisions which make the difference between physical and regulatory takings a touchstone of takings doctrine.⁵⁴ The distinction did not make sense to Judge Plager, so he decided to discard it.

Of course it makes perfect sense to apply one standard to a category of government actions—physical expropriations—which are clearly prohibited by the Constitution and a different standard to a category—regulations—that is prohibited only by analogy. The distinction only becomes illogical when you interpret the Takings Clause to equally encompass both physical expropriations and regulations. In other words, both Epstein's and Plager's arguments about the illogic of applying different tests to regulatory and physical takings are necessarily premised upon Epstein's "plain meaning" interpretation of the Takings Clause, which, as demonstrated above, is irreparably flawed.

Second, Judge Plager obliterated any distinction between incremental diminutions in value and property rights, concluding, in essence that increments of value *are* property rights. Again, however, the premise that "value" is somehow a property right is inconsistent with Supreme Court precedent⁵⁵ and, in this instance, the status quo in all fifty states.⁵⁶ It *was* consistent, however, with Professor Epstein's theory,⁵⁷ and that, it seems, was enough for Judge Plager.

With these two radical steps, Judge Plager achieved, at least for now in the Federal Circuit, the principal objective Epstein set out to accomplish a decade before: an interpretation of the Takings Clause that requires careful judicial scrutiny of any regulation that reduces the value of private property. Gone is the distinction between physical and regulatory takings that has been a mainstay of the Court's interpretation of the Takings Clause for two hundred years. Gone too is what is perhaps the single most important rule in takings doctrine: *Penn Central's* category of regulatory actions that are generally not takings — those that reduce property value by less than 90%.⁵⁸

Florida Rock demonstrates what Professor Blumm called an "unprecedented vision of judicial activism."⁵⁹ The activism is Judge Plager's, who has acknowledged his activism⁶⁰ and commented that "one of the advantages of being an Article III judge with a lifetime appointment is that you never have to say you are sorry."⁶¹ The vision, however, was Epstein's who created the partial takings doctrine a decade ago and recognized that implementing the Takings Project would require judicial activism of an unprecedented nature.

"one of the advantages of being an Article III judge with a lifetime appointment is that you never have to say you are sorry."

— Judge Jay Plager

"[U]nless the Supreme Court reverses Florida Rock, all federal environmental regulations are in jeopardy, and environmental law, as we have come to know it in the last quarter century, is over."

— *Michael Blumm*

Florida Rock is "an extremely destabilizing decision, exposing all wetlands regulation, indeed all environmental and land use regulation, to compensation claims."⁶² After *Florida Rock*, in the Federal Circuit, every time a regulation decreases the value of property, the government may be held liable for monetary damages. It does not require much imagination to realize that such a monetary burden could seriously hamper, if not completely hinder, attempts to regulate land use to protect the community. And that is precisely what Epstein and Plager intended. As Chief Judge Nies noted in dissent, "the objective of the [partial takings] theory is to preclude government regulation precisely because regulation will entail too great a cost."⁶³

The Nuisance Exception

From the Takings Project's inception, the nuisance exception loomed as a potential obstacle to the Project's goal of thwarting modern environmental laws. After all, as structured by the Court in *Mugler* and its progeny, the exception gave legislatures a broad, evolving and fairly open-ended opportunity to define what is and is not an injurious use. Since all or virtually all modern environmental laws have been justified by the legislature as being necessary to protect the health and welfare of the community, this exception threatened to thwart the Project. Not surprisingly, therefore, the nuisance exception has been under attack—first by Professor Epstein and later by both the Supreme Court and the Federal Circuit.

Professor Epstein

In *Takings*, Professor Epstein proposed a nuisance exception that is limited, essentially, to cases of physical invasion of neighboring property. The starting point for Epstein's nuisance analysis is not the legislature's assessment of the impact of a proposed use on the community, but rather the common-law or natural rights held by a property owner and defined in a property owner's title.

Epstein's argument is premised upon his idiosyncratic notion that the interaction between the Government and the property owner must be viewed essentially as a relationship between private parties. To Epstein, a corollary to this point is that the state has no independent set of entitlements. As such, in discussing the nuisance exception, Professor Epstein draws an analogy between self-defense and the police power: "The police power as a ground for legitimate public intervention is, then, exactly the same as when a private party acts on its own behalf."⁶⁴ A private individual may act to protect his own property against common law nuisances—that is, against deliberate acts by a neighboring owner that physically invade the property. According to Epstein, the nuisance exception "gives the state control over the full catalogue of common law wrongs involving force and misrepresentation, deliberate or accidental, against other persons," but no more.⁶⁵ Under his theory "the sole function of the police power is to protect individual liberty and private property against all manifestations of force and fraud."⁶⁶

The Supreme Court

In *Lucas*, Justice Scalia fashioned a nuisance exception that echoes Epstein's in important respects.⁶⁷ He argued that the "prevention of harmful use analysis" in *Mugler* and other prior cases was "merely" the Supreme Court's early formulation of the requirement that a regulation must advance a legitimate state interest to avoid compensation. Thus the nuisance analysis in earlier cases did not, according to Justice Scalia, describe an exception to the Takings Clause; it does not excuse payment of just compensation. Rather, control of a harmful use is a necessary component of a valid, non-compensable regulation: the "nuisance" analysis is necessary but not sufficient to avoid paying compensation.

Scalia crafted a new, narrower exception to takings liability by reference to common law nuisance principles and the restrictions in place at the time a property owner purchased the parcel. According to Scalia, when new regulations deprive a property owner of all economically beneficial use, the state must compensate a landowner unless the regulation simply makes explicit limitations that "inhere in the title" of the property. Scalia describes this as an "antecedent inquiry" pursuant to which compensation would be required for new regulations that eliminate all uses of property unless "[t]he use of these properties for what are now expressly prohibited purposes was *always* unlawful and. . . it was open to the State at any point to make the implication of those background principles of nuisance and property law explicit."⁶⁸ Finally, Justice Scalia suggests that he intended to limit the category of uses that were always unlawful to those that impose direct negative impacts on neighboring landowners.⁶⁹

Justice Scalia's analysis of the nuisance exception to the Takings Clause, thus, is similar in important ways to the exception proposed by Professor Epstein: The scope of the nuisance exception is linked to the title held by the land owner, and the government's authority is bounded, at least in part, by common law principles of nuisance.⁷⁰

However, Justice Scalia's nuisance exception also differed from Professor Epstein's version in two critical ways. First, the Court in *Lucas* applied the exception to a much smaller category of cases than proposed by Professor Epstein. Second, the Court provided a broader exception for "background principles of property and nuisance law" than Epstein envisioned. We discuss each of these critical differences in turn below.

Professor Epstein argued that nuisance control (in his narrow definition of the notion) should be the only excuse for non-compensation in *all* takings cases.⁷¹ Justice Scalia in *Lucas*, on the other hand, created his nuisance exception in the narrow context of a regulation rendering property "valueless" and was explicit that nuisance control is necessary to avoid compensation *only* in this limited category of cases.⁷² For other regulations, the *Penn Central* test will still apply, and *Lucas* clarifies that *Mugler* and other "harm

In Lucas, Scalia crafted a new, narrower exception to takings liability by reference to common law nuisance principles and the restrictions in place at the time a property owner purchased the parcel.

*Justice Scalia's
nuisance
exception also
differed from
Professor
Epstein's version
in two critical
ways.*

prevention cases are still very relevant in applying Penn Central's third prong inquiry in the 'character of the government interest.'" As a result, *Lucas* does nothing to increase the likelihood that the vast majority of regulations (that restrict property use but do not render property valueless) will be considered a taking.⁷³

The second important way the nuisance exception established by the Court in *Lucas* varies from that proposed by Professor Epstein is that it refers to limitations in place at the time a property owner "obtains title" and suggests that limitations from "property law" as well as the common law of nuisance may "inhere in the title." This portion of the opinion, interpreted literally, suggests that all health, welfare and environmental laws and regulations that are in place at the time of purchase "inhere" in the title.⁷⁴

The Court's intent in this regard is uncertain. While Scalia suggests in portions of the *Lucas* opinion that the pre-existing limitations that "inhere" in the title may somehow be limited only to principles of state nuisance law, other portions suggest quite clearly that the "principles of property and nuisance law" include statutes in effect at the time of purchase. For example, Justice Scalia cites the Court's opinion in *Board of Regents of State Colleges v. Roth*,⁷⁴ in explicating the "existing rules or understandings that . . . define the range of interests that qualify for protection as 'property' under the Fifth and Fourteenth Amendments."⁷⁶ *Roth*, in turn, involves property interests that were created and defined entirely by state statutes. Similarly, Justice Scalia cites to Professor Michelman's classic article on "Property, Utility and Fairness"⁷⁵ in defining the category of uses that were "always unlawful."⁷⁸ In the cited passage, Professor Michelman makes quite clear that the exception should extend to uses that are unlawful under statutory as well as the common law.⁷⁹ Moreover, as courts and commentators have noted, there is no basis in logic or precedent for making the common law the sole basis for "inherent limitations on title."⁸⁰

Picking up on this portion of the Court's opinion in *Lucas*, numerous state and lower federal courts have interpreted *Lucas* to bar compensation whenever a property owner purchased property with an existing statutory restriction on its use.⁸¹ Perhaps the most comprehensive analysis was undertaken by the New York Court of Appeals in four cases decided on the same day in February 1997. The Court of Appeals applied *Lucas*' antecedent inquiry to rule against compensation for state regulations protecting wetlands,⁸² preventing development on steep slopes,⁸³ and requiring maintenance of lateral-support for public highways.⁸⁴

The logic of each of the cases was the same. *Lucas* requires courts make a threshold inquiry into "the rights and restrictions contained in a property owner's title."⁸⁵ Because constitutional law, statutory law and the common law all play a role in defining the rights and restrictions applicable to a specific parcel, "a court should look to the law in force, whatever its source, when the owner acquired the property."⁸⁶ Where a statutory or common law restriction was in place at the time a parcel was purchased, a property owner

cannot thereafter assert a takings claim.⁸⁷ The New York Court of Appeals also noted that restrictions in place at the time a parcel is purchased are factored into the purchase price.⁸⁸ A rule allowing a landowner who acquires restricted title to challenge the restriction as a taking, would create a windfall for subsequent purchases and “reward land speculation to the detriment of the public fisc.”⁸⁹

As the New York cases and the discussion above demonstrate, the Supreme Court’s flirtations with Professor Epstein’s theories have yet to have profound impacts on traditional takings law. There appears from the Court’s opinions in *Lucas* and other recent cases, that there are not yet five votes on the Court for adoption of the more radical aspects of the Epstein theories. Still, in taking tentative steps towards adopting a portion of Epstein’s nuisance exception, the Court has given Judge Plager and his activist colleagues a crack in the door. The Federal Circuit, in turn, has pushed through the crack to adopt a much more robust version of Professor Epstein’s nuisance exception.

The Federal Circuit

In an article discussing the *Lucas* opinion, Professor Epstein praised the Court for adopting many of his ideas but harshly criticized the Court for the two aforementioned limitations on the nuisance exception. According to Epstein, “[i]n order for Justice Scalia’s reasoning to work, it would have to bring many more forms of land use regulation within the Takings Clause. . . .” Only by expanding the category of cases where the nuisance exception applied, Epstein declared, can health and safety regulations receive “the close scrutiny and swift dispatch that most of them so richly deserve.”⁹⁰ Dutifully, in two Federal Circuit opinions, Judge Plager has closed (or attempted to close) the two loopholes created in *Lucas* and has created a nuisance exception far closer to that envisioned by Professor Epstein.

In *Loveladies*, Judge Plager accomplished the task of interpreting *Lucas* to change regulatory takings law outside of the narrow category of regulations that deny “all economically viable use.”⁹¹ According to Judge Plager, the *Lucas* opinion constituted a “sea change” in regulatory takings law that changed the central question in regulatory takings cases to:

simply one of basic property ownership rights: within the bundle of rights which property lawyers understand to constitute property, is the right or interest at issue, as a matter of law, owned by the property owner or reserved to the state?⁹²

Judge Plager thus concluded in *Loveladies* that the *Lucas* opinion replaced *Penn Central’s* three part balancing with a three part analysis through which a regulatory taking may be found if:

- (1) there is a denial of economically viable use of the land;⁹³
- (2) the owner has investment-backed expectations for

There appears from the Court’s opinions in Lucas and other recent cases, that there are not yet five votes on the Court for adoption of the more radical aspects of the Epstein theories.

the land; and

(3) the interest at issue was a property interest vested in the owner as a matter of state property law, and not within the power of the state to regulate under common law nuisance doctrine.⁹⁴

Under Judge Plager's reformulation of *Lucas*, the inquiry into restrictions that inhere in the title is not an "antecedent" inquiry that makes application of the *Penn Central* balancing unnecessary; rather, the inquiry replaces *Penn Central's* third-prong query into the "government interest" in the regulation. As Judge Plager notes, this masterstroke "removed from regulatory takings the vagaries of the balancing process."⁹⁵ What Judge Plager means is that under his reformulation of regulatory takings doctrine, the public's interest in regulating the uses of land is simply irrelevant. Rather than balancing competing interests, public and private, a court, according to Judge Plager, should look only at the title to the property and the history of state property law.⁹⁶

Judge Plager's opportunity to dismiss the notion that statutory laws may inhere in the title of property took a bit longer to materialize, and, when it finally did, it required Judge Plager to take on the logic and reasoning of two of his own colleagues on the Federal Circuit. The case in question was *Preseault v. United States*,⁹⁷ a case involving the federal Rails-to-Trails Act and the impact that federal regulation of rail corridors had on the reversionary interests held by landowners along a now unused corridor. Beginning in 1920, federal regulation prohibited abandonment of rail lines (the condition necessary for reversion of conditional interests to original landowners) without federal approval. By 1979, when the Preseaults purchased their parcel, federal regulations sanctioned the temporary use of rail corridors as recreational trails. Subsequently, the Preseaults challenged the use of the rail corridor as a recreational trail, alleging that this use amounted to a taking of their reversionary interest in the corridor.

A panel of the Federal Circuit found that no taking had occurred.⁹⁸ After first deciding that the government action in question was a physical invasion, requiring application of *Lucas'* per se takings analysis, the court turned to applying *Lucas'* antecedent inquiry. The court ruled that when the Preseaults purchased the reversionary interest in the rail corridor in 1979, the interest was already conditioned upon federal approval of any abandonment by the railroad. Because the federal government never sanctioned the abandonment of the rail corridor sought by the Preseaults, they had no current possessory interest in the rail corridor, and nothing was taken from them. In other words, the federal statutes in place at the time the Preseaults purchased their property inhered in their title, and the Preseaults could not now challenge the statutory provisions, which burdened their reversionary interests, as a taking.

Like the New York Court of Appeals, the panel justified its ruling as "a matter of economic as well as legal common sense."⁹⁹ The

*Dutifully, in two
Federal Circuit
opinions, Judge
Plager has closed
(or attempted to
close) the two
loopholes created
in Lucas and has
created a
nuisance
exception far
closer to that
envisioned by
Professor
Epstein.*

market price paid by a subsequent purchaser would reflect the restrictions in effect at the time of the purchase, so government compensation for the regulation would be a windfall to the subsequent owner. It is the first owner who has a takings claim, even after the sale, because the first owner received less for the property than he would have but for the restriction.

The activist majority on the Federal Circuit did not even wait for the *Preseaults* to request a rehearing. They decided on their own initiative to review the case in banc and Judge Plager wrote a plurality opinion vacating the panel's decision.¹⁰⁰ Judge Plager dismissed the panel's argument about *Lucas'* antecedent inquiry in a single page, without even discussing the logic of the panel's ruling or the language in *Lucas* suggesting that the antecedent inquiry includes both statutory and common law restrictions. Instead, Judge Plager again relied primarily on dictum from other portions of *Lucas* to conclude that *Lucas'* antecedent inquiry was limited to state-defined nuisance rules.¹⁰¹

The combined effect of *Loveladies* and *Preseault* is that, in the Federal Circuit, the nuisance exception and *Penn Central's* consideration of the government's interest in regulating have been reduced to a very narrow inquiry into whether the regulated use was a common-law nuisance. Coupled with *Florida Rock's* expansion of what can constitute a taking, the Federal Circuit has adopted important portions of two of the central tenets of Professor Epstein's proposed revolution in takings law.

Means/Ends Analysis

The final critical element of Professor Epstein's theory — the notion that courts should apply heightened scrutiny to all regulations affecting property to ensure the means used by federal, state and local governments to achieve their regulatory objectives are closely tailored to achieve permissible ends — has also begun to work its way into our constitutional jurisprudence. In *Takings*, Epstein, citing the Supreme Court's long-discredited *Lochner* opinion, argued that courts should apply an intermediate standard of review to land use regulations. In his formulation:

The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate.¹⁰²

Professor Epstein suggested that this heightened scrutiny is especially important for land use restrictions that prevent certain individuals from engaging in land uses that are open to others. Professor Epstein's central concern was that differential treatment of one landowner or set of landowners is a "powerful telltale sign that the police power has become a cloak for illegitimate ends."¹⁰³ Professor Epstein suggested that over-broad means for achieving a valid end may be a sign that the articulated end is a sham and a cover for an illegitimate purpose—taking land without paying for it.

The activist majority on the Federal Circuit did not even wait for the Preseaults to request a rehearing.

In Nollan and Dolan, the Supreme Court adopted an Epstein-like means/ends analysis in takings cases involving “exactions”—and has articulated the same concerns in so doing.

In *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*,¹⁰⁴ the Supreme Court adopted an Epstein-like means/ends analysis in takings cases involving “exactions”¹⁰⁵—and has articulated the same concerns in so doing. For example, in *Nollan*, Justice Scalia acknowledged that the Coastal Commission could constitutionally have denied the Nollan’s requested development permit outright without compensation, but then found that the Commission could not constitutionally condition the permit on the receipt of an easement across the Nollan’s property unless there is an “essential nexus” between the purpose of the condition and the purpose that would be served by prohibiting the proposed development. According to Justice Scalia, the lack of a nexus shows the condition “is not a valid regulation of land use but an ‘out-and-out plan of extortion.’”¹⁰⁶ The link to Professor Epstein is apparent.

Similarly, in *Dolan*, the Court ruled that in addition to the essential nexus, there must be a “rough proportionality” between the legitimate state interest (the ends) and the condition (the means).¹⁰⁷ This heightened standard of review requires not just that there be some connection between the ends and the means, but also that the connection be quite close—so close in fact that the analysis effectively shifts the burden of proof in cases involving exactions to the government.¹⁰⁸ Chief Justice Rehnquist echoed Professor Epstein in suggesting that the narrow means/ends analysis is in truth a method for ferreting out illegitimate state ends cloaked in the police power.¹⁰⁹

As with other Supreme Court forays into Professor Epstein’s theory, the Supreme Court’s adoption of Epstein’s means/ends scrutiny has been less than complete. To date, the Court has only applied its nexus and rough proportionality tests to exactions that entail a physical invasion or require a dedication of private property, and the logic of the opinions suggest that the tests will be limited to that context.¹¹⁰ However, the Supreme Court has agreed to hear a case this term, *Eastern Enterprises v. Apfel*,¹¹¹ that may shed light upon the question of how broadly the Supreme Court will apply *Nollan’s* and *Dolan’s* heightened scrutiny.

Moreover, the Supreme Court’s introduction of the issue has again brazened conservative judges on lower federal courts to adopt a more expansive version of Epstein’s handiwork. In *Del Monte Dunes v. City of Monterey*,¹¹² a 1996 case, the Ninth Circuit Court of Appeals applied *Nollan’s* and *Dolan’s* heightened scrutiny to a decision to deny a development permit and implied that, as Epstein proposed, heightened judicial scrutiny will apply to all land use regulations.

Endnotes

- ¹ See EPSTEIN, *supra* Ch. 1, note 2, at 30.
- ² In addition to the Supreme Court cases discussed below, see *First Lutheran Church v. Los Angeles County*, 482 U.S. 304, 322—23 (1986) (Stevens, J. dissenting) (noting that the church had not even raised a takings challenge in its complaint and noting that the state court had remanded to the trial court on distinct grounds for liability—raising the possibility that the plaintiff would have won remuneration on non-Constitutional grounds.); *Dolan v. City of Tigard*, 512 U.S. 374, 412—14 (Souter J., dissenting) (questioning whether the facts of the case raised the question answered by the majority and arguing the case could have been decided using without creating a new takings doctrine).
- ³ 483 U.S. 825 (1987).
- ⁴ Motion of Appellee California Coastal Commission to Dismiss, No 86-133 (Nov. 26, 1996) at 3.
- ⁵ Bench Memorandum at 3, *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (No. 86—133).
- ⁶ See Brief of the United States as Amicus Curiae Supporting Reversal, n. 86-133, at 6.
- ⁷ See SC. Code Ann. S. 48—39—10 et. seq. (Law Co-op.1989).
- ⁸ *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).
- ⁹ *Id.* at 1043 n.5 (Blackmun, J., dissenting).
- ¹⁰ *Lucas v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992).
- ¹¹ *Lucas*, 505 U.S. at 1012—13 n.3.
- ¹² *Lucas*, 505 U.S. at 1043 n.5.
- ¹³ See *Lucas*, 505 U.S. at 1020 n.9.
- ¹⁴ Richard J. Lazarus, *Putting the Correct "Spin" on Lucas*, 45 STAN. L.REV. 1411 at 1418, 1420—21 (1993); see also *Lucas*, 505 U.S. at 1062 (Stevens J. dissenting) (noting the majority was "eager to decide the merits" of Lucas' claim); *Id.* at 1036 (Blackmun J. dissenting) ("the court presses on to decide the issue, and as it does, it ignores its jurisdictional limits, remakes its traditional rules of review and creates simultaneously a new categorical rule and an exception (neither of which is rooted in our prior case law, common law, or common sense)"); *Id.* at 1077 (Souter, J., statement) (noting the "imprudence of proceeding to the merits in spite of these unpromising circumstances").
- ¹⁵ See 27 F.3d 1545, 1547 (Fed. Cir. 1994). For additional evidence of the activism of the Federal Circuit in takings cases, see *Florida Rock Industries v. United States*, 18 F.3d 1560, 1573 (Fed. Cir. 1994) (Neis, C.J., dissenting) (noting that Judge Smith had rejected Florida Rock's partial takings claim (finding instead that Florida Rock had suffered a complete denial of economic use) and Florida Rock had not appealed that ruling). As Judge Neis argued persuasively in dissent, the so-called "law of the case" should govern the partial takings issue and should not have been addressed by the Federal Circuit. See also *Preseault v. United States* 100 F.3d 1525 (Fed. Cir. 1996) (granting "in banc" review sua sponte).
- ¹⁶ 28 U.S.C. §1500.

- ¹⁷ 962 F.2d 1013, 1023 (Fed. Cir. 1992), *aff'd sub nom. Keene Corp. v. United States*, 508 U.S. 200 (1993).
- ¹⁸ *See id.* at 1023 (citation omitted).
- ¹⁹ 135 Ct. Cl. 647 (1956).
- ²⁰ *See id.* at 1548-49 (citing *Keene Corp. v. United States*, 508 U.S. 200, 211 (1993)).
- ²¹ *Id.* at 1548.
- ²² 27 F3d at 1556—60 (Mayer, J., dissenting).
- ²³ *Id.* at 1558.
- ²⁴ *Id.* at 1556—58.
- ²⁵ *Id.* at 1558.
- ²⁶ *Id.* at 1557.
- ²⁷ *Id.* at 1559.
- ²⁸ *Id.* at 1558.
- ²⁹ *Id.* at 1555—1556.
- ³⁰ *Id.*
- ³¹ *See* 18 F3d 1560 (Fed. Cir. 1994).
- ³² *See e.g. Broadwater Farms Joint Venture v. United States*, 1997 WL 428516 (Fed Cir. July 31, 1997) (reversing a ruling that a 28% diminution in value was not a taking (as a result of a denial of a wetlands permit under Section 404 of the Clean Water Act to develop 12 of 27 lots) and ruling that, under *Florida Rock*, a court must always evaluate the extent to which a regulation interferes with investment-backed alternatives and the character of the Government action before denying a takings claim).
- ³³ Professor Blumm finishes his article on *Florida Rock* by concluding that “[U]nless the Supreme Court reverses *Florida Rock*, all federal environmental regulations are in jeopardy, and environmental law, as we have come to know it in the last quarter century, is over.” *See Blumm, supra* Ch. 2, note 27, at 198.
- ³⁴ *Penn Central Transp Co. v. New York City*, 438 U.S. 104, 130-31 (1978). *See also* Margaret Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 Colum. L. Rev. 1667, 1676-77 (1988).
- ³⁵ *Penn Central*, 438 U.S. at 142-144.
- ³⁶ Radin, *supra* note 34 at 1677.
- ³⁷ 458 U.S. 419 (1982).
- ³⁸ Indeed the Court (through Justice Marshall) goes to great lengths in *Loretto* to clarify that it is *not* finding a takings simply because of the impact on the right to exclude *See* 458 U.S. at 435 (“[p]roperty rights in a physical thing have been described as the rights ‘to possess, use and dispose of it.’ (citation omitted) To the extent that the government permanently occupies physical property, it effectively destroys each of these rights.”) The *Loretto* Court also made clear that a similar rule

should not apply to other sticks in the bundle, “deprivation of the right to use and obtain a profit from property is not, in every case, independently sufficient to establish a taking.” *Id.* at 435—36.

³⁹ See *id.* at 426 (“we have long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause”).

⁴⁰ 481 U.S. 704 (1987).

⁴¹ *Id.* at 716.

⁴² Cf. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027—1030 (1992) (citing *Andrus v. Allard*, 444 U.S. 51 (1979), a case prohibiting the sale of eagle feathers, for the proposition that strands in the bundle of “personal” property (as opposed to land) may be abrogated without compensation).

⁴³ Severing property into strands in the bundle or incidences of ownership is different from physically severing property into affected and not-affected portions (for example by dividing a parcel into its wetland and upland portions). The Court has adopted the first method of severing property, it has resolutely rejected the second method. See *Concrete Pipe & Prods. of Cal. v. Constr. Laborers Pension Trust for Southern California*, 508 U.S. 602, 643—44 (1993) (unanimous Court reaffirming *Penn Central’s* holding that “a claimant’s parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete”); cf. *Lucas*, 505 U.S. at 1017—18 (recognizing difficulty in ascertaining in all cases the “property interest” against which the loss of value is to be measured). Both these methods of severing property interests, in turn, are distinct from Epstein’s partial takings doctrine, which holds that any portion of any property interest (however defined) may be compensable under the Takings Clause.

⁴⁴ See 505 U.S. at 1019.

⁴⁵ See 508 U.S. at 645.

⁴⁶ See *Lucas*, 505 U.S. at 1017—18; see also *Dolan v. City of Tigard*, 512 U.S. 374, 396 (1994).

⁴⁷ The dicta relied upon by the Federal Circuit is contained in Footnote 7 of the *Lucas* opinion where Justice Scalia complains about the difficulty in determining “the ‘property interest’ against which the loss of value is to be measured” and muses that it is “unclear” whether the Court would treat a regulation that requires a developer to leave 90% of a rural tract in its natural state “as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole” See 505 U.S. at 1016 n.7. This dicta, at most, leaves open the possibility of physically severing property by the affected and unaffected portions, it does not raise or in any way leave open the partial takings issue. See *supra* Ch.5, note 43; *Florida Rock Indus. v. United States*, 18 F.3d 1560, 1578 (Fed. Cir. 1994) (Nies, J., *issenting*) (“[t]he majority seeks to shoehorn its ‘partial takings’ theory into this open question. It does not fit.”) Moreover, any ambiguity raised by Scalia’s dicta was forcefully put to rest by a unanimous Court a year before *Florida Rock* in *Concrete Pipe*. See 113 S.Ct. at 2290 (“to the extent that any portion of property is taken, that portion is always taken

in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of the parcel in question.”

⁴⁸ See *Concrete Pipe*, 508 U.S. at 643—45.

⁴⁹ *Florida Rock*, 18 F3d at 1573 (Nies, C.J., dissenting).

⁵⁰ See *id.* at 1570—71.

⁵¹ EPSTEIN, *supra* Ch. 1, note 2, at 57.

⁵² See *Florida Rock*, 18 F3d at 1572 (“The fact that the source of a taking is a regulation rather than a physical entry should make no difference”).

⁵³ See *id.*

⁵⁴ See Chapter Two. See also *Lucas*, 505 U.S. at 1017 (justifying his rule that total deprivations in use were per se takings by noting that “total deprivation of beneficial use is, from the landowners’s point of view, the equivalent of a physical appropriation”).

⁵⁵ See *id.* at 1575 (Neis, C.J., dissenting) (noting that in *United States v. Causby*, 328 U.S. 256 (1945), and other Supreme Court cases the Court demanded “an identification of the specific property interest to be transferred”).

⁵⁶ See *id.* at 1575 (Neis, C.J., dissenting) (“Value is not a property value under Florida law or any state law that I can uncover.”).

⁵⁷ See EPSTEIN, *supra* Ch. 1, note 2, at 199.

⁵⁸ See 438 U.S. 104, 106-38 (1977). It is perhaps an overstatement to say that *Penn Central* established a “rule” that regulations that diminish property value by less than 90% do not require compensation under the takings clause. After all, *Penn Central* established a balancing test of three factors and ‘effect on property value’ is only one of the three factors. Nonetheless, *Penn Central* and its progeny strongly suggest that regulations that reduce property value by less than 90% will not be takings unless one of the other factors (the property owner’s “distinct investment backed expectations” and the “character of the government action” weigh strongly in the property owners favor. See *Concrete Pipe*, 508 U.S. at 643-45. If not a rule, then, it is at least a “rule of thumb” that provides guidance to government officials.

⁵⁹ See Blumm, *supra* Ch. 2, note 27, at 173.

⁶⁰ See Jay Plager, *Takings Law and Appellate Decision Making*, 25 ENVTL L 161, 162—163 (1995) (acknowledging that the partial takings issue had not been “fully briefed and argued,” and explaining that sometimes you have a “problem of trying to fit the issue you want to write about to the case that is before you”); see also *Florida Rock*, 18 F.3d at 1568 (“Nothing in the language of the Fifth Amendment compels a court to find a taking *only* when the Government divests the total ownership of the property”).

⁶¹ Plager, *supra* Ch.5, note 60, at 163.

⁶² See Blumm, *supra* Ch.2, note 27, at 180.

⁶³ *Florida Rock*, 18 F3d at 1575 (Nies, C.J., dissenting).

⁶⁴ See EPSTEIN, *supra* Ch. 1, note 2, at 111.

⁶⁵ *Id.*

⁶⁶ *Id.* at 112. Epstein's minimalist notions of the police power are, of course, fundamentally inconsistent with the broad and encompassing definition of the police power outlined by the Supreme Court:

Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. . . . The concept of public welfare is broad and inclusive (citations omitted). The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.

Berman v. Parker, 348 U.S. 26, 32—33 (1954) (citations omitted).

⁶⁷ *Lucas*, 505 U.S. 1023-1024.

⁶⁸ *Id.*

⁶⁹ The examples Scalia gave of regulations that would not require compensation both involved proposed uses that would cause significant spillover costs to neighboring property. *See Lucas*, 505 U.S. at 1028—29 (discussing landowner land filling a lake bed and flooding his neighbors and corporation operating a nuclear power plant on top of an earthquake fault).

⁷⁰ *See* John A. Humbach, "Taking" *The Imperial Judiciary Seriously: Segmenting Property Interests and Judicial Revision of Legislative Judgments*, 42 *CATH. U. L. REV.* 771, 772 (1993) ("[w]hat the Supreme Court did in *Lucas* itself was to reassign flat-out a portion of this nation's ultimate environmental and land use authority from the legislatures, which traditionally had it, to the courts."

⁷¹ *See* EPSTEIN, *supra* Ch.1, note 2, at 112.

⁷² *Lucas*, 505 U.S. at 1007—08; *Concrete Pipe*, 508 U.S. at 643—44.

⁷³ *Lucas*, 505 U.S. at 1029.

⁷⁴ *See infra* notes 81-89 and accompanying text. While the Court in *Lucas* does not state explicitly that its antecedent inquiry applies outside of the category of *per se* takings, if compensation is not required in such instances for *per se* takings, *a fortiori* compensation should not be required under the same circumstances for less restrictive laws and regulations.

⁷⁵ 408 U.S. 564 (1972)

⁷⁶ *See Lucas*, 505 U.S. at 1030 (citations omitted).

⁷⁷ Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 *HARV. L. REV.* 1165 (1967).

⁷⁸ *See Lucas*, 505 U.S. at 1030.

⁷⁹ *See* Michelman, *supra* Ch.5, note 77, at 1239—41.

⁸⁰ For cases on the subject, *see infra*. For commentary, *see* Lynn E. Blais, *Takings, Statutes, and the Common Law: Considering Inherent Limitations on Title*, 70 *S. CAL. L. REV.* 1 (1997); *see also* Lazarus, *supra* Ch.5,

note 14, at 1426; Daniel R. Mandelker, *Investment-Backed Expectations in Taking Law*, 27 URBAN LAW. 215, 225 (1995).

⁸¹ In addition to the cases discussed below, see *Wilson v. City of Louisville*, 957 F.Supp. 948, 956 (W.D. Ky. 1997); *Hunziker v. State*, 519 N.W.2d 367, 370—71 (Iowa 1995); *Grant v. South Carolina Coastal Council*, 461 S.E.2d 388, 391 (S.C. 1995).

⁸² See generally *Gazza v. New York State Dept. of Env't'l Conserv.*, 679 N.E.2d 1035, 1041—42 (N.Y. 1997); *Basile v. Town of Southampton*, 678 N.E.2d 489, 490—91 (N.Y. 1997).

⁸³ See *Anello v. Zoning Bd. of Appeals of the Village of Dobbs Ferry*, 678 N.E.2d 870, 870—71 (N.Y. 1997).

⁸⁴ See *Kim v. City of New York*, 681 N.E.2d 312, 315 (N.Y. 1997).

⁸⁵ See *Kim*, 681 N.E.2d at 315.

⁸⁶ *Id.* at 315—16. The Court of Appeals stated in *Kim*:

It would be an illogical and incomplete inquiry if the courts were to look exclusively to common-law principles to identify the preexisting rules of State property law, while ignoring statutory law in force when the owner acquired title. (Citations omitted). To accept this proposition would elevate common law over statutory law, and would represent a departure from the established understanding that statutory law may trump an inconsistent principle of the common law. (citation omitted).

Id. at 315.

⁸⁷ See *id.* at 316—17 (common law and statutory obligations of lateral support); *Anello*, 678 N.E.2d at 870 (steep slope ordinance).

⁸⁸ *Kim*, 681 N.E.2d at 319; *Anello*, 678 N.E.2d at 871.

⁸⁹ *Anello*, 678 N.E.2d at 871.

⁹⁰ See Richard A Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 STAN. L. REV. 1369, 1392 (1993).

⁹¹ *Loveladies Harbor, Inc v. United States*, 28 F.3d 1171 (Fed. Cir. 1994).

⁹² *Id.* at 1179.

⁹³ Judge Plager's phrasing of this new first prong seems deliberately misleading. He drops the word "all" from Lucas' "denial of all economically viable use" category and replaces it with the ambiguous "denial of economically viable use." Judge Plager's discussion of the prong, however, makes it clear that he intends his new three prong test to apply whenever a regulation denies a property owner of *an* economically viable use. *Id.* at 1179-80. With that simple editing of the Supreme Court's opinion in *Lucas*, Judge Plager interpreted *Lucas*' to impact all regulatory takings cases. See *id.*

⁹⁴ *Id.*

⁹⁵ See *id.* at 1179.

⁹⁶ We note that because the Federal Circuit in *Loveladies* ultimately ruled that the regulation in question deprived *Loveladies* of *all* economically viable use of their property, Judge Plager's reformulation of *Penn Central* outside of *Lucas*' category of *per se* takings is *dicta*, which courts,

including the Federal Circuit, do not appear to be following. See *Broadwater Farms*, 1997 WL 428516, slip op. at 2 (applying original three-prong Penn Central test to regulatory taking case).

⁹⁷ See 66 F.3d 1167 (Fed. Cir. 1995), *vacated*, 66 F.3d 1190 (Fed. Cir. 1995), *rev'd* 100 F.3d 1525 (1996).

⁹⁸ See 66 F.3d at 1174-1180.

⁹⁹ 66 F.3d at 1176; see also *Gazza v. New York State Dep't of Env'tl. Conserv.*, 679 N.E.2d 1035, 1043 (N.Y. 1997).

¹⁰⁰ 100 F.3d 1525 (Fed. Cir. 1996). Because Judge Plager was only able to get three other justices to join his opinion, the opinion is not binding precedent in the circuit.

¹⁰¹ *Id.* at 1538-1539 ("Much of what the Supreme Court said then. . . about property rights indicates to the contrary.").

¹⁰² EPSTEIN, *supra* Ch.1, note 2, at 128.

¹⁰³ EPSTEIN, *supra* Ch.1, note 2, at 133.

¹⁰⁴ See 512 U.S. 374, 389—90 (1994). For a more complete treatment of *Nollan* and *Dolan*, see Douglas T. Kendall & James E. Ryan, *Paying for the Change: Using Eminent Domain to Secure Exactions and Sidestep Nollan and Dolan*, 81 VA. L. REV. 1801, 1807—79 (1995).

¹⁰⁵ The term "exactions" encompasses a variety of concessions that municipalities extract from landowners who wish to change the use of their land, such as impact fees, the provisions of services, restrictions on land use, and dedications of land. See Kendall & Ryan, *supra* Ch.5, note 104, at 1802—03.

¹⁰⁶ *Id.* 512 U.S. at 391.

¹⁰⁷ (quoting *J.E.D. Assoc. v. Atkinson*, 432 A.2d 12, 14—15 (1981)).

¹⁰⁸ See 512 U.S. at 413—14 (Souter, J., dissenting).

¹⁰⁹ See *Dolan*, 512 U.S. at 387.

¹¹⁰ See Kendall & Ryan, *supra* Ch.5, note 104, at 1807—08, n26, 1812 n.51 (discussing reasons why applying *Nollan* and *Dolan* outside the realm of physical exactions would be an improper extension of the cases).

¹¹¹ Docket No. 97-42.

¹¹² 95 F.3d 1422, 1428—34 (9th Cir. 1996).

CHAPTER 6

IMPLICATIONS AND CONCLUSIONS

TAKINGS LAW 1998

As we noted in introducing the Report, the Takings Project is at a critical juncture. In the last ten years, the Supreme Court has introduced many of the notions Professor Epstein promoted in *Takings*, but its steps have been tentative and the Court has yet to adopt (or even suggest acceptance of) the most radical aspects of Professor Epstein's theory. These tentative steps and some expansive dicta by the Court's most conservative judges have, nonetheless, encouraged greater activism by lower federal court judges. Most notably, the Federal Circuit in *Florida Rock*, *Loveladies*, and *Preseault* has adopted many of the core elements of Professor Epstein's blueprint for the Takings Clause.

The combined efforts of developers, conservative foundations, non-profits and activist conservative judges have thus transformed the notion that the Taking Clause represents a barrier to health, welfare and environmental law from the theoretical musings of a scholar at the fringe of constitutional law into circuit court precedent. Because the Supreme Court declined the government's invitation to review *Florida Rock*,¹ and because the Federal Circuit has exclusive jurisdiction over most claims stemming from the federal government's enforcement of the wetlands provision of the Clean Water Act, the habitat protection provision of the Endangered Species Act, and numerous other federal health and environmental laws, these cases are already impacting federal laws that affect land use. The success the Project has had to date is a lesson to those who questioned whether Epstein's work would have any practical import and a warning to those who are tempted to conclude that Epstein's more extreme notions could never gain acceptance from the Supreme Court.

In sum, the Takings Project represents a remarkably dangerous, open question: will central elements of Professor Epstein's proposal become Supreme Court precedent. This term, in *Eastern Enterprises v. Apfel*, the Supreme Court may address how expansively the means/ends analysis established in *Nollan* and *Dolan* will be applied. The Federal Circuit's opinions in *Preseault*, *Florida Rock* and *Loveladies* also create conflicts in judicial interpretations of the

The fate of the Project thus depends in large part upon the jurisprudence of Justice Kennedy and the ideology of the next several justices appointed to the Court.

We do not question the sincerity of Senator Hatch's concern for the rights of developers, but simply cannot see how his support for the Takings Project can be squared with his simultaneous attack on judicial activism.

Takings Clause, and make it very likely that the Supreme Court will address the questions of partial takings and the scope of nuisance exception over the next decade. The direction the Court will take in these future opinions is, at present, far from certain. The Takings Project appears to have four, but not five, solid and consistent votes on the Supreme Court: Chief Justice Rehnquist, and Justices Scalia, Thomas and O'Connor.² The most likely fifth vote, Justice Kennedy has a record on takings issues that is both less developed and less consistent.³ The fate of the Project thus depends in large part upon the jurisprudence of Justice Kennedy and the ideology of the next several justices appointed to the Court.

For opponents of the Project, that is not a comfortable position. Like Professor Blumm, we think it should be unlikely that the Supreme Court "would want to reverse large-scale social and economic decisions of more representative branches of government with no basis in precedent or the history of the Fifth Amendment." But the fact that Judge Plager and his colleagues on the Federal Circuit have, as an inferior court, managed to write so many of Professor Epstein's ideas into the nation's case law without getting immediately reversed, suggests that more radical decisions by the Supreme Court advancing the Takings Project are at least a possibility.

CONCLUSION

We began this Report by asserting that neither the means nor the ends of the Takings Project could withstand scrutiny. We now can clarify more precisely what we mean. The flaws with the Takings Project stem from the Takings Clause itself. If there were a persuasive (or even plausible) basis for the Project in the text of the Takings Clause, attacking it would be considerably more difficult. As we, and a long line of scholars from both sides of the political spectrum have thoroughly documented, however, the words of the clause and the intent of its authors simply do not support the result the Project seeks. It is particularly notable that prominent conservative scholars such as Robert Bork and Charles Fried, who quite openly support many of the objectives of the Project, have felt compelled to join the pile of commentators rejecting Professor Epstein's interpretation of the text of the Constitution.

Stripped of any textual grounding, the Takings Project relies on judicial activism. It asks conservative judges to find new development rights in the Constitution, and does so on behalf of a group — developers — that already does quite well in the political process. At the very least, the proponents of the Project must address the reality that they are promoting judicial activism on behalf of developers and explain why they favor activism to benefit this segment of our society but not others.

This raises the principal concern with the legal foundations and congressional supporters of the Takings Project. We do not question the sincerity of Senator Hatch's concern for the rights of devel-

opers, but simply cannot see how his support for the Takings Project can be squared with his simultaneous attack on judicial activism. Similarly, it may be appropriate for the Pacific Legal Foundation to litigate vigorously on behalf of property owners,⁴ but PLF's demand that judges broadly interpret the Takings Clause is difficult to reconcile with PLF's simultaneous demand that judges narrowly interpret the Equal Protection Clause to prohibit all forms of affirmative action.

The problems with the judicial seminars conducted by FREE and the activism of the Federal Circuit run somewhat deeper. We can think of no good reason why judges need to attend week-long seminars in resort locations hosted by private, ideologically-driven, interest groups. Federal judges should not be cloistered, but there is a line that can and should be drawn between FREE's seminars and speaking engagements, teaching assignments, award ceremonies and even, perhaps, longer educational seminars conducted by government agencies or bar associations. The Court's Administrative Office certainly has the power to draw this line, but if they fail to do so, Congress should consider a legislative solution. The integrity of the judicial process is too important to allow even the appearance of impropriety that attendance at such judicial seminars can create.

The activism of the Federal Circuit highlights a problem with granting a single federal appellate court so much power to shape a critical and highly politicized area of constitutional law. The idea of organizing portions of the federal appellate system by subject matter, rather than by region, is a relatively novel and controversial one.⁵ Judge Plager, in an article written shortly after he was named to the Federal Circuit, argued that the critics of such non-regional, subject matter courts rely on "untested assumptions," and proposed that commentators "carefully analyze the performance of the Federal Circuit" to "illuminate the rightness or the wrongness of the concerns raised about subject matter based courts."⁶ This Report demonstrates that many of the concerns Judge Plager identified regarding subject matter courts — the "polarization or politization around policy issues" and the potential that judges may be "more readily controlled, or their selection controlled, in some invidious way"⁷ — are valid and serious concerns.

The most often cited advantages of subject matter based appellate courts — the need for judges with subject matter expertise and the need for uniformity of decision — also do not apply with any particular force to takings law.⁸ Unlike other areas in the Federal Circuit's jurisdiction, such as patent law or international trade law, takings cases require no particular expertise or technical background. Takings cases are often factually complex, and frequently require a delicate balancing of public and private interests, but these are tasks federal district court and appellate court judges from around the country are more than qualified to perform. Moreover, because federal district and appellate courts already hear takings challenges to state laws, they have experience and some expertise in such cases.

Rather than expanding the jurisdiction of the Federal Circuit over takings cases as Takings Project advocates are promoting, we believe Congress should consider eliminating it.

The Takings Project may wither under scrutiny, but for that to matter, the Project must be scrutinized outside of the realm of academic law journals and amicus briefs.

Similarly, because takings challenges are constitutional, rather than statutory,⁹ and because state courts and regional federal courts already interpret the Takings Clause in addressing challenges to state and local laws, the Federal Circuit cannot provide any meaningful uniformity to takings law. As long as the Federal Circuit's opinions conflict with the opinions given to the same constitutional text by other state and federal courts, there is no real certainty for landowners and federal regulators. Only the Supreme Court can resolve conflicting interpretations of the Takings Clause and provide any real uniformity or certainty in takings law.

In sum, rather than expanding the jurisdiction of the Federal Circuit over takings cases as Takings Project advocates are promoting, we believe Congress should consider eliminating it. Takings challenges against the federal government raise broad and fundamental questions about the role of government, a citizen's rights and responsibilities within a community and the nature of private property; these fundamental challenges probably should be addressed by the entire federal judiciary.

Our final observation goes not to the proponents, but to the natural adversaries of the Takings Project. To date, state and local government associations, progressive foundations and non-profit organizations have made no concerted effort to combat the Takings Project,¹⁰ and, as a result, the Project has been able to progress for the last decade without a serious public discussion of the merits of the Project's means and ends. If the Project is to be thwarted, it must receive more attention from its adversaries,¹¹ and federal, state and local government attorneys must receive assistance in defending laws that protect the public health and welfare against constitutional attack. The Takings Project may wither under scrutiny, but for that to matter, the Project must be scrutinized outside of the realm of academic law journals and amicus briefs. The stakes — our nation's health, safety and environmental laws — are high enough to justify such a coordinated response.

Endnotes

- ¹ While it is always dangerous to read too much into a decision by the Supreme Court not to review a case, it seems possible here to also read too little. A petition from the government to review as important a takings case as *Florida Rock* unquestionably got the attention of all the justices. At the very least, the decision not to review the case would seem to indicate that there is some discord among the members of the current court about the appropriate response to Judge Plager's handiwork.
- ² A decade ago, Justice O'Connor, joining Justice Stevens' dissent in *First English*, seemed to question the Takings Project's objective of imposing upon government agencies a new and burdensome compensation requirement. See *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 322 (1987) (O'Connor J. joining portions of dissent authored by Stevens, J). Since then, however, Justice O'Connor has been uncompromising in her support for the Project. See *Nollan*, 483 U.S. 825 (1987) (O'Connor J. joining majority); *Lucas*, 505 U.S. 1003 (same); *Dolan*, 512 U.S. 374 (same); *Preseault*, 494 U.S. at 20 (O'Connor J. concurring)(addressing the merits of the Preseault's takings claim and suggesting that their claim had merit); *Suitum*, 117 S.Ct. 243 (O'Connor J. joining Scalia J. and Thomas J. in concurring)(arguing that transferable development rights (TDR's) received by a property owner are not relevant to whether a taking has occurred); *Parking Ass'n v. City of Atlanta*, 115 S.Ct. 2268 (1995) (O'Connor J. joining Thomas, J. in dissenting form the denial of certiorari)(arguing that the means/ends scrutiny established in *Nollan* and *Dolan* should apply to legislative as well as adjudicative determinations); *Stevens v. City of Cannon Beach*, 510 U.S. 1207 (1994)(O'Connor J. joining Scalia, J. in dissenting form the denial of certiorari)("[t]o say that this case raises a serious Fifth Amendment takings issue is an understatement"). For a more nuanced, analysis of each Court member's voting in takings cases, See *Lazarus, supra* Ch. 3, note 48 at 110 - 121.
- ³ See *Lazarus, supra* Ch. 3, note 48 at 109-121.
- ⁴ See Oliver Houck, *With Charity for All*, 93 YALE L.J. 1415, 1470-74 & 1544-45 (1984) (questioning whether PLF's litigation on behalf of developers qualifies as "public interest law" within the meaning of Section 501 (c)(3) of the United States tax code).
- ⁵ See Jorden, *Specialized Courts: A Choice?*, 76 Nw U.L. Rev. 745 (1981); Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U.L.Rev. 1 (1989); Richard Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U.Pa. L.Rev. 1111 (1990); Daniel J. Meador, *An Appellate Court Dilemma and a Solution Through Subject Matter Organization*, 16 U.Mich. J.L.Ref. 471 (1983).
- ⁶ S. Jay Plager, *The United States Courts of Appeals, the Federal Circuit and the Non- Regional Subject Matter Concept: Reflections on the Search for a Model*, 39 Am.U.L.Rev. 853, 866-67 (1990).
- ⁷ *Id.*
- ⁸ See e.g. Randall R. Rader, *Specialized Courts: The Legislative Response*, 40 Am. L. Rev. 1003, 1008-1009 (discussing the need for judges with

expertise in highly specialized and technical areas and the need to promote uniformity of decision.)

- ⁹ Most of the subject matters within the jurisdiction of the Federal Circuit are statutory, rather than Constitutional, and because Congress has granted the Federal Circuit's exclusive jurisdiction over claims under the statute, the Federal Circuit is the sole interpreter of the statute, subject only to the discretionary review of the Supreme Court. See generally Plager, *supra* Ch. 6, note 5 at 853-854.
- ¹⁰ To be clear, a large and effective coalition *has* formed to oppose property rights legislation, including the procedural reform legislation that has been proposed this term. We believe that a similarly intense and focused opposition must form to combat all aspects of the litigation campaign being waged in the nation's courts.
- ¹¹ We suspect, for example, that if Judge Plager was creating rights on behalf of criminal defendants or minorities instead of developers, he would be a household name by now, see, eg. H. Lee Sarokin, *A Judge Speaks Out*, *Nation*, Oct. 13, 1997 (Judge Sarokin, one of the right's favorite "liberal judicial activists" explains that he "retired from the federal bench . . . over the politicization (what I characterized as the "Willie Hortonizing" of the federal judiciary.), but note that there is not a single story in the NEXIS database discussing Judge Plager's activism in takings cases. We also find it hard to believe that Project proponents continue to derive political mileage from an attacking judicial activism when the activism they are promoting — the Takings Project — is perhaps the single most significant form of judicial activism to come from the federal courts over the last decade.