


5-1-1998

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Recommended Citation

Douglas T. Kendall and Charles P. Lord, *The Takings Project: A Critical Analysis and Assessment of the Progress So Far*, 25 B.C. Env'tl. Aff. L. Rev. 509 (1998), <http://lawdigitalcommons.bc.edu/ealr/vol25/iss3/2>

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THE TAKINGS PROJECT: A CRITICAL ANALYSIS AND ASSESSMENT OF THE PROGRESS SO FAR[†]

Douglas T. Kendall* and Charles P. Lord**

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

INTRODUCTION

While numerous commentators have documented and attempted to explain the dramatic changes that have occurred in takings law over the last decade,² few have examined in any detail the questions of how

[†] c Community Rights Counsel, 1998.

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¹ CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT 183 (1991) [hereinafter ORDER AND LAW].

² See generally Jed Rubenfeld, *Usings*, 102 YALE L. J. 1077 (1993); Jeremy Paul, *The Hidden Structure of Takings Law*, 64 S. CAL. L. REV. 1393 (1991); Vicki Been, *"Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473 (1991); Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles*, 77 CAL. L. REV. 1299 (1989); Stewart E. Sterk, *Nollan, Henry George, and Exactions*, 88 COLUM. L. REV. 1731 (1988); Nicholas Tideman, *Takings, Moral Evolution, and Justice*, 88 COLUM. L. REV. 1714 (1988); Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667 (1988). The authors have, in prior pieces, joined this debate. See generally Douglas T. Kendall & James E. Ryan, *"Paying" for the Change: Using the Eminent Domain Clause to Sidestep Nollan and Dolan*, 81 VA. L. REV. 1801 (1995); Douglas T. Kendall, Note, *The Limits to Growth and the Limits to the Takings*

and why this doctrinal shift has taken place. These are the questions to which this Article turns.

The genesis for this Article, 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 (Takings)*.³ This observation, while by no means original,⁴ was, to us, both remarkable and troubling. After all, Epstein's work was almost universally criticized (if not ridiculed) by the legal academy⁵ and Epstein's proposed end result—the overturning of a century's worth of health, safety, and economic regulation⁶—would sink this country in a constitutional crisis as serious as that brought about by the economic due process jurisprudence of the *Lochner*-era Supreme Court.⁷

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

Clause, 11 VA. ENV'TL L.J. 547 (1992); Charles P. Lord, Note, *Stonewalling the Malls: Just Compensation and Battlefield Protection*, 77 VA. L. REV. 1637 (1991).

³ RICHARD A. EPSTEIN, *TAKINGS, PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985) [hereinafter *TAKINGS*].

⁴ While we provide in Section IV what is perhaps the most comprehensive matching of the ideas proposed by Professor Epstein with the Supreme Court and lower federal court case law that has developed over the last decade, we are by no means the first to note the influence Professor Epstein's work is having on takings doctrine. See *infra* note 46 (collection of sources discussing Professor Epstein's influence on takings law).

⁵ See *infra* notes 35–79 and accompanying text.

⁶ See EPSTEIN, *supra* note 3, at 281 (“It will be said that my position invalidates much of the twentieth century legislation, and so it does.”).

⁷ 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 sixty 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 period

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 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

reached its zenith in the mid-1930s when the Court repeatedly struck down President Roosevelt’s New Deal programs, and ended in 1937 when Justice Roberts switched his vote and became the fifth justice necessary to uphold the New Deal. *See generally* *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937); *see also* *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

term), and this Article 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,⁸ 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,"⁹ many of the Project's strongest proponents are using cries of judicial activism to delay confirmation of President Clinton's judicial appointments.¹⁰ At the

⁸ For an inspiring account of the century's most famous and, arguably most successful, constitutional litigation campaign see generally 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)).

⁹ See EPSTEIN, *supra* note 3, at 30–31.

¹⁰ 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 Senator Hatch's simultaneous attack on judicial activism and promotion of the Takings Project).

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.¹¹ The Project is indefensible, in other words, for its hypocrisy. The Project is hypocritical, moreover, because the promoters portray it 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.¹²

We write as part of a larger effort to bring attention to the Project and, thereby, to help stop it before it goes much further.¹³ Neither the means—the activities we encompass within the term the Takings Project—nor the ends of the Project—interpreting the Takings Clause to thwart popular and important health, safety, and environmental laws—withstand serious scrutiny. As a result, the more attention the media, policymakers and the public pays to the Project, the less likely it will succeed.

This Article proceeds in four sections. Section I 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 doc-

¹¹ See Douglas T. Kendall & James E. Ryan, *The Right Can't Have It Both Ways*, L.A. TIMES, Feb. 8, 1998, at M5.

¹² 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.

¹³ The authors are members of the Board of Directors of the Community Rights Counsel (CRC), a non-profit, public interest law firm founded in 1997 to help communities protect laws that regulate land use from the attack of the Takings Project. Mr. Kendall serves as CRC’s Executive Director.

trine over nearly two centuries. After summarizing the status of takings law in 1985, when Professor Epstein's book was published, we turn to Epstein's work. In particular, we examine his argument that the Takings Clause itself renders zoning laws, wetlands regulations, flood-control legislation, and a wide variety of other laws regulating land use "constitutionally suspect or infirm." Drawing upon a decade of scholarly criticism, we thoroughly refute 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 Epstein's reactionary political views, it is, as one scholar called it, a "travesty of constitutional scholarship."¹⁴

Sections II and III summarize the Takings Project. Section II 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 President Reagan's attack on federal health, safety, and environmental regulations. Section II 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. Section III 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.

Section IV documents the results of the Takings Project. This Section 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 will then discuss three of the most important aspects of Professor Epstein's takings doctrine and trace the progress of those ideas into the nation's case law. The Article will end 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.

¹⁴ Thomas C. Grey, *The Malthusian Constitution*, 41 U. MIAMI L. REV. 21, 24 (1986).

I. THE TAKINGS CLAUSE, TAKINGS DOCTRINE CIRCA 1985, AND PROFESSOR EPSTEIN'S THEORY

A. *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,¹⁵ 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 framer's 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.¹⁶ Similarly, there is no

¹⁵ Webster's Dictionary's first definition of the word "take" is "to get into one's possession by force, skill, or artifice; seize, grasp, catch, capture, win, etc." WEBSTER'S NEW COLLEGE DICTIONARY 1123 (1995).

¹⁶ See *Lucas v. South Carolina Coastal Council*, 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 . . ." *Id.* at 1056-58 (Blackmun, J., dissenting); EPSTEIN, *supra* note 3, at 26-29 (recognizing historical evidence that 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"); see also William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 825 (1995); John A. Humbach, "Taking" the Imperial Judiciary Seriously: Segmenting Property Interests and Judicial Revision of Legislative Judgments, 42 CATH. U. L. REV. 771, 776-77 (1993) (collecting sources in support of the notion that "interpreting the Takings Clause to limit regulation appears ahistorical, contrary to both the intentions of the Framers and to the understanding of most 19th century judges"); William W. Fisher III, *The Trouble with Lucas*, 45 STAN. L. REV. 1393, 1395 (1993) (noting that Justice Scalia's justifications in *Lucas* for reading the Takings Clause broadly "plainly diverge from the originalist theory to which [Justice Scalia] formerly pledged his

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 Court¹⁷ illustrates 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.¹⁸

B. *The Evolution of Modern (Pre-1985) Takings Law*

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*,¹⁹ 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.²⁰

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.²¹

allegiance"); ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 230 (1990) ("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.").

¹⁷ *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 551-52 (1870).

¹⁸ Treanor, *supra* note 16, at 794-96.

¹⁹ *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1872).

²⁰ *Id.* at 177-78.

²¹ *Id.* at 181; *see also Sanguinetti v. United States*, 264 U.S. 146, 149 (1924) (to be a taking, flooding must "constitute an actual, permanent invasion of the land, amounting to an appropriation of, and not merely an injury to, the property"); Treanor, *supra* note 16, at 795-96 n.74 ("[T]he

Nearly fifty years later, in the 1922 case of *Pennsylvania Coal v. Mahon*,²² the Court expanded the reach of the Takings Clause again to encompass particularly oppressive regulations. *Pennsylvania Coal* 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”²³ 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.²⁴

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”²⁵ 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.”²⁶

Following *Mugler*, the Supreme Court applied the nuisance exception to justify a significant number of legislative prohibitions without compensation.²⁷ The Court recognized that declaring an activity a

government action in *Pumpelly* gave rise to a compensation requirement because it was a de facto physical taking. Initially the Court construed *Pumpelly* as limited to this very narrow category of cases.”)

²² *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922)

²³ *Id.* at 414.

²⁴ *Id.* at 414–15.

²⁵ *Mugler v. Kansas*, 123 U.S. 623, 665 (1887).

²⁶ *Id.* at 669.

²⁷ See generally *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).

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.²⁸ The Court also acknowledged that what is and is not a nuisance would change over time, and that the legislature could declare uses that were formerly commonplace to be contemporary nuisances.²⁹

Justice Brennan summarized the status of takings law prior to 1985 in his opinion for the Court in *Penn Central Transportation v. New York City*.³⁰ As Justice Brennan noted, the question of what constitutes a regulatory takings (i.e. when a regulation was sufficiently akin to an expropriation) for the purposes of the Fifth Amendment "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."³¹ 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.³² Under *Penn Central's* balancing test, no one factor alone is determinative,³³ and significant diminutions in property value are generally permissible without compensation.³⁴

While not always simple to apply, the doctrine the Court established in *Pumpelly*, *Mugler*, *Pennsylvania Coal*, *Penn Central*, and other cases had a logic based on the text and the original meaning of the clause. The clause was applied primarily to prevent uncompen-

²⁸ See *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 . . .").

²⁹ See *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

³⁰ See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

³¹ *Id.* at 123-24.

³² *Id.* at 124.

³³ *Id.* at 130-31 & n.27.

³⁴ See *Euclid*, 272 U.S. at 384 (permitting approximately 75% diminution in value); *Hadacheck*

sated 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.

C. *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 1985,³⁵ 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."³⁶

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.³⁷ Property ownership, in turn, consists a bundle of rights, of which possession, use, and disposition are the most important.³⁸ 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."³⁹

To reach his result, Epstein suggested that the Supreme Court should revise then-standing precedent in two 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

v. Sebastian, 239 U.S. 394, 405 (1915) (permitting 92.5% diminution in value from \$800,000 to \$60,000); see also *Concrete Pipe & Prod. of Cal., Inc. v. Construction Laborers Pension Trust for So. Cal.*, 508 U.S. 602, 645 (1993) (rejecting a takings claim based on allegations that an employer's "withdrawal liability" from a multi-employer pension plan required payments of "46% of shareholder equity," on the grounds that "our cases have long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking").

³⁵ EPSTEIN, *supra* note 3, at xi (recognizing "a generous grant from the Institute for Educational Affairs").

³⁶ *Id.* at x.

³⁷ See *id.* at 7-18.

³⁸ See *id.* at 57-62.

³⁹ *Id.*

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.”⁴⁰ 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,”⁴¹ 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.⁴²

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 but 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.⁴³

D. *Epstein Critiqued*

Although criticized (if not ridiculed) within the legal academy as “shallow,”⁴⁴ a “travesty of constitutional scholarship,”⁴⁵ and a failure as a matter of history, logic, philosophy, or textual analysis,⁴⁶ *Takings*

⁴⁰ See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 130–32 (1978); *infra* notes 30–34 and accompanying text (discussing *Penn Central*).

⁴¹ EPSTEIN, *supra* note 3, at 58.

⁴² 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.

⁴³ See *id.* at 107–25.

⁴⁴ Thomas Ross, Review, *Taking Takings Seriously*, 80 Nw. U. L. Rev. 1591, 1592 (1987).

⁴⁵ Grey, *supra* note 14, 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.

⁴⁶ See Joseph L. Sax, Review, *Takings*, 53 U. CHI. L. Rev. 279, 279 (1986). For additional

has been used as a legitimizing tool by those interested in using the Takings Clause to halt government regulation.⁴⁷ More importantly, as described in detail in Section IV, 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*.⁴⁸ It is therefore important to articulate clearly and early in this Article some of the legion of severe flaws in Professor Epstein's work.⁴⁹ 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.

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.⁵⁰ 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.⁵¹ How Epstein reaches this

evidence of the disdain with which scholars received *Takings*, see Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW § 9-6, at 606 n.6 (2d ed. 1988) (“the gaps, flawed assumptions and argumentative [el]isions in Epstein's reactionary interpretation of the Fifth Amendment [are] too numerous to address fairly here . . .”); see also Martin S. Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 556-67 (1995).

⁴⁷ See Ross, *supra* note 44, at 1592, 1603; Treanor, *supra* note 16, 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.”).

⁴⁸ 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 ENVTL. 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”).

⁴⁹ See generally Grey, *supra* note 14, at 21-48. As Professor Mark Kelman acknowledged, one might question the value of attacking a book that is so clearly terrible; it is important to do so, however, because “in today's political intellectual culture, *Takings* is taken seriously.” Mark Kelman, Review, *Taking Takings Seriously: An Essay for Centrists*, 74 CAL. L. REV. 1829, 1829-30 (1986).

⁵⁰ See BORK, *supra* note 16, at 230 (“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* note 46, at 280.

⁵¹ See EPSTEIN, *supra* note 3, at 31.

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.⁵² 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.⁵³ 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.⁵⁴ 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 the individual's own labor.⁵⁵ These private rights, however, could only be exercised "where there is enough, and as good left in common for others."⁵⁶ 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.⁵⁷ 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

⁵² See *id.* at 7–18.

⁵³ See Treanor, *supra* note 16, at 823–24 ("While historians are sharply divided on a host of interpretive matters concerning republicanism and liberalism in the revolutionary era and the first years of the early republic, there is now a near consensus that both republican and liberal ideas powerfully influenced American politics during the 1780s and 1790s."); see generally GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787* (1969); BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 35–36 (1967); Gregory S. Alexander, *Time and Property in the American Republican Legal Culture*, 66 N.Y.U.L. REV. 273 (1991).

⁵⁴ See EPSTEIN, *supra* note 3, at 10–11 (citing JOHN LOCKE, *OF CIVIL GOVERNMENT* ¶ 27 (1690)).

⁵⁵ See *id.*

⁵⁶ *Id.* (quoting LOCKE, *supra* note 54, ¶ 27).

⁵⁷ For a modern explication of this theory, see Akil Amar, *Forty Acres and a Mule: A Republican Theory of Minimal Entitlements*, 13 HARV. J.L. & PUB. POL'Y 37, 37 (1990) (arguing that the state may have an obligation to provide a minimum amount of property to all its citizens).

of private property.⁵⁸ This correction, although done almost casually by Epstein, is a radical restatement of Locke's philosophy.⁵⁹ 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."⁶⁰

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.⁶¹ 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.⁶² 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."⁶³

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" ap-

⁵⁸ EPSTEIN, *supra* note 3, at 10–11 (quoting LOCKE, *supra* note 54, ¶ 27). As Epstein writes in a later article, "the takings clause should be read as being inspired by Locke's treatise but not as following its language, or its logic, to the end." Richard A. Epstein, *Takings: Descent and Resurrection*, 1987 SUP. CT. REV. 1, 2 n.5.

⁵⁹ See Ross, *supra* note 44, at 1594.

⁶⁰ *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 Ronald 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." Fried, *supra*, at 48–49.

⁶¹ See EPSTEIN, *supra* note 3, at 31.

⁶² See *id.* at 29–31.

⁶³ See *id.* at 20.

proach 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."⁶⁴ Not surprisingly, Epstein's interpretive shell game "produces a Constitution that comports perfectly with his personal political philosophy."⁶⁵

An example illustrates 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.⁶⁶ 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[es] the rights of the owner in any fashion . . . no matter how small the alteration."⁶⁷

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 eviscerate 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 Professor Alexander observed, while Epstein's contention "is an argument for a

⁶⁴ Sax, *supra* note 46, at 280.

⁶⁵ *Id.* at 282.

⁶⁶ See generally Blumm, *supra* note 48, at 194 ("partial takings" doctrine "threatens to undermine all environmental and land use regulation").

⁶⁷ See EPSTEIN, *supra* note 3, at 57.

broad construction of takings, it is surely not the argument of a textual literalist."⁶⁸

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 evidence regarding the framer's original intent.⁶⁹ 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."⁷⁰ Historical sources, in turn, indicate quite clearly that the standard meaning of the phrase "take private property" did not encompass land use regulations.⁷¹

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

⁶⁸ Larry Alexander, *Takings of Property and Constitutional Serendipity*, 41 U. MIAMI L. REV. 223, 225 (1986).

⁶⁹ See *supra* note 16 (collecting authorities).

⁷⁰ EPSTEIN, *supra* note 3, at 29.

⁷¹ 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 non-injurious 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.

Id. at 1258 (citation omitted).

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 Economic Rights,"⁷² Epstein suggested that his theory would require "a level of judicial intervention far greater than we now have, and indeed far greater than we ever have had."⁷³

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 Article, have expanded the scope of the Takings Clause in recent years, often along lines suggested in Epstein's book.⁷⁴ Epstein's call has also inspired the constitutional litigation strategy 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.⁷⁵ Judicial activism, of course, is often decried by the same conservatives—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.⁷⁶ This criticism, however, applies with perfect and ironic

⁷² Grey, *supra* note 14, at 22 n.2 (quoting the article).

⁷³ See EPSTEIN, *supra* note 3, at 30.

⁷⁴ See, e.g., MARK POLLOT, GRAND THEFT AND PETIT LARCENY: PROPERTY RIGHTS IN AMERICA 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."); see also James L. Huffman, *Judge Plager's "Sea Change" in Regulatory Takings Law*, 6 FORD. ENVTL. L.J. 597, 600-10 (1995) [hereinafter Huffman I] (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); 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) [hereinafter Huffman II].

⁷⁵ See, e.g., Fried, *supra* note 60, at 48 ("The text and inspiration for some of the boldest of the recent litigation efforts has been Richard Epstein's celebrated book, *Takings*"); Deborah Graham, *Conservative Academics: Rising Stars*, LEGAL TIMES, Mar. 18, 1985, at 1 ("Epstein has gained a certain amount of disfavor among some conservatives because they think he favors judicial activism.").

⁷⁶ See Hatch, *supra* note 10, at C9.

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), and, indeed, prominent conservative legal scholars—such as Robert Bork and Charles Fried—have strongly criticized the Takings Project on just this basis.⁷⁷

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.⁷⁸ 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 large developers, it is quite difficult to justify federal court intervention on the ground that such groups or individuals have limited access or are routinely short-changed by the political process.⁷⁹

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

⁷⁷ BORK, *supra* note 16, at 223, 230–31 (“[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* note 60, at 48–51. 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* note 3, 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.

⁷⁸ The most famous explication of this political process theory of judicial review is John Hart Ely’s *Democracy and Distrust* (1982).

⁷⁹ See Treanor, *supra* note 16, at 879; Kendall, *supra* note 2, at 558–62.

process. It is difficult to imagine a less compelling agenda for the federal judiciary.

II. THE ORIGINS OF THE TAKINGS PROJECT

A. *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. 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 conservatives and libertarians interested in the development of constitutional law.

By 1985, a dramatic shift in the ideological make up 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 (Justices Blackmun, Brennan, and Marshall) were aging, each approaching their 80's. With President 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.

The year 1985, represented therefore, 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 the conservative agenda. In the minds of many 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,⁸⁰ the choice of the Heritage Foundation to be a Supreme Court justice, and among the most influential intellectual leaders of the Reagan Revolution.⁸¹ As one administration official commented in

⁸⁰ Grey, *supra* note 14, at 23.

⁸¹ Graham, *supra* note 75, 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

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."⁸² 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,⁸³ the Reagan Revolution meant "[t]aking the Constitution, taking principles of free markets, taking the ideals of individual liberty, and translating them into action."⁸⁴ 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."⁸⁵ Within the Takings Clause, he argued, "a revolution in, or perhaps more accurately, a revisiting and restoration of economic liberty is a prospect."⁸⁶

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 for taking of property every time its regulation impinged too se-

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.").

⁸² *Id.*

⁸³ See HERMAN SCHWARTZ, *PACKING THE COURTS, THE CONSERVATIVE CAMPAIGN TO REWRITE THE CONSTITUTION* 31 (1988) (Meese was "among the most powerful members of the Administration, and even before he became attorney general, while on the White House Staff, he took a very active role in Justice Department business, especially judicial appointments and Supreme Court arguments . . .").

⁸⁴ See Major Policy Statements of the Attorney General, Edwin Meese III, 1985–1988, at 183 (address to the Conservative Political Action Committee Conference, Feb. 19, 1987).

⁸⁵ 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).

⁸⁶ *Id.* at 141.

verely 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.⁸⁷

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.⁸⁸ They argued for property owners and against the government position in Supreme Court cases including *Nollan v. California Coastal Commission*.⁸⁹ And they issued the takings Executive Order (E.O. 12,630), which required that “government decision-makers evaluate carefully the effect of their administrative, regulatory, and legislative actions on constitutionally protected property rights.”⁹⁰

B. 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 Court of Federal Claims—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.”⁹¹

⁸⁷ FRIED, *supra* 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.

⁸⁸ See Major Policy Statements of the Attorney General, *supra* note 84, at 142.

⁸⁹ See Brief for the United States as Amicus Curiae Supporting Reversal at 22–23, *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987) (No. 86–133).

⁹⁰ See Exec. Order No. 12,630, 53 Fed. Reg. 8,859 (1988), reprinted in 5 U.S.C. § 601 (1988). 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. ENVTL L.J. 439, 442–47 (1993) (collecting authorities). Ultimately, Executive Order 12,630 was used as the framework for the property rights legislation that came close to becoming law during the 104th Congress. See *id.*

⁹¹ Graham, *supra* note 75, at 1 (quoting Epstein); see also Richard A. Epstein, *Judicial*

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.⁹² 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 courts"⁹³

During Reagan's second term in office, Assistant Attorney General Stephen Markman, who chaired the Washington Chapter of the Fed-

Review: Reckoning on Two Kinds of Error, 4 CATO J. 711, 717-18 (1985) ("One only has to read the opinions of the Supreme Court on economic liberties to realize that these opinions are intellectually incoherent and that some movement in the direction of judicial activism is clearly indicated."); see generally PEOPLE FOR THE AMERICAN WAY, ASSAULT ON LIBERTY 1 (1992) ("While both Presidents [Reagan and Bush] maintained their intent was to find and appoint judges who would enforce the law, not make the law, they have in fact sought out judges who would rewrite the law and reshape it along sharp ideological lines. In the process, judges appointed under the guise of judicial restraint have in fact engaged in a striking measure of judicial activism.").

⁹² 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." Federalist Society 1997-1998 Pamphlet on Student Division Membership and Benefits. Like Epstein, the Society's principal target is federal regulation adopted during and since the New Deal. Indeed, the Society's disdain for President Roosevelt's New Deal is such that Society members routinely hiss whenever President Roosevelt's name is mentioned. See Neil A. Lewis, *Conservative Outsiders Now at the Hub of Power*, N.Y. TIMES, Mar. 29, 1991, at B16; see also Peter Swire & Simon Lazarus, *Reactionary Activism: Conservatives and the Constitution*, NEW REPUBLIC, Feb. 22, 1988, at 17 (discussing an October 1987 Federalist Society conference on "Constitutional Protections of Economic Activity" where Professor Epstein served as the keynote speaker and argued that the Takings Clause "invalidates much of the 20th Century legislation" including "modern zoning, landmark preservation, and rent control statutes . . .").

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 thought at the nation's campuses. See JEAN STEFANIC & RICHARD DELGADO, NO MERCY, HOW CONSERVATIVE THINK TANKS AND FOUNDATIONS CHANGED AMERICA'S SOCIAL AGENDA 109 (1996). The Institute for Education Affairs (IEA) and the Olin Foundation (Olin) 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*. See STEFANIC & DELGADO, *supra*, at 110.

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 President Reagan's second term, Steve Calabresi, one of the Society's founders, was able to claim that "more than half of the 153 Reagan-appointed Justice Department employees and all twelve assistant attorneys general are members or have spoken at Federalist Society events." Lewis, *supra*, at B16.

⁹³ Neil A. Lewis, *A Republican Senator Forces the Administration to Rethink Strategy on Judicial Appointments*, N.Y. TIMES, Dec. 9, 1994, at B7. See also Roger J. Miner, Remark,

eralist Society, oversaw Meese's judicial appointment process, with assistance from Society co-founders Liberman and Calabresi.⁹⁴ 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 . . ." ⁹⁵ 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."⁹⁶ C. Boyden Gray, the White House Counsel and a Federalist Society member,⁹⁷ delegated primary responsibility for selecting judges to Society co-founder, Lee Liberman,⁹⁸ who evaluated the "ideological purity" of all of Bush's candidates for federal judgeships.⁹⁹

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 winners 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.

⁹⁴ See Crocker Coulson, *Federalist Pipers*, NEW REPUBLIC, Dec. 1, 1986, at 23.

⁹⁵ 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).

On Capitol Hill, the Senate Judiciary Committee hardly paused long enough to give them any label. Particularly under committee chair Strom Thurmond, Reagan's judicial nominees won assembly line approval. After a brief hearing, the judicial nominees gained confirmation to a lifetime seat on the federal judiciary. . . . During Reagan's eight years in office, he filled 378 judgeships in the three-tiered federal court system. Only three of his nominees were rejected by the Senate . . .

SAVAGE, *supra*, at 422-23.

⁹⁶ Paul A. Gigot, *Supreme Court: An Emerging Case of Poetic Justice*, WALL ST. J., Jan. 27, 1989 (page unavail.) (available in 1989 WL-WSJ 493281).

⁹⁷ See Al Kamen & Ruth Marcus, *A Chance to Deepen Stamp on Courts*, WASH. POST, Jan. 29, 1989, at A1. Grey is now on the Society's Board of Trustees. See FEDERALIST SOCIETY FOR LAW AND PUBLIC POLICY STUDIES, 1996 ANNUAL REPORT (1997).

⁹⁸ See Miner, *supra* note 93, 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.")

⁹⁹ See Miner, *supra* note 93, 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.

1. 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.¹⁰⁰ 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.

a. *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).¹⁰¹ 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.¹⁰²

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. 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, 1986.¹⁰³ Thus, by the middle of his second term, President 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 twelve 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 eleven

¹⁰⁰ See 28 U.S.C. §§ 1346, 1491 (1994). 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.

¹⁰¹ Federal Courts Improvement Act of 1982, Pub. L. No. 97-164 (1982).

¹⁰² Philip R. Miller, *The New United States Claims Court*, 32 CLEV. ST. L. REV. 7, 7-8 (1982).

¹⁰³ 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).

appointments to the Federal Circuit, and to name eight of the eleven judges currently serving on the court.¹⁰⁴

b. *The Federal Circuit Court of Appeals*

Presidents Reagan and Bush used their eleven 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).¹⁰⁵ Judge Robert Michel, similarly, was appointed to the bench after serving as a top aide and counsel for Senator Arlen Specter (R-Pa.). Judge Robert Mayer served in the Reagan administration as deputy to current Ninth Circuit Court of Appeals judge Alex Kozinski during Kozinski's stint as Special Counsel at the Merit Systems Protection Board.¹⁰⁶

Unquestionably, however, the most activist and influential Reagan/Bush appointee has been S. Jay Plager. Judge Plager, who lists Federalist Society membership on an official biography,¹⁰⁷ 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 President Reagan's second term, Judge Plager simultaneously served as Administrator of the OMB's Office of Information and Regulatory Affairs,¹⁰⁸ and as Executive Director of President Reagan's Vice-Presidential Task Force on Regulatory Relief.¹⁰⁹

¹⁰⁴ See Huffman I, *supra* note 74, at 599 n.14 (stating that "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").

¹⁰⁵ Judge Rader worked as Steve Markman's deputy counsel on the Senate Judiciary Committee (chaired by Senator Orrin Hatch) and then, after Markman left to head judicial selection at the Justice Department, see *supra* note 92 and accompanying text, briefly moved up to Chief Counsel before being named to a position on the Court of Federal Claims. President Bush subsequently promoted Judge Rader to a position on the Federal Circuit.

¹⁰⁶ Terence Moran, *Nominee's Pentagon Speech Questioned*, LEGAL TIMES, May 18, 1987, at 6.

¹⁰⁷ See 1996 JUDICIAL STAFF DIRECTORY 851-52.

¹⁰⁸ See generally SUSAN J. TOLCHIN & MARTIN TOLCHIN, *DISMANTLING AMERICA—THE RUSH TO DEREGULATE* (1983).

¹⁰⁹ *Former Hoosier Dean to be Nominated to Court*, UPI, Oct. 2, 1989, available in LEXIS, UPI File; see Steven Waldman, *Watching the Watchdogs*, NEWSWEEK, Feb. 20, 1989, at 34.

At OMB, Judge 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.¹¹⁰ With the advent of Reagan's Executive Order on takings, Judge Plager's office at OMB was also given a central role in assessing the takings implications of new federal regulations.¹¹¹ As Executive Director of the of the Task Force on Regulatory Relief, Judge Plager served as the conduit between industries seeking relief from regulatory burdens and the administration officials empowered to grant such relief.¹¹²

c. *The Court of Federal Claims*

Presidents Reagan and Bush followed a similar pattern in filing 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.¹¹³

Most notably, Reagan appointed Loren Smith, a member of President Nixon's Watergate defense team and general counsel to President Reagan's 1976 and 1980 presidential campaigns,¹¹⁴ as Chief Judge of the Court of Federal Claims.

¹¹⁰ See Robin E. Folsom, Comment, *Executive Order 12,630: 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 (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)). The author cites numerous sources for the proposition that the OIRA became "a vehicle for influencing and coercing agency actions." *Id.* at 651.

¹¹¹ Exec. Order 12,630, *supra* note 90 (requiring that agencies identify and address takings implications in submissions to OMB); Folsom, *supra* note 110, at 687 (stating that "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.").

¹¹² Folsom, *supra* note 110, 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").

¹¹³ W. John Moore, *Just Compensation*, 1992 NAT'L J. 1404, 1406.

¹¹⁴ See Richard Minter, *The Shifting Ground of Property Rights*, INSIGHT, Aug. 23, 1993, at 4.

Judge Smith, who calls Professor Epstein one of his intellectual heroes,¹¹⁵ is the judiciary's most vocal cheerleader for the Takings Project.¹¹⁶ The "darling of conservative members of Congress,"¹¹⁷ 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."¹¹⁸ This term, Judge Smith has testified in favor of procedural reform bills that would expand his court's jurisdiction over takings cases.¹¹⁹

Judge Smith has also championed property rights on the lecture circuit.¹²⁰ Between 1995 and 1996, for example, Judge Smith was reimbursed by the Federalist Society for speeches to at least six Society

¹¹⁵ David Helvarg, *Legal Assault On the Environment*, THE NATION, Jan. 30, 1995, at 126.

¹¹⁶ With his handlebar mustache and affinity for performing magic tricks, Judge Smith has shown what one reporter called a "clear penchant for the limelight." Castleton, *supra* note 87, 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).

The National Legal Center for the Public Interest [a conservative legal foundation devoted to private ownership of property] 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!

Id.

¹¹⁷ Terry Carter, *The Court Conjurer*, A.B.A. J., Dec. 1997, at 73.

¹¹⁸ The Omnibus Property Rights Act of 1995: Hearings on S. 605 Before the Senate Comm. on the Judiciary, 105th Cong. 2-4 (1995) (statement of Loren Smith).

¹¹⁹ See generally The Tucker Act Shuffle Relief Act of 1997: Hearings Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary, 105th Cong. (1997) (statement of Loren A. Smith).

¹²⁰ In addition to the speeches discussed above, see The Federalist Society for Law and Public Policy Studies, *Lawyers Chapters Focus Attention on Judicial Activism, Local Self-Government*, THE FEDERALIST PAPER, 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").

chapters.¹²¹ 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 property¹²²—Judge Smith was flown to Tucson, Arizona to give a speech to the National Coal Lawyers Association.¹²³ 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 developers:

[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.¹²⁴

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. Recall that 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, President Clinton's opportunity to remake the Claims Court is not materializing. Shortly after being named Chief Judge, Judge Smith lobbied and ultimately

¹²¹ See Loren A. Smith, Financial Disclosure Report (June 14, 1996) (on file with authors).

¹²² *Whitney Benefits, Inc. v. United States*, 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 *Whitney Benefits, Inc. v. United States*, 18 Cl. Ct. 394 (1989), *modified*, 20 Cl. Ct. 324 (1990), *aff'd*, 926 F.2d 1169 (raising the government's liability to over \$300 million).

¹²³ See Loren A. Smith, Financial Disclosure Report (July 17, 1995) (on file with authors).

¹²⁴ Smith, *supra* note 116, at 525; see also, Castleton, *supra* note 87, 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").

convinced the federal judiciary's Administrative office, headed by Chief Justice Rehnquist, to recommend significant changes to the tenure system for Claims Court judges.¹²⁵ 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.¹²⁶

2. The Supreme Court

Presidents Reagan and Bush were also very successful in appointing justices to the Supreme Court who 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.¹²⁷ For example, in the Court's 1994 decision in *Dolan v. Tigard*, Chief Justice Rehnquist (President Reagan's choice to be Chief Justice) was joined by four Reagan and Bush appointees (Justices 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 developers.¹²⁸

¹²⁵ See 28 U.S.C. § 178(b) (1995); see also Terry Carter, *U.S. Claims Court Anxious To Secure Further Respect*, L.A. DAILY J., Jan. 3, 1992, at 1.

¹²⁶ While President Clinton, if he chooses, can appoint judges to take the positions of the judges President Reagan appointed whose terms are expiring, he cannot prevent these judges from continuing to hear cases and continuing to draw a federal salary equal to that of a judge in active service. See 28 U.S.C. § 178(e).

¹²⁷ See Robert Meltz, *The Property Rights Issue*, Cong. Res. Serv., No. 95-200A (Jan. 20, 1995). [V]otes 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. Justices Rehnquist and Scalia, generally regarded as among the Court's most conservative members, have emerged as strong advocates for greater private property protection. Justices generally regarded as liberal or moderate, such as Stevens and Blackmun, have usually taken the government side. Compounding the importance of this ideological element is the fact that many of the recent land use/taking cases in the Court were decided on razor-thin margins.

Id.; see generally Richard J. Lazarus, *Counting Votes and Discounting Holdings in the Supreme Court's Takings Cases*, 38 WM. & MARY L. REV. 1099 (1997).

¹²⁸ President Clinton may have succeeded in shifting the balance in takings cases to five to

Not surprisingly, the justice leading the Supreme Court in revising takings doctrine has been Antonin Scalia. Justice 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.¹²⁹ Liberman, while at the Justice Department, helped prepare Justice Scalia for Senate confirmation hearings. During his first term on the bench (the term he authored the Court's opinion in *Nollan*), Justice Scalia hired Liberman and Gary Lawson, two of the five co-founders of the Federalist Society, to be his law clerks.¹³⁰ Calabresi, a third Society founder, clerked for Justice Scalia the following year.¹³¹

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 a successful litigation campaign to use those judges to advance the Takings Project.

III. 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.

A. *The Courthouse Lawyers*

At the center of the Takings Project is a nationwide network of pro-development, 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 Oregonians in Action Legal Center, the Texas Justice Foundation, the Stewards of the Range, the Landmark Legal Foundation, the Washington Legal Foundation—

four by replacing Justice White, who typically sided with property owners, with Justice Ginsburg, 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.

¹²⁹ See Al Kamen, *Scalia's Federalists from Justice*, WASH. POST, Dec. 12, 1986, at A23.

¹³⁰ See *id.*

¹³¹ See *id.*

with a combined budget in excess of \$15 million litigate takings cases on behalf of developers.¹³²

These non-profits act as the highest profile courthouse lawyers in the Takings Project. Dubbing property rights the “civil rights issue of the ’90s,”¹³³ 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.¹³⁴ 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.”¹³⁵

The leading force in this litigation campaign is the Pacific Legal Foundation (PLF). Formed in Sacramento in the early 1970s by for-

¹³² See National Directory of Non-Profit Organizations (1997–1998 ed.); ECON. AMERICA, INC., THE RIGHT GUIDE, A GUIDE TO CONSERVATIVE AND RIGHT-OF-CENTER ORGANIZATIONS (Derk Arend Wilcox 1997) [hereinafter THE RIGHT GUIDE]; 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 (visited Feb. 6, 1998) <<http://www.instituteforjustice.org>> (Institute’s FY 1996 budget exceeds \$2 million). See also DAVID HELVARG, THE WAR AGAINST THE GREENS, at 21–22 (1994).

The 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.

Id.

¹³³ 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 24 (Bruce Yandle ed., 1995) (“Just as segregation led to the civil rights movement of the 1960s, government intrusion on property rights—largely in the name of protecting the environment—has sparked a new crusade to protect an individual’s right to use and own all forms of and interests in private property.”).

¹³⁴ See Fried, *supra* note 60, at 48–49. Starting in the early 1930s—at the same time President Roosevelt began transforming the federal judiciary—the NAACP began a campaign to bring sympathetic civil rights plaintiffs to the Supreme Court. This campaign allowed the Court to gradually expand the category of constitutionally protected rights of minorities in this country and ultimately led to the Court’s monumental anti-segregation ruling in *Brown v. Board of Education*. See generally KLUGER, *supra* note 8. This model was later adopted by other groups such as the American Civil Liberties Union, which won important victories for free speech and the free exercise of religion.

¹³⁵ Richard Perez-Pena, *A Rights Movement that Emerges from the Right*, N.Y. TIMES, Dec. 30, 1994, at B6 (quoting Richard Samp of the Washington Legal Foundation). Of course, the same groups—most prominently the Pacific Legal Foundation and the Institute for Justice—that are leading the Takings Project are also simultaneously fighting to limit the effectiveness of the civil rights laws and Supreme Court opinions that represent an important part of Justice Marshall’s and Dr. King’s life work. See, e.g., Steven A. Holmes, *Political Right’s Point Man on*

mer assistants to Governor Ronald Reagan, PLF has spent, in their words "a quarter of a century devoted to defending property rights, the free enterprise system, and the concept of limited government."¹³⁶ 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."¹³⁷

Begun with a single office and a \$100,000 budget, PLF has grown with the Takings Project and has become a national organization with offices in five states, a budget of over \$4 million, and a litigation docket consisting of sixty of the most important takings cases from around the country.¹³⁸ PLF only represents a small number of plaintiffs in the time-consuming and expensive early stages of litigation.¹³⁹ 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.¹⁴⁰ PLF has filed a brief in favor of the property owner in every important Supreme Court regulatory takings case that has been heard by the Court since the mid-1970s.¹⁴¹

Race, N.Y. TIMES, Nov. 16, 1997, at A24 (calling Clint Bolick of the Institute for Justice "the leading voice in attacks on Government programs that give breaks to minority groups and women"); Maura Dolan, *Giving the Right Its Day in Court*, L.A. TIMES, Feb. 8, 1996, at A1 (reporting that PLF is representing California Governor Pete Wilson in "his attempt to eliminate five state laws designed to help women and minorities get state jobs and state contracts"); Kendall & Ryan, *supra* note 11, at M5.

¹³⁶ PACIFIC LEGAL FOUND., 1996 ANNUAL REPORT (1997).

¹³⁷ David Helvarg, *Legal Assault on the Environment*, THE NATION, Jan. 30, 1995, at 126 (quoting Jim Burling, PLF's Litigation Director).

¹³⁸ See generally PACIFIC LEGAL FOUND., 1996 ANNUAL REPORT.

¹³⁹ See Jack Woodward, *David v. Goliath: Pacific Legal Foundation Is Changing Regulatory Law in the United States*, undated PLF pamphlet (on file with authors); 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. . . . Our effort is to change the law.") (quoting Richard R. Bradley, PLF's Director of Strategy and Development). One of the rare exceptions was the *Nollan* case, where PLF represented the Nollans from the initial filing through the Supreme Court. See Woodward, *supra*.

¹⁴⁰ Dolan, *supra* note 135, 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."). That, for example, was the role played by PLF in last term's *Suitum v. California Coastal Commission*, 117 S. Ct. 293 (1997). PLF submitted an amicus brief for Ms. Suitum in the Ninth Circuit Court of Appeals and then, when Suitum lost that appeal, offered to represent Ms. Suitum before the Supreme Court.

¹⁴¹ PLF's prominent role in bringing conservative arguments to the Supreme Court appears

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,¹⁴² and the property owner has prevailed in each of the cases.¹⁴³ These cases, in turn, have set the stage for even more dramatic victories in the Federal Circuit and other lower federal courts.¹⁴⁴ As PLF founder and past-President Ronald Zumbrun boasted, “[w]e see the ‘90s as our decade. . . . We have the weapons—court precedent, experienced personnel, and credibility.”¹⁴⁵

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,¹⁴⁶ and Clint Bolick, a veteran of the Meese Justice Department and a former assistant to Justice Clarence Thomas when Justice 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.”¹⁴⁷

The Institute’s Center for Private Property Rights both litigates cases on behalf of developers and supports developers in cases brought by other groups.¹⁴⁸ The Institute distinguishes itself from

to have made a fan of at least one Supreme Court justice. Justice Scalia, at Stanford Law School to give a lecture to the Federalist Society, advised Robert Corry, now a PLF attorney, that PLF was a place Corry could find work in constitutional law that would blend with Corry’s conservative ideology. See Dolan, *supra* note 135, at A16.

¹⁴² See *Suitum v. Tahoe Reg’l Planning Agency*, 117 S. Ct. 293 (1997); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987).

¹⁴³ See *Suitum*, 117 S. Ct. at 293; *Dolan*, 512 U.S. at 374; *Lucas*, 505 U.S. at 1003; *Nollan*, 483 U.S. at 825.

¹⁴⁴ See *infra* Section IV.

¹⁴⁵ H. Jane Lehman, *Owners Aren’t Giving Ground in Property Battles*, CHICAGO TRIB., Feb. 9, 1992, at 1.

¹⁴⁶ Institute for Justice, Staff Biography, *supra* note 132.

¹⁴⁷ See Institute for Justice, *supra* note 132, *The Court of Public Opinion* (quoting George F. Will). See also William H. Mellor, III, *Can Washington Change?*, REASON, Aug. 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

Id. (quoting William H. Mellor, III).

¹⁴⁸ See Institute for Justice, *supra* note 132, Electronic Brochure, Institute for Justice Approach: Private Property Rights.

other legal foundations by being able to claim that it is not just inspired by Professor Epstein, it has Epstein on its payroll. In three recent Supreme Court takings cases, *Lucas*, *Dolan*, and *Suitum*, Professor Epstein has co-authored an amicus brief on the Institute's behalf.¹⁴⁹

A third organization, the Defenders of Property Rights (DOPR), claims itself as "[t]he nation's only legal defense foundation dedicated exclusively to the protection of property rights."¹⁵⁰ 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,¹⁵¹ DOPR boast that it has won thirteen of the fifteen property rights cases in which it has acted as lead counsel and has assisted property owners in sixty-one other cases.¹⁵²

The non-profit law firms that are working takings cases through the courts coordinate with each other through regular meetings in Washington, D.C., 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 the regular meetings at the Heritage Foundation that coordinate the activities of the participants in the Takings Project.¹⁵³

The legal foundations are assisted in the litigating takings cases by an army of pro bono lawyers from private law firms. This pro bono

¹⁴⁹ See generally Brief of the Institute for Justice as Amicus Curiae in Support of Petitioner, *Suitum v. Tahoe Reg'l Planning Agency*, 117 S. Ct. 293 (1996) (No. 96-243); Brief of the Institute for Justice as Amicus Curiae in Support of Petitioner, *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (No. 93-518); Brief of the Institute for Justice as Amicus Curiae in Support of Petitioner, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (No. 91-453).

¹⁵⁰ THE RIGHT GUIDE, *supra* note 132, at 122.

¹⁵¹ Margaret Kriz, *Nancie G. Marzulla: Taking Root in Property Rights*, NAT'L J., Oct. 3, 1996, at 2133.

¹⁵² THE RIGHT GUIDE, *supra* note 132, at 122.

¹⁵³ See James Andrews, *Conservative Law Groups Adopt the Liberal Model*, CHRISTIAN SCI. MONITOR, Oct 3, 1994, at 13 (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* note 132, at 21-22 ("a nationwide network of twenty-two pro-business 'public interest' law firms . . . coordinate through an annual meeting sponsored by the Heritage Foundation").

network amplifies the forces marshaled by conservative non-profits.¹⁵⁴ For example, in 1993, Washington Legal Foundation reported that forty-eight law firms, including top Washington, D.C. law firms such as Arnold & Porter and Covington & Burling, donated pro bono services to WLF.¹⁵⁵

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 over 18,000 members of 59 active chapters.¹⁵⁶ 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 and legal foundations, such as PLF, which conduct such litigation.¹⁵⁷ The Society reports that over 1,000 members have joined this network.¹⁵⁸

The Institute for Justice runs a similar network dubbed the Human Action Network (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.¹⁵⁹

¹⁵⁴ See Newman, *supra* note 153, 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); William G. Castagnoli, *What Is the WLF and Why Is It Challenging the FDA?*, MED. MARKETING & MEDIA, Apr. 1995, at 27, 28, 32.

¹⁵⁵ See Castagnoli, *supra* note 154, at 28, 32.

¹⁵⁶ See FEDERALIST SOCIETY, 1996 ANNUAL REPORT 4, 10.

¹⁵⁷ 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").

¹⁵⁸ See *id.*

¹⁵⁹ As takings challenges have become more viable, an increasingly lucrative for-profit practice in representing property owners has developed, 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 . . . 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. *Id.*; THE RIGHT GUIDE, *supra* note 132, at 253. PLF also contracted the Sacramento firm of Zumbrun, Best & Findley for management and legal services. See *id.* The firm was paid \$212,661. See *id.* The firm is affiliated with PLF president Ronald Zumbrun, who is paid as an independent contractor through the firm. See *id.*

A final group of important players 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,¹⁶⁰ a staff in excess of 350, and 850 affiliated state and local associations nationwide,¹⁶¹ the NAHB is one of the nation's best organized and most powerful lobbying organizations.¹⁶² The NAHB role in takings cases has traditionally been limited to filing amicus briefs in support of developers in important takings cases and in supporting local associations in litigating cases.¹⁶³ In several recent cases, however, the NAHB has delved more directly into the fray by bringing a series of cases as plaintiffs on behalf of its members.¹⁶⁴

B. *Training Lawyers and Judges*

The non-profit organizations leading the takings campaign also spend considerable resources both in training the army of pro bono counsel, counsel for developers, and private practitioners that assist them in litigating takings cases and in training and rewarding the judges that provide them with critical victories in takings cases.

¹⁶⁰ NATIONAL DIRECTORY OF NON-PROFIT ORGANIZATIONS 1890 (1998 ed.).

¹⁶¹ DIRECTORY OF ASSOCIATIONS 100 (1997 ed.).

¹⁶² Another important player is the California-based Building Industry Legal Defense Foundation (BILD). BILD, an offshoot of the Southern California Building Industry Association, has a mission to "defend the legal rights of home and property owners" and to "secure a body of favorable court decisions for its members specifically, and property owners and developers generally." Briefs Amici Curiae of the National Association of Home Builders and the Building Industry Legal Defense Foundation in Support of Petitioner at 1-2, *Suitum v. Tahoe Regional Planning Agency*, 1997 U.S. LEXIS 3233 (No. 96-243) (listing "myriad" of Supreme Court cases in which the NAHB has appeared as an amicus on behalf of developers).

¹⁶³ See *id.*; Steve Kerch, *Builders Seek Protection of Property Rights*, CHIC. TRIB., Jan. 25, 1987, at 1 ("The [NAHB] has a litigation program that aids local associations in certain cases where suits to protect property rights are involved.").

¹⁶⁴ See generally *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); *National Ass'n of Home Builders v. Babbitt*, 949 F. Supp. 1 (D.C. Cir. 1996) (Commerce Clause challenge to habitat regulation under Endangered Species Act). Ironically, in bringing these suits, the associations for developers rely on the liberalized rules of standing won primarily by advocates for environmental protection. See generally *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973); *Sierra Club v. Morton*, 405 U.S. 727 (1972). In *Bennett v. Spear*, a case decided by the Supreme Court last term, the NAHB and BILD successfully argued (as *amici*) to extend standing to developers to sue the federal government challenging protection of species under the Endangered Species Act. See *Bennett v. Spear*, 117 S. Ct. 1154, 1169 (1997).

1. Lawyer Training

The most important actor in the lawyer training effort is again the Federalist Society. The Society's Lawyers 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.¹⁶⁵ 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."¹⁶⁶ The *Bulletin* described the seminar as "a national revival meeting for takings lawyers" and went on to report, "[e]nvironmental 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."¹⁶⁷ The *Bulletin* explained this fervor as follows: "[i]t's like they've been a suppressed religious cult for years and suddenly gained legitimacy and mainstream currency."¹⁶⁸

PLF also conducts takings training seminars in venues across the country discussing topics such as "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 of an October 1996 PLF training seminar in Washington, D.C. event described the seminar as a "property rights rally" where opposing views were repeatedly discredited out-of-hand by the conference chair.¹⁶⁹

Finally, the Institute for Justice plays an important supporting role. The Institute hosts "Policy Activist Seminars" each year for practic-

¹⁶⁵ THE FEDERALIST SOCIETY, MEMBERSHIP & BENEFITS, (undated pamphlet) (on file with authors).

¹⁶⁶ Terry Carter, *A National Revival Meeting for Takings Lawyers*, CHICAGO DAILY L. BULL., Apr. 2, 1992, at 2.

¹⁶⁷ See *id.*

¹⁶⁸ *Id.*

¹⁶⁹ 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 authors); see also INSTITUTE FOR JUSTICE, *supra* note 132, (discussing a 1995 "policy activist seminar" on property rights where one attendee reports leaving the conference "considerably energized and looking eagerly for someone to sue").

ing lawyers intended to “develop a whole new network of conservative legal crusaders across the country.”¹⁷⁰ These seminars seem to be having the intended impact: Edwin Meese, a speaker at a 1995 seminar declared the seminars to be “one of the more important events in the conservative movement.”¹⁷¹ A recent attendee reported leaving the conference “considerably energized and looking eagerly for someone to sue.”¹⁷²

2. 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 the George Mason University’s Law and Economics Center, host all-expenses-paid judicial seminars that discuss libertarian views on topics including property rights.¹⁷³

The most significant judicial training program, both in terms of 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). FREE is a Montana-based non-profit that promotes “free market environmentalism,”¹⁷⁴ a doctrine that relies on the free market and private property rights as the best protectors of the environment.¹⁷⁵ Perhaps the leading legal aca-

¹⁷⁰ Institute for Justice, *supra* note 132.

¹⁷¹ *Id.*

¹⁷² *Id.* (quoting J. Stanley Marshall, Chairman, THE JAMES MADISON INSTITUTE).

¹⁷³ See ALLIANCE FOR JUSTICE, JUSTICE FOR SALE 70–82 (1993).

¹⁷⁴ FREE was founded and is operated 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* (visited Mar. 15, 1998) <<http://www.cato.org/>>. Baden has long been 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, 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 conservative credentials include editing *Environmental Gore*, a collection of essays critiquing Vice President Gore’s *Earth in the Balance*, which includes contributions by property rights ideologues such as Nance Marzulla, who argues 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 ENVIRONMENTAL GORE 219–21 (John A. Baden ed., 1994) (quoting Vice President Gore’s EARTH IN THE BALANCE).

¹⁷⁵ See TERRY L. ANDERSON & DONALD R. LEAL, FREE MARKET ENVIRONMENTALISM 3 (1993).

democratic proponent of the 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.¹⁷⁶

Since 1992, FREE has offered a series of 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."¹⁷⁷ As FREE explains: "[o]ur 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."¹⁷⁸ 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 fifty-four seminar openings. FREE's seminars have been particularly popular with the judges on the Federal Circuit and the Court of Federal Claims Courts 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, and Yock from the Court of Federal Claims all attended FREE Seminars; Judges Plager and Michel have each attended two FREE seminars since 1992.¹⁷⁹

FREE's judicial seminars are funded by the same foundations—the Olin Foundation, the Carthage 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 that litigate takings cases in courts such as the Federal Circuit. For example, the Olin Foundation simultaneously funded the

¹⁷⁶ See Huffman II, *supra* note 74, at 177 ("Epstein is on the right track in urging judicial activism . . ."); Huffman I, *supra* note 74, at 609 (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 Oregonians in Action Legal Center, a non-profit property rights group with a mission to "protect Constitutional rights of landowners . . . through litigation." See THE RIGHT GUIDE, *supra* note 132, at 251-52 (noting that group litigated *Dolan v. City of Tigard* before Supreme Court).

¹⁷⁷ FREE invitation to federal judge, Jan. 7, 1996 ("conference and travel expenses are paid and time is provided for cycling, fishing, golfing, hiking, and horseback riding") (on file with authors). See FREE (visited Mar. 15, 1998) <<http://www.free-eco.org/free>>.

¹⁷⁸ See FREE, *supra* note 177.

¹⁷⁹ Judges' Financial Disclosure forms (copies on file with authors).

New England Legal Foundation to litigate on behalf of the property owners in *Preseault v. United States*,¹⁸⁰ and FREE to provide judicial seminars for the Federal Circuit judges that decided to hear *Preseault en banc* and ruled in favor of the NELF.¹⁸¹ Similarly, the M.J. Murdoch Foundation has been a large contributor to FREE¹⁸² and to the Pacific Legal Foundation,¹⁸³ which has appeared before the Federal Circuit as an amicus supporting the property owner in the seminal *Florida Rock Industries v. United States* and *Loveladies Harbor v. United States* cases.¹⁸⁴ Finally, through the Carthage Foundation, Richard Scaife is the largest single contributor to FREE¹⁸⁵ and PLF,¹⁸⁶ 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.”¹⁸⁷ Richard Scaife also heads the Sarah Scaife Foundation, one of the largest contributors to NELF.¹⁸⁸

¹⁸⁰ In 1994, the Olin Foundation gave \$35,200 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).

¹⁸¹ In 1995, the Olin Foundation gave \$25,000 to FREE to support its judicial seminars. 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*. See *Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996); Judges’ Financial Disclosure Forms (copies on file with authors).

¹⁸² M.J. MURDOCK CHARITABLE TRUST, 1993 GRANTS APPROVED BY CLASSIFICATION (\$78,000 grant to FREE); M.J. MURDOCK CHARITABLE TRUST, 1995 ANNUAL REPORT (\$150,000 grant to FREE in 1995).

¹⁸³ M.J. MURDOCK CHARITABLE TRUST, 1996 ANNUAL REPORT (\$200,000 to PLF in 1996); 1994 FOUND. GRANTS INDEX 330 (\$200,000 grant from Murdoch to PLF in 1992); M.J. MURDOCK CHARITABLE TRUST, 1994 ANNUAL REPORT (\$200,000 to PLF in 1994).

¹⁸⁴ See generally SARAH SCAIFE FOUND., 1995 ANNUAL REPORT 9 (1995) (reporting grants to PLF of \$200,000 and \$175,000, respectively). Scaife’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.” See *id.* Scaife granted \$200,000 to PLF “to enable the Pacific Legal Foundation to continue its work.” See *id.*

¹⁸⁵ See CARTHAGE FOUND. 1993, 1995, & 1996 ANNUAL REPORTS (reporting grants to FREE of \$100,000 a year for each of the last four years); 1993 FOUND. GRANTS INDEX 655 (\$100,000 grant to FREE in 1990).

¹⁸⁶ 1994 FOUND. GRANTS INDEX 327 (reporting that in 1991 Carthage granted \$75,000 to PLF); 1993 FOUND. GRANTS INDEX 307 (\$275,000 in grants to PLF in 1990).

¹⁸⁷ See THE RIGHT GUIDE, *supra* note 132, at 122.

¹⁸⁸ The question of whether attending these seminars violates any ethical restrictions imposed upon federal judges appears to be an open one. The Ethics Reform Act of 1989 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

C. Procedural Reform Legislation

This term in Congress, proponents of the Takings Project, most notably the National Association of Homebuilders, turned to the Project's congressional supporters for legislation designed to grease the wheels of the Takings Project.¹⁸⁹ In particular, the NAHB drafted¹⁹⁰ and turned the full force of its lobbying capability behind the Private Property Implementation Act of 1997 (H.R. 1534).¹⁹¹ 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, thirty-seven 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 22 by a 248 to 178 vote.¹⁹² The

5 U.S.C. § 7353(a)(2)-(b)(1) (1994). The Court's ethics 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 advisory opinion have not, to date, been addressed by the Administrative Office.

¹⁸⁹ 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*, CONG. Q., Oct. 25, 1997, at 2591.

¹⁹⁰ 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." *Id.*

¹⁹¹ See Freedman, *supra* note 189, 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.*

¹⁹² See generally Nancy Petersen, *Legislation Would Make Federal Case of Land Use*, PHILA.

Senate equivalent, S. 1204, has now garnered thirty-one co-sponsors.¹⁹³

Equally notable simply for its audacity is Senator Orrin Hatch's (R-Utah) Citizens Access to Justice Act of 1997 (S. 1256) and its companion bill in the House of Representatives (H.R. 992). Introduced during the same term Senator Hatch brought the judicial appointments process almost to a standstill by attacking "judicial activism,"¹⁹⁴ Senator Hatch's takings bill would expand significantly 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.¹⁹⁵ Moreover, to "assure uniformity in property rights law," Senator Hatch's bill would vest in the Federal Circuit Court of Appeals 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,"¹⁹⁶ Senator Hatch's legislation would reward the nation's most activist court on property rights with significant new power to shape the direction of takings law in this country. As this Article was going to the publisher, the House of Representatives passed H.R. 992 on a 230-180 vote, and the Senate Judiciary Committee voted Senator Hatch's proposed takings legislation out of committee by a ten to eight party-line vote.

INQUIRER, Feb. 22, 1998; *see also* Letter from Judicial Conference of the United States to Rep. Howard Cobb, Sept. 29, 1997 (on file with authors); Letter from state attorneys general to Rep. Henry J. Hyde, Sept. 24, 1997 (on file with authors); Letter from National League of Cities and U.S. Conference of Mayors to Rep. Cobb, Sept. 24, 1997 (on file with authors); Letter from American Planning Association to Rep. Hyde, Sept. 16, 1997 (on file with authors).

¹⁹³ *See* The Library of Congress, *Thomas* (visited Mar. 15, 1998) <<http://thomas.loc.gov/>>.

¹⁹⁴ *See* S. 1254, 105th Cong. § 5 (1997) (creating, if enacted, a new, federal cause action for all takings claims whether for declaratory or monetary relief and vesting the Court of Federal Claims and the district courts with concurrent jurisdiction over this new cause of action). The result would be to permit the Court of Federal Claims to hear claims for declaratory relief and expand the district court's ability to hear claims for money damages exceeding \$10,000. *See id.*

¹⁹⁵ *See* S. 1256, 105th Cong. § 4(6) (1997).

¹⁹⁶ Anthony Lewis, *The War on the Courts*, N.Y. 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. *See id.* The article 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.*

D. *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,¹⁹⁷ the campaign is, to a remarkable extent, the funding vision of two prominent conservative 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.

Simon, the Treasury Secretary under Presidents Nixon and Ford, wrote a blueprint for organizing the conservative agenda in his 1979 book *Time for Truth*.¹⁹⁸ 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."¹⁹⁹ Since then Simon, first at the Institute for Educational Affairs (IEA) (which Simon helped found in 1978 with Irving Kristol)²⁰⁰ and now as the President of the Olin Foundation, has worked to transform that blueprint 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 Takings Project participants: the Cato Institute's Center for Constitutional Studies,²⁰¹ the Federalist Society,²⁰² FREE,²⁰³

¹⁹⁷ See Woodward, *supra* note 139 (discussing 20,000 donors).

¹⁹⁸ WILLIAM E. SIMON, *A TIME FOR TRUTH* (1978); see also STEFANIC & DELGADO, *supra* note 92, at 90.

¹⁹⁹ STEFANIC & DELGADO, *supra* note 92, at 90.

²⁰⁰ See *id.* at 110. According to Stefancic 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 109-10. In 1990, the IEA merged with the Madison Center and became the Madison Center for Educational Affairs. *Id.*

²⁰¹ See JOHN M. OLIN FOUND., INC., 1996 ANNUAL REPORT 9 (\$75,000 grant).

²⁰² See *id.* at 13 (\$240,000 in grants).

²⁰³ See *id.* at 14 (\$25,000 grant).

George Mason's Center for Law and Economics,²⁰⁴ the Institute for Justice,²⁰⁵ the Landmark Legal Foundation,²⁰⁶ the Pacific Legal Foundation,²⁰⁷ and the Washington Legal Foundation.²⁰⁸

Scaife's support 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"²⁰⁹ and this title fits the role he has played in the Takings Project. In the 1980s, the Sarah Scaife Foundation was among the largest foundation funders of the Federalist Society, the Institute for Educational Affairs, and many of the then-fledgling legal foundations.²¹⁰ For example, in 1987, the Foundation awarded \$60,000 to both the Federalist Society and the Institute for Educational Affairs, \$110,000 to the Pacific Legal Foundation and the Washington Legal Foundation, and \$25,000 to the Southeast Legal Foundation.²¹¹

In the 1990s, Carthage has been the single largest contributor to FREE,²¹² the Defenders of Property Rights,²¹³ and the Washington Legal Foundation,²¹⁴ and a generous contributor to the Landmark Legal Foundation.²¹⁵ The Sarah Scaife Foundation regularly funds the Cato Institute's Center for Constitutional Studies,²¹⁶ PLF,²¹⁷ NELF,²¹⁸ Atlantic Legal Foundation,²¹⁹ Southeastern Legal Foundation,²²⁰ the

²⁰⁴ See *id.* at 15 (\$200,000 grant for its "institutes in law and economics for federal judges").

²⁰⁵ See *id.* at 18 (\$125,000 grant).

²⁰⁶ See JOHN M. OLIN FOUND., INC., 1996 ANNUAL REPORT 20 (\$25,000 grant).

²⁰⁷ See *id.* at 23 (\$60,000 grant).

²⁰⁸ See *id.* at 31 (\$200,000 grant).

²⁰⁹ Phil Kuntz, *Citizen Scaife: Heir Turned Publisher Uses Financial Largess to Fuel Conservatism*, WALL ST. J., Oct. 12, 1995, at A1.

²¹⁰ See FOUNDATION GRANTS INDICES (12th–20th eds.).

²¹¹ See 1989 FOUNDATION GRANTS INDEX 651–52.

²¹² See generally CARTHAGE FOUND., 1996 ANNUAL REPORT; CARTHAGE FOUND., 1995 ANNUAL REPORT; CARTHAGE FOUND., 1993 ANNUAL REPORT (reporting \$100,000 grants in three of the last four years).

²¹³ See CARTHAGE FOUND., 1996 ANNUAL REPORT; CARTHAGE FOUND., 1995 ANNUAL REPORT; CARTHAGE FOUND., 1994 ANNUAL REPORT; CARTHAGE FOUND., 1993 ANNUAL REPORT (\$100,000 grants in 1994–1996, \$50,000 grant in 1993).

²¹⁴ See CARTHAGE FOUND., 1996 ANNUAL REPORT (\$200,000 in 1996); CARTHAGE FOUND., 1995 ANNUAL REPORT (\$450,000 in 1995); CARTHAGE FOUND., 1994 ANNUAL REPORT (\$350,000 in 1994); CARTHAGE FOUND., 1993 ANNUAL REPORT (\$800,000 grant in 1993).

²¹⁵ CARTHAGE FOUND., 1996 ANNUAL REPORT; CARTHAGE FOUND., 1995 ANNUAL REPORT (\$125,000 in 1995)

²¹⁶ See SARAH SCAIFE FOUND., INC., 1994 ANNUAL REPORT (\$25,000 grant for Cato's Center for Constitutional Studies, which "focuses on the awareness and protection of economic liberties with particular emphasis on the "taking issue."").

²¹⁷ See SARAH SCAIFE FOUND., INC., 1995 ANNUAL REPORT 1995 (\$200,000 grant).

²¹⁸ See *id.* (\$50,000 grant).

²¹⁹ 1995 FOUND. GRANTS INDEX (\$75,000 grant in 1994).

²²⁰ See SARAH SCAIFE FOUND., INC., 1995 ANNUAL REPORT (\$50,000 grant).

Pacific Legal Foundation,²²¹ the Institute for Justice,²²² and George Mason's Law and Economics Center.²²³

IV. THE RESULTS: WILL THIS BE THE END OF ENVIRONMENTAL LAW?

To this point, this Article has focused entirely on Professor Epstein's theory that the Takings Clause could be used to roll back decades of health and safety regulations and the campaign by anti-regulatory ideologues to transform Professor Epstein's polemic on the Constitution into a body of case law. In this section, 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 Project have succeeded in creating in the federal courts a sympathetic environment for developers and a hostile environment for communities seeking to defend innovative efforts to protect 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.

A. *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."²²⁴ 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.²²⁵

²²¹ See 1993 FOUND. GRANTS INDEX 307 (\$275,000 in grants in 1990).

²²² See SARAH SCAIFE FOUND., INC., 1995 ANNUAL REPORT (\$75,000 grant).

²²³ See *id.* (\$125,000 grant).

²²⁴ See EPSTEIN, *supra* note 3, at 30.

²²⁵ In addition to the Supreme Court cases discussed *infra*, see *Dolan v. City of Tigard*, 512 U.S. 374, 412-14 (1994) (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 without creating a new takings doctrine); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 322-23 (1986) (Stevens, J., dissenting) (noting that plaintiff 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).

In addition to the federal circuit cases, see *Florida Rock Industries v. United States*, 18 F.3d

1. Supreme Court

The *Nollan v. California Coastal Commission* case provides a good early example.²²⁶ *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.²²⁷ Typically, when granting such a permit, the Coastal Commission demanded a concession from the landowner to mitigate the harm caused by the development.²²⁸ 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 Nollans' house from the ocean.²²⁹

To reach the merits, the Supreme Court had to overcome a number of procedural obstacles.²³⁰ As an initial matter, the Court had to ignore questions about whether the Nollans even owned the beachfront passageway that the state allegedly "took" through their regulation.²³¹ 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.²³² 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: "[n]ot 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."²³³

The Court also had to ignore the fact that, while the Nollans' permit appeal was pending, the Nollans built their beach house without a

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 Florida Rock*, 18 F.3d at 1573 (Neis, C.J., dissenting); *see also* Preseault v. United States, 100 F.3d 1525 (Fed. Cir. 1996) (granting *en banc* review *sua sponte*).

²²⁶ *See* *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

²²⁷ *See id.* at 828-31.

²²⁸ *See id.*

²²⁹ *See id.*

²³⁰ *See id.*

²³¹ *See generally* *Nollan*, 483 U.S. at 847-55 (Brennan, J., dissenting).

²³² *See* Government's Brief at 6, *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (No. 86-133); *see also* Motion of Appellee California Coastal Commission to Dismiss at 3, *Nollan v. California Coastal Comm'n*, 223 Cal. Rptr. 28 (Cal. Ct. App. 1986) (Civ. B-004663).

²³³ *See* Government's Brief, *supra* note 232, at 6; *see also* Bench Memorandum at 3, *Nollan v. California Coastal Comm'n*, 223 Cal. Rptr. 28 (Cal. Ct. App. 1986) (Civ. B-004663).

permit. Under California law, this illegal, unilateral action by the Nollans waived the Nollans' right to challenge the conditions imposed on their development permit. California raised this point in seeking dismissal of the Nollans' appeal, 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.²³⁴ The Court, however, simply denied California's motion without comment and proceeded to address the merits of the Nollans' claim.

Lucas v. South Carolina Coastal Council, a 1992 case involving a development restriction imposed by South Carolina's 1988 Beachfront Management Act,²³⁵ provides an even stronger example.²³⁶ The first hurdle cleared by Justice Scalia's opinion for the Court was ripeness.²³⁷ 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.²³⁸ 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.²³⁹ Indeed, Justice Scalia admitted as much, concluding in the first pages of his opinion that Mr. Lucas' permanent taking claim was not ripe.²⁴⁰ Instead of dismissing the case, however, the Court decided to address 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.²⁴¹

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."²⁴² As importantly, the trial court had

²³⁴ See Government's Brief, *supra* note 232, at 6.

²³⁵ See S.C. CODE ANN. §§ 48-39-10 *et. seq.* (Law Co-op. 1989).

²³⁶ *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

²³⁷ See *id.* at 1010-13.

²³⁸ See *id.* at 1010-11.

²³⁹ See *id.* at 1011.

²⁴⁰ See *id.* at 1011-12.

²⁴¹ See *Lucas*, 505 U.S. at 1042 (Blackmun, J., dissenting).

²⁴² *Id.* at 1043 n.5 (Blackmun, J., dissenting).

made no findings of fact that Lucas had any plans to use the property between 1988 and 1990.²⁴³ 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.”²⁴⁴

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.”²⁴⁵ This, however, as Justice Blackmun points out, was 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.²⁴⁶ 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 seventeen-day-old Supreme Court case, he lacked standing to even bring his temporary taking case before the Supreme Court.

Moreover, Justice 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 Justice Scalia’s ruling for Lucas and Justice 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.²⁴⁷

²⁴³ See *id.* (Blackmun, J., dissenting)

²⁴⁴ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992).

²⁴⁵ *Lucas*, 505 U.S. at 1012–13 n.3.

²⁴⁶ *Lujan*, 504 U.S. at 1043 n.5.

²⁴⁷ See *Lucas*, 505 U.S. at 1020 n.9.

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. . . . The 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.²⁴⁸

2. 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 hurdles. The best example is the Federal Circuit's decision that it had the authority to hear the claim asserted in *Loveladies Harbor v. United States*.²⁴⁹ 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.²⁵⁰ 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"²⁵¹

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 *en banc* engaged in "a comprehensive effort to set out the

²⁴⁸ Richard J. Lazarus, *Putting the Correct "Spin" on Lucas*, 45 STAN. L. REV. 1411, 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").

²⁴⁹ See *Loveladies Harbor, Inc. v. United States*, 27 F.3d 1545, 1547 (Fed. Cir. 1994).

²⁵⁰ See *id.* at 1547. The Court of Federal Claims notes that large portions of the complaints filed in the two cases were "copied one from the other." See *id.* at 1553; see also *id.* at 1559 (Mayer, J., dissenting) (noting the similarities in the claims filed by *Loveladies* in the two federal courts).

²⁵¹ 28 U.S.C. § 1500 (1994).

proper interpretation” of section 1500.²⁵² 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.’”²⁵³ The court expressly overruled *Casman v. United States*,²⁵⁴ 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 1500.²⁵⁵

To reach the merits of Loveladies’ takings claim, Judge Plager convinced five judges to join him in reversing course again.²⁵⁶ Finding the plain language of section 1500 was no longer so plain, Judge Plager resurrected the *Casman* exception.²⁵⁷ Judge 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.”²⁵⁸ From this, Judge 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.”²⁵⁹ Judge 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.²⁶⁰

A three judge dissent took on every aspect of Judge Plager’s opinion.²⁶¹ As an initial matter, the dissent decried the majority’s decision to even revisit the court’s opinion in *UNR*.²⁶² The dissent reminded Judge Plager that the Supreme Court had affirmed *UNR*, and that

²⁵² *UNR Indus., Inc. v. United States*, 962 F.2d 1013, 1023 (Fed. Cir. 1992), *aff’d sub nom.*, *Keene Corp. v. United States*, 508 U.S. 200 (1993).

²⁵³ *See id.* at 1023 (citation omitted).

²⁵⁴ *Casman v. United States*, 135 Ct. Cl. 647 (1956).

²⁵⁵ *See UNR Indus.*, 962 F.2d at 1023–25.

²⁵⁶ *Loveladies Harbor, Inc. v. United States*, 27 F.3d 1545, 1554–56 (Fed. Cir. 1994).

²⁵⁷ *Id.* at 1551–52.

²⁵⁸ *See id.* at 1548–49 (citing *Keene Corp. v. United States*, 508 U.S. 200, 211 (1993)).

²⁵⁹ *Id.* at 1548.

²⁶⁰ *See infra* text accompanying notes 238–55.

²⁶¹ The dissent was written by Judge Mayer and joined by Judge Rader, two usually reliable supporters of developers. Indeed, the dissent went out of its way to note that “the claims of these property owners might well be valid on the merits,” and less than a month later Judge Rader joined Judge Plager’s opinion on the merits in *Loveladies*. *See Loveladies*, 27 F.3d at 1558 (Mayer, J., dissenting); *see also Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994).

²⁶² *See Loveladies*, 27 F.3d at 1556–60 (Mayer, J., dissenting).

the Supreme Court "said nothing by way of disapproval of our ruling on *Casman*."²⁶³ The dissent also noted that the "at the very least, one would expect reversal of our so recent *en banc* precedent to be supported by some compelling reason," but that such "special justification" was "missing from today's undertaking."²⁶⁴

On the merits, the dissent rejected Judge Plager's "judicial revision" of section 1500.²⁶⁵ 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 court's opinion in *UNR*:

[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.²⁶⁶

Finally, the dissent criticized Judge Plager's "machinations" in fitting Loveladies claim into the newly resurrected exception created in *Casman*. As the dissent noted, 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."²⁶⁷

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."²⁶⁸ 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]ause 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

²⁶³ *Id.* at 1558 (Mayer, J., dissenting).

²⁶⁴ *Id.* at 1556-58 (Mayer, J., dissenting).

²⁶⁵ *Id.* at 1558 (Mayer, J., dissenting).

²⁶⁶ *Id.* at 1557 (Mayer, J., dissenting).

²⁶⁷ *Loveladies*, 27 F.3d. at 1559 (Mayer, J., dissenting). Judge Plager, "reading the two complaints in light of the legal and factual circumstances in which they were drawn" concluded that the complaints were "for distinctly different and not the same or even overlapping relief." *Id.* at 1554.

²⁶⁸ *Id.* at 1558 (Mayer, J., dissenting).

sound policy to force plaintiffs to forego monetary claims in order to challenge the validity of Government action²⁶⁹

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.²⁷⁰

B. *The Progress So Far*

To see the 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.²⁷¹ 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.²⁷²

As outlined above, Professor Epstein's proposed rewrite of the Takings Clause required several significant revisions to Supreme Court takings doctrine including: 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.²⁷³ 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. Extrapolating from these tentative steps, the Federal Circuit and the 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 built on a textual interpretation 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*²⁷⁴—are impacting the operation of important laws such as the wetlands provision of the Clean Water Act.²⁷⁵ The success is also significant

²⁶⁹ *Id.* at 1555–56.

²⁷⁰ *Id.*

²⁷¹ See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1977).

²⁷² See *infra* notes 321–29 and accompanying text.

²⁷³ See *supra* notes 35–43 and accompanying text.

²⁷⁴ See *Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994).

²⁷⁵ See, e.g., *Broadwater Farms Joint Venture v. United States*, 1997 WL 428516 (Fed. Cir.

because the Takings Project has the potential to put all modern environmental and land use laws at risk.²⁷⁶

1. The Partial Takings Doctrine

The most critical and controversial aspect of Professor Epstein's theory is the 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."²⁷⁷

Epstein's partial takings doctrine flows from his anachronistic notion that acquisition of private property provides the private property owner with a full and complete set of rights of ownership, independent of custom or law.²⁷⁸ Under Professor Epstein's theory, the institution of private property contains no gaps—there are no residual rights that remain with or can be transferred to the public or the government. Any law that restricts the disposition, possession or use of property is a taking; there is no line between partial and total takings.

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 and that each stick in the bundle is protected by the Takings Clause.²⁷⁹ Second, that any infringement on any stick

Jul. 31, 1997) (reversing a ruling that a 28% diminution in value was not a taking 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).

²⁷⁶ Blumm, *supra* note 48, at 198 ("[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.").

²⁷⁷ EPSTEIN, *supra* note 3, at 283.

²⁷⁸ As Professor Blumm notes, Epstein's notion that "property and the individual exist in a kind of state of nature . . . is fundamentally inconsistent with both recent Supreme Court rulings and vintage Anglo-American philosophy, which acknowledge that property rights are social constructs, creatures of the state." See Blumm, *supra* note 48, at 182.

²⁷⁹ For an interesting discussion of how the modern notion of property as rights (or incidents), not things, has skewed takings doctrine see Leif Wenar, Essay, *The Concept of Property and the Takings Clause*, 97 COLUM. L. REV. 1923 (1997). Professor Wenar comments that "[l]ike a rogue star, the Scientific conception of *property as rights* has drawn academic interpretations of the Takings Clause farther and farther out of their orbits, until they can no longer be seen from Earth," and argues for an interpretation of the Takings Clause based on a return to the "ordinary notion of *property as things* and that is sensitive to the multifiform possibilities of modern divided ownership and the many powers of modern government." Wenar, *supra*, at 1945.

in the bundle, including for example a partial loss in use, is a taking and must be compensated as such.²⁸⁰ Since 1980, the Supreme Court has adopted the first of Epstein's two prongs; the Federal Circuit has adopted both.

a. *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."²⁸¹ 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.²⁸² Beginning with *Loretto v. Teleprompter Manhattan CATV* in 1982, however, the Court began to move away from a focus on the parcel as a whole and toward an assessment of the impact of regulation on a single strand.²⁸³

The first and least surprising of these cases, *Loretto*,²⁸⁴ was decided in 1982, while Epstein was still writing *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.²⁸⁵ The strand in *Loretto*, after all, was the right to be free of

²⁸⁰ See EPSTEIN, *supra* note 3, at 57–62. Professor Epstein's theory, thus, cherry-picks from competing conceptions of property, selecting from the modern conception of property the notion of property as a bundle of rights, while adopting the older Classical Liberal notions regarding the sanctity of private property with the result that, in his view, ownership rights in each stick in the bundle are nearly absolute. As Professor Grey points out, however, Epstein cannot have it both ways. If he is going to adopt the broad modern notion of private property, he must also adopt the modern notions of "greatly enhanced toleration of their infringement." Grey, *supra* note 14, at 21, 30.

²⁸¹ *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 130–31 (1978); see also Radin, *supra* note 2, at 1676–77.

²⁸² *Penn Cent.*, 438 U.S. at 142–44.

²⁸³ See Radin, *supra* note 2, at 1677.

²⁸⁴ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)

²⁸⁵ Indeed, the Court through Justice Marshall went to great lengths in *Loretto* to disclaim

physical invasions and, as the Court noted, permanent physical invasions had always been treated differently.²⁸⁶

A much larger step toward adoption of the “sticks in the bundle” approach to takings law came in 1987 in the Court’s opinion in *Hodel v. Irving*.²⁸⁷ 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 on the Native Americans and did not interfere with investment-backed expectations.²⁸⁸ Central to the Court’s analysis was the “extraordinary” nature of the government regulation: that is, that it “amounts to virtually abrogation” of the landowners’ rights in one “strand” of the bundle of property rights.²⁸⁹

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.²⁹⁰ The Court 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.²⁹¹

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 more 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 re-

any notion that it was finding a takings simply because of the impact on the right to exclude. *See id.* at 435 (“[p]roperty rights in a physical thing have been described as the rights ‘to possess, use and dispose of it. . . . 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, stating that “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.

²⁸⁶ *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”).

²⁸⁷ *Hodel v. Irving*, 481 U.S. 704 (1987).

²⁸⁸ *See id.* at 715–16.

²⁸⁹ *Id.* at 716.

²⁹⁰ *Cf. Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027–30 (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).

²⁹¹ Severing property into strands in the bundle or incidences of ownership is different from

jected such a notion, particularly with regard to partial deprivations in the right to use property.²⁹² In *Lucas*, for example, the Court reaffirmed that the *Penn Central* balancing test applies to regulations that restrict, but do not abrogate, the economic use of property.²⁹³ In *Concrete Pipe & Products of California v. Construction Laborers Pension Trust for Southern California*, a unanimous Court reaffirmed that under *Penn Central* “mere diminution in value of property, however serious, is insufficient to demonstrate a taking.”²⁹⁴ Finally, in several recent cases, the Court has reaffirmed Justice Holmes’ recognition in creating the regulatory takings doctrine 70 years ago in *Pennsylvania Coal* that “government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.”²⁹⁵ Each of these statements is directly at odds with Epstein’s partial takings theory.

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. Construction Laborers Pension Trust for So. Cal.*, 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 Takings Clause.

²⁹² The Court’s treatment of partial takings of other sticks in the bundle is, perhaps, more muddled. In *Loretto v. Teleprompter Manhattan CATV*, 458 U.S. 419, 426, 435–36 (1982), for example, the Court held that a physical invasion of even a small portion of a parcel can be considered a taking of the right to exclude. In *Youpee v. Babbitt*, 117 S. Ct. 727, 733 (1997), a case involving a similar, but slightly less restrictive prohibition on the right to devise than that at issue in *Hodel*, the Court ruled that a “severe restriction” of the right to devise can constitute a taking. While both these cases could be viewed as accepting a form of partial takings of these sticks, there are stronger alternative explanations for both cases. *Loretto* simply reflects the unique and absolute nature of the right to exclude. While involving only a small portion of their property, the permanent physical invasion at issue in *Loretto* (the installed cable box) totally and forever abrogated the Loretto’s “right” to exclude all others. See *Loretto*, 458 U.S. at 435 (regulation “effectively destroy[s]” right to exclude). *Youpee* on the other hand is most appropriately viewed as a decision by the Court that the restriction on the right to devise was so severe that it “went too far” under the *Penn Central/Pennsylvania Coal* framework.

²⁹³ See *Lucas*, 505 U.S. at 1019.

²⁹⁴ See *Concrete Pipe*, 508 U.S. at 645.

²⁹⁵ See *Lucas*, 505 U.S. at 1017–18; see also *Dolan v. City of Tigard*, 512 U.S. 374, 396 (1994).

b. *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,²⁹⁶ 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*, plaintiffs, 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 plaintiffs' "total takings" argument because of uncontroverted evidence that the property maintained a resale value of at least twice the \$1900 per acre price Florida Rock originally paid, Judge 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?"

²⁹⁶ The *dicta* relied upon by the Federal Circuit is contained in footnote seven 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 was "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 *Lucas*, 505 U.S. at 1016 n.7. This passage, at most, leaves open the possibility of physically severing property by the affected and unaffected portions; it does not raise or in any way open the partial takings issue. See *Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1578 (Fed. Cir. 1994) (Nies, J., dissenting) ("[t]he majority seeks to shoehorn its 'partial takings' theory into this open question. It does not fit."); see also *supra* note 291. Moreover, any ambiguity stemming from Justice Scalia's *dicta* was forcefully put to rest by a unanimous Court in *Concrete Pipe* a year before *Florida Rock*. See *Concrete Pipe*, 508 U.S. at 642 ("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"). Cf. *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1183 (Fed. Cir. 1994) (adopting a narrow definition of the "parcel as a whole").

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.²⁹⁷ *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.²⁹⁸ As Chief Judge Nies argued 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.”²⁹⁹

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, Judge Plager felt free to disregard *Penn Central* completely. In its place, Judge Plager established a rule that the government may have to compensate a landowner for any regulation that causes a diminution in value, unless there is a “reciprocity of advantage” by which the landowner receives “direct compensating benefits” from the regulation.³⁰⁰

Judge Plager reached this ruling following precisely the two-step blueprint drafted by Professor Epstein. Judge Plager begins, as Epstein suggested,³⁰¹ by erasing the distinction between regulatory tak-

²⁹⁷ See *Concrete Pipe*, 508 U.S. at 643–45 (applying *Penn Central* balancing test).

²⁹⁸ In *Florida Rock* the denial of a mining permit reduced the property’s value, at the most, by slightly over 60% from \$10,500 an acre to approximately \$4,000 an acre. See *Florida Rock*, 18 F.3d at 1567. Moreover, during the ten-year period *Florida Rock* owned the property, the parcel had actually doubled in value (from \$1,900 per acre to \$4,000 per acre). See *id.* at 1562–63. The Supreme Court in *Penn Central* reaffirmed that reductions in market value exceeding 90% could be permitted without compensation and the Court “uniformly reject[ed] the proposition that diminution in property value, standing alone, can establish a taking.” *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 131 (1978) (citing *Hadacheck v. Sebastian*, 239 U.S. 394, 405 (1915), and *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365, 384 (1926)); see also *Concrete Pipe*, 508 U.S. at 645 (“mere diminution in the value of property, however serious, is insufficient to demonstrate a taking”). As Judge Nies noted in dissent, “[a] diminution in value from denial of an economic use (even if the loss can be expressed in property rights terms) is insufficient to effect a taking under all Supreme Court precedent so long as substantial other uses are left to the owners.” *Florida Rock*, 18 F.3d at 1573 (Nies, C.J., dissenting) (emphasis in original).

²⁹⁹ *Florida Rock*, 18 F.3d at 1573 (Nies, C.J., dissenting).

³⁰⁰ See *id.* at 1570–71.

³⁰¹ EPSTEIN, *supra* note 3, at 57.

The [partial takings] proposition seems straightforward enough where the state takes two acres of land from a four-acre parcel. Prima facie, compensation must be paid for the land taken no matter how much land the owner retains. The same principles apply no matter what form of division applies. Let the government remove any of the

ings and physical invasions.³⁰² Thus, according to Judge Plager, the Takings Clause treats both the same: whenever government action impinges in any way on an owner's property, a court must look further to find whether a taking has occurred.³⁰³ Judge Plager ignored two centuries' worth of binding Supreme Court decisions which make the difference between physical and regulatory takings a touchstone of takings doctrine.³⁰⁴ The distinction did not make sense to Judge Plager, so he decided to discard it.³⁰⁵

Second, Judge Plager obliterated any distinction between incremental diminutions in value and property rights, concluding, in essence, that increments of value *are* property rights.³⁰⁶ Again, however, the premise that "value" is somehow a property right is inconsistent with Supreme Court precedent³⁰⁷ and, in this instance, the status quo

incidents of ownership, let it diminish the rights of the owner in any fashion, then it has prima facie brought itself within the scope of the eminent domain clause, no matter how small the alteration and no matter how general its application.

See id.

³⁰² *See Florida Rock*, 18 F.3d at 1572 ("The fact that the source of a taking is a regulation rather than a physical entry should make no difference.").

³⁰³ *See id.*

³⁰⁴ *See supra* Section I. As explained above, the distinction between regulatory and physical takings stems from the text of the Takings Clause itself, which applies on its face to physical expropriations but not regulations. *See id.* The Supreme Court has always ruled that compensation is required when property is expropriated, but generally ruled that regulations are takings only when the deprivation is so total as to be "akin to an expropriation." *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922) (regulation had "very nearly the same effect for constitutional purposes as appropriating or destroying it"); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1017 (1992) (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").

³⁰⁵ *See Florida Rock*, 18 F.3d at 1572. Of course it is not illogical at all 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 second category—regulations—that is prohibited only by analogy. The distinction only becomes illogical when you read the clause to equally encompass both physical expropriations and regulations. In other words, both Epstein's and Judge Plager's arguments about the illogic of applying different tests to regulatory and physical takings necessarily depend upon Epstein's "plain meaning" interpretation of the Takings Clause, which, as demonstrated above, is irreparably flawed. *See supra* Section I.

³⁰⁶ *See Florida Rock*, 18 F.3d at 1572. The majority "sees no distinction in a property right, an economic use and a loss of value. However, I will address lost value separately from property rights because the concepts, which may be the same under 'law-and-economics' theories, are not interchangeable in established takings jurisprudence." *Id.* at 1575 (Neis, C.J., dissenting).

³⁰⁷ *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").

in all fifty states.³⁰⁸ It *was* consistent, however, with Professor Epstein's theory.³⁰⁹

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: interpretation of the Takings Clause to require heightened 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%.³¹⁰

Florida Rock demonstrates what Professor Blumm called an “unprecedented vision of judicial activism.”³¹¹ The activism is Judge Plager's, who has acknowledged his activism³¹² 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.”³¹³ The vision, however, was Epstein's³¹⁴ who devised the partial takings doctrine a decade ago and recognized that implementing the Takings Project would require judicial activism of an unprecedented nature.

³⁰⁸ 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.” *Id.* (Neis, J., dissenting).

³⁰⁹ According to Epstein, “each and every dollar” of value is a property right subject to compensation under the Takings Clause. EPSTEIN, *supra* note 3, at 199.

³¹⁰ See *Penn Cent. Transp. Co. v. New York City*, 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. See *id.* 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 owner's favor. See *id.*; see also *Concrete Pipe Prods. of Cal. v. Construction Laborers Pension Trust for So. Cal.*, 508 U.S. 602, 543-45 (1993). If not a rule, then it is at least a “rule of thumb” that provides guidance to government officials.

³¹¹ See Blumm, *supra* note 48, at 173.

³¹² See Jay Plager, *Takings Law and Appellate Decision Making*, 25 ENV'T L. 161, 162-63 (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”); *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.”).

³¹³ Plager, *supra* note 312, at 163.

³¹⁴ See EPSTEIN, *supra* note 3, at 30.

Florida Rock is "an extremely destabilizing decision, exposing all wetlands regulation, indeed all environmental and land use regulation, to compensation claims."³¹⁵ 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 forestall, attempts to regulate against environmental harms.³¹⁶ And that is precisely what Epstein and Judge 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."³¹⁷

Florida Rock is also destabilizing because it exponentially increases the line drawing problems that already plague takings law. Without *Penn Central's* threshold determination,³¹⁸ land use regulators are left attempting to apply Judge Plager's newly-minted "judicial balancing" test to every attempt to regulate land use. While Judge Plager predicts that "[o]ver time . . . the line [between compensable partial takings and mere diminutions] will more clearly emerge," there is no reason to think his balancing test, which asks whether "the government has acted in a responsible way, limiting the constraints on property ownership to those necessary to achieve the public purpose, and not allocating to some individuals, less than all, a burden should be borne by all,"³¹⁹ will be any easier to apply than the balancing test Justice Brennan articulated in *Penn Central*. Indeed, there is every reason to believe that *Florida Rock*, if followed by other courts, will make the "takings muddle"³²⁰ infinitely worse.

In summary, Judge Plager's opinion in *Florida Rock* relies on the pro-developer sentiment and irrelevant dicta of Justice Scalia in *Lucas* to support a partial takings theory that is inconsistent with a

³¹⁵ See Blumm, *supra* note 48, at 180.

³¹⁶ See *Florida Rock*, 18 F.3d at 1575 (Nies, C.J., dissenting) ("it requires little imagination to envision the vast sums required for the lost value/use claims if the government must pay for mere impairment of rights").

³¹⁷ *Id.* (Nies, C.J., dissenting).

³¹⁸ See Blumm, *supra* note 48, at 173.

³¹⁹ *Florida Rock*, 18 F.3d at 1571.

³²⁰ See generally Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984).

century of binding Supreme Court precedent and is supported only in the work of Richard Epstein.

2. 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.³²¹ 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.

a. *Professor Epstein*

In *Takings*, Professor Epstein proposed a nuisance exception that is limited, essentially, to cases of physical invasion of neighboring property.³²² 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 land owner and defined in a land owner's title.³²³ 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.³²⁴ To Epstein, a corollary to this point is that the state has no independent set of entitlements.³²⁵ 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."³²⁶ A private individual may act to protect his own property against common law nuisances—that is, against deliberate acts by a neighboring

³²¹ See *supra* Section I.

³²² See EPSTEIN, *supra* note 3, at 111.

³²³ See *id.* at 5–6.

³²⁴ See *id.* at 112. "All questions of conflict between the state and the individual must be decomposed into a complex array of conflicts between various individuals." *Id.*

³²⁵ See *id.* at 111.

³²⁶ See EPSTEIN, *supra* note 3, at 111.

owner that physically invade the property.³²⁷ 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.³²⁸ 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.”³²⁹

b. *The Supreme Court*

In *Lucas*, Justice Scalia fashioned a nuisance exception that echoes Epstein’s in important respects.³³⁰ He argued that the “prevention of harmful use analysis” in 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.³³¹ 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 nuisance is a necessary component of a valid, non-compensable regulation: the “nuisance” analysis is necessary but not sufficient to avoid paying compensation.

Justice Scalia defined a new nuisance exception by reference to the principles of nuisance and property law in place at the time a property owner purchased the parcel.³³² According to Justice Scalia, when new regulations deprive a property owner of all economically beneficial use, the state must compensate a landowner unless the use regulation simply makes explicit limitations that “inhere in the title” of the property.³³³ In his words, compensation would be required for new regulations that eliminate all uses of property unless “[t]he use of

³²⁷ *See id.*

³²⁸ *See id.* at 112 (“the state can only act to control nuisances”).

³²⁹ 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. 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).

³³⁰ *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

³³¹ *See id.* at 1023–24.

³³² *See id.* at 1027.

³³³ *See id.* at 1029.

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.”³³⁴ Finally, Justice Scalia suggests that he intended to limit the category of uses that were always unlawful to those that have a direct negative impact on neighboring landowners.³³⁵

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 landowner, and the government’s authority is bounded, at least in part, by common law principles of nuisance.³³⁶

Justice Scalia’s nuisance exception, however, differed from Professor Epstein’s version in two critical ways. The Court in *Lucas* applied the exception to a much smaller category of cases than proposed by Professor Epstein and provided a broader exception for “background principles of property and nuisance law” than Epstein envisioned.

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.³³⁷ Justice Scalia in *Lucas*, on the other hand, created his nuisance exception in the narrow context of regulations rendering property “valueless” and was explicit that nuisance control is necessary to avoid compensation *only* in this limited category of cases.³³⁸ For other regulations, the *Penn Central* test will still apply, and *Lucas* clarifies that *Mugler* and other “harm prevention cases” are still very relevant in applying *Penn Central*’s third prong inquiry into the “character of government interest.”³³⁹ 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.

³³⁴ See *id.* at 1030.

³³⁵ The two examples Justice 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 a landowner who landfills a lake bed and floods his neighbors’ property and a corporation operating a nuclear power plant on top of an earthquake fault).

³³⁶ See Humbach, *supra* note 16, at 72 (“What 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.”).

³³⁷ See EPSTEIN, *supra* note 3, at 107–13.

³³⁸ *Lucas*, 505 U.S. at 1007–08; *Concrete Pipe & Prods. of Cal. v. Construction Laborers Pension Trust for So. Cal.*, 508 U.S. 602, 643–44 (1993).

³³⁹ *Lucas*, 505 U.S. at 1029.

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 health, safety, and environmental regulations that are in place at the time of purchase "inhere" in the title.

The Court's intent in this regard is uncertain.³⁴⁰ While Scalia suggests in portions of the *Lucas* opinion that pre-existing limitations may somehow be limited only to principles of state nuisance law,³⁴¹ 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*,³⁴² 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."³⁴³ *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"³⁴⁴ in defining the category of uses that were "always unlawful."³⁴⁵ In the cited passage, Professor Michelman makes quite clear that the exception should extend to uses that are unlawful under statutory as well as common law.³⁴⁶ Moreover, as courts and commen-

³⁴⁰ See Lazaras, *supra* note 248, at 1426 (noting that justices that join an opinion do not necessarily join in all the "peripheral suggestions in the opinion" and predicting that Justices Kennedy and O'Connor would not join in an opinion that limited the background principles that inhere in property title to those principles supplied by judge-made common law).

³⁴¹ See *Lucas*, 505 U.S. at 1029 ("A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.").

³⁴² *Board of Regents State Colleges v. Roth*, 408 U.S. 564 (1972)

³⁴³ See *Lucas*, 505 U.S. at 1030 (citations omitted).

³⁴⁴ Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967).

³⁴⁵ See *Lucas*, 505 U.S. at 1030.

³⁴⁶ See Michelman, *supra* note 344, at 1239–41. Professor Michelman argues that compensation is not necessary when "it has been formally declared, or when a tacit understanding has arisen, that society reserves the right to preempt the exploitation of a certain narrowly described class of resources at any time." *Id.* at 1240. The declarations and understandings referenced in Michelman's article come both from federal and state common law (such as the federal common law restriction on private exploitation of navigable waters) and state and federal statutory law

tators have noted, there is no basis in logic or precedent for making the common law the sole basis for "inherent limitations on title."³⁴⁷

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 existing statutory restrictions on its use.³⁴⁸ 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 lower court of appeals applied *Lucas*' antecedent inquiry to rule against compensation for state regulations protecting wetlands,³⁴⁹ preventing development on steep slopes,³⁵⁰ and requiring maintenance of lateral-support for public highways.³⁵¹

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."³⁵² 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."³⁵³ Where a statutory or common law restriction was in place at

(such as state zoning laws and liquor licenses and a federal law assuming federal control over navigable air space). See *id.* at 1240-41.

³⁴⁷ See generally Lynn E. Blais, *Takings, Statutes, and the Common Law: Considering Inherent Limitations on Title*, 70 S. CAL. L. REV. 1 (1997). Professor Blais comprehensively examines the possible rationales for treating common law principles differently than statutory limitation and concludes that none of them support "a limited common law based view of inherent limitations on title." *Id.* at 7; see also Lazarus, *supra* note 248, at 1426 ("The majority's intimations that the background principles must be supplied by judge-made common law, rather than by legislative or regulatory enactment, will probably not survive review in the future."); Daniel R. Mandelker, *Investment-Backed Expectations in Taking Law*, 27 URBAN LAW. 215, 225 (1995) ("This admission could mean a 'newly enacted' land use regulation 'inheres' in the title and is not a per se taking if it was in effect when the landowner purchased her land . . .").

³⁴⁸ In addition to the cases discussed *infra*, 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).

³⁴⁹ See generally *Gazza v. New York State Dept. of Env'tl. Conservation*, 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).

³⁵⁰ See *Anello v. Zoning Bd. of Appeals of the Village of Dobbs Ferry*, 678 N.E.2d 870, 870-71 (N.Y. 1997).

³⁵¹ See *Kim v. City of New York*, 681 N.E.2d 312, 315 (N.Y. 1997)

³⁵² See *Kim*, 681 N.E.2d at 315.

³⁵³ *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. . . . To accept this proposition would elevate common law over statutory law, and would represent a

the time a parcel was purchased, a property owner cannot thereafter assert a takings claim.³⁵⁴ 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. A rule allowing a landowner who acquires restricted title to challenge a restriction as a taking would create a windfall for subsequent purchasers and “reward land speculation to the detriment of the public fisc.”³⁵⁵

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 toward adopting a portion of Epstein’s nuisance exception, the Court has given Judge Plager and his 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.

c. *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 limitations in the case discussed above.³⁵⁶ 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”³⁵⁷ 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.”³⁵⁸ Dutifully, in two Federal Circuit opinions, Judge Plager has closed (or attempted to close) *Lucas*’ two loopholes and has created a nuisance exception far closer to that envisioned by Professor Epstein.

departure from the established understanding that statutory law may trump an inconsistent principle of the common law.

Id. at 315 (citations omitted).

³⁵⁴ See *id.* at 316–17 (common law and statutory obligations of lateral support); *Anello*, 678 N.E.2d at 870 (steep slope ordinance).

³⁵⁵ *Anello*, 678 N.E.2d at 871.

³⁵⁶ See Richard A. Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 STAN. L. REV. 1369, 1392 (1993).

³⁵⁷ *Id.*

³⁵⁸ *Id.*

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.”³⁵⁹ 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?”³⁶⁰

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;³⁶¹
- (2) the owner has investment-backed expectations for 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.³⁶²

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 inquiry into the “government interest” in the regulation. As Judge Plager notes, this masterstroke “removed from regulatory takings the vagaries of the balancing process, so dependant on judicial perceptions with little effective guidance in law.”³⁶³ What Judge Plager means is that under his reformulation of regulatory takings doctrine, the public's interest in protecting the environment and in regulating the uses of land is simply irrelevant. Rather than balancing competing interests, public and private, a court will look only at the title to the property and the history of state property law.³⁶⁴

³⁵⁹ See *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994).

³⁶⁰ *Id.* at 1179.

³⁶¹ See *id.* 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. See *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.

³⁶² *Id.*

³⁶³ See *Loveladies*, 28 F.3d at 1179.

³⁶⁴ We note that because the Federal Circuit in *Loveladies* ultimately ruled that the regulation

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*,³⁶⁵ a case involving the federal Rails-to-Trails Act (RTA) 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.³⁶⁶ By 1979, when the Preseaults purchased their parcel, federal regulations sanctioned the temporary use of rail corridors as recreational trails.³⁶⁷ Subsequently the Preseaults challenged the use of the rail corridor as a recreational trail, alleging that such use amounted to a taking of their reversionary interest in the corridor.³⁶⁸

A split three judge panel of the Federal Circuit found that no taking had occurred.³⁶⁹ 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.³⁷⁰ 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.³⁷¹ 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.³⁷² In other words, the federal statutes in place at the time the Preseaults purchased their property inhaled in their

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 *dictum, dictum*, which courts, including the Federal Circuit, do not appear to be following. See *Broadwater Farms Joint Venture v. United States*, 1997 WL 428516 (Fed. Cir. July 31, 1997) (applying original three-prong *Penn Central* test to regulatory taking case).

³⁶⁵ See *Preseault v. United States*, 66 F.3d 1167 (Fed. Cir. 1995), *vacated*, 66 F.3d 1190 (Fed. Cir.), *rev'd*, 100 F.3d 1525 (1996).

³⁶⁶ See *id.* at 1186.

³⁶⁷ See *id.* at 1170.

³⁶⁸ *Id.* at 1169.

³⁶⁹ *Id.*

³⁷⁰ See *Preseault*, 66 F.3d at 1174.

³⁷¹ See *id.* at 1180.

³⁷² *Id.*

title, and the Preseaults could not now challenge the statutory provisions, which further burdened their reversionary interests, as a taking.

Like the New York Court of Appeals, the panel justified their ruling as “a matter of economic as well as legal common sense.”³⁷³ The 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 that 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.³⁷⁴

The Federal Circuit did not even wait for the Preseaults to request a rehearing; they decided on their own initiative to review the case *en banc*. Judge Plager wrote a plurality opinion vacating the panel’s decision.³⁷⁵ Judge Plager dismissed the panel’s argument about *Lucas*’ antecedent inquiry in a single page without even discussing the language in *Lucas* suggesting that the antecedent inquiry should include both statutory and common law restrictions or the logic of the panel’s ruling.³⁷⁶ Instead Judge Plager again relied on *dictum* from other portions of *Lucas* and Justice O’Connor’s concurrence in an earlier Supreme Court opinion in the *Preseault* case³⁷⁷ to conclude that *Lucas*’ antecedent inquiry was limited to state-defined nuisance rules.³⁷⁸

The combined effect of Judge Plager’s opinions in *Loveladies* and *Preseault* is that, in the Federal Circuit, the nuisance exception and *Penn Central*’s consideration of the government’s interest in regulating has been reduced to a very narrow inquiry into whether the

³⁷³ *Id.* at 1176; see *Gazza v. New York State Dep’t of Envntl. Conservation*, 679 N.E.2d 1035, 1043 (N.Y. 1997).

³⁷⁴ See *Preseault*, 66 F.3d at 1177. Both the Federal Circuit and the New York Court of Appeals concluded that, pursuant to *Lucas*, the judicial rule should be that takings claims do not normally convey with the sale of property. See *id.* at 1177 & n.6; *Gazza*, 679 N.E.2d at 1039 & n.4. Neither court addressed the issue of whether an existing takings claim may be donated, sold, inherited or otherwise assigned. See, e.g., *Gazza*, 679 N.E.2d at 1039 n.4.

³⁷⁵ Because Judge Plager was only able to get three other judges to join his opinion, the opinion is not binding precedent in the circuit.

³⁷⁶ *Preseault*, 100 F.3d at 1538–39.

³⁷⁷ *Preseault v. Interstate Commerce Comm’n*, 494 U.S. 1, 20 (O’Connor, J., concurring). The majority in *Preseault* concluded that the Preseaults’ takings claim should have been filed in the Court of Federal Claims, and declined to address the merits of the Preseaults’ case. Justice O’Connor, joined by Justices Scalia and Kennedy, commented on the merits and suggested that a taking may have occurred. See *id.* at 24.

³⁷⁸ *Preseault v. United States*, 100 F.3d 1525, 1538 (Fed. Cir. 1996). “Much of what the Supreme Court said then . . . about property rights indicates to the contrary.” See *id.* at 1539.

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.

3. Means/Ends Analysis

The final critical element of Professor Epstein's theory—the notion 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. Most important is the Supreme Court's adoption in *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard* of an Epstein-like scrutiny of the means and ends of land use regulation.³⁷⁹ In *Takings*, Epstein, citing the Supreme Court's long-discredited *Lochner* opinion, argued that the Court should apply an intermediate standard of review to land use regulations. In his formulation, “[t]he act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate.”³⁸⁰

Professor Epstein suggests 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.³⁸¹ Professor Epstein's central concern is 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.”³⁸² Professor Epstein suggests that overbroad 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.³⁸³

In *Nollan*³⁸⁴ and *Dolan*³⁸⁵ the Supreme Court has adopted just such a means/ends analysis in takings cases involving “exactions”³⁸⁶—and has articulated the same concerns in so doing. For example, in *Nollan*,

³⁷⁹ See *id.* at 126–34.

³⁸⁰ *Id.* at 128.

³⁸¹ *Id.*

³⁸² *Id.* at 133.

³⁸³ See EPSTEIN, *supra* note 3, at 126–34.

³⁸⁴ *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

³⁸⁵ See *Dolan v. City of Tigard*, 512 U.S. 374, 389–90 (1994). For a more complete treatment of *Nollan* and *Dolan*, see generally Kendall & Ryan, *supra* note 2.

³⁸⁶ 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 provision of services, restrictions on land use, and dedications of land. See Kendall & Ryan, *supra* note 2, at 1802–03.

Justice Scalia acknowledged that the Coastal Commission could constitutionally have denied the Nollans' 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 Nollans' property unless there was an "essential nexus" between the purpose of the condition and the purpose that would be served by prohibiting the proposed development.³⁸⁷ According to Justice Scalia, the lack of a nexus showed that the condition "is not a valid regulation of land use but an 'out-and-out plan of extortion.'"³⁸⁸ 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).³⁸⁹ This refined 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 regulatory takings cases to the government.³⁹⁰ 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.³⁹¹

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.³⁹² However, the Supreme Court has recently heard oral argument in *Eastern Enterprises v. Apfel*,³⁹³ a case that may shed light upon the question of how broadly the Supreme Court will apply *Nollan* 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

³⁸⁷ *Nollan*, 512 U.S. at 386.

³⁸⁸ *Id.* (quoting *J.E.D. Assoc. v. Atkinson*, 432 A.2d 12, 14–15 (1981)).

³⁸⁹ *Id.* at 391.

³⁹⁰ *See id.* at 413–14 (Souter, J., dissenting).

³⁹¹ *See id.* at 387.

³⁹² *See Kendall & Ryan*, *supra* note 2, at 1807–08 n.26, 1812 n.51 (discussing reasons why applying *Nollan* and *Dolan* outside the realm of physical exactions would be an improper extension of the cases).

³⁹³ *See Eastern Enterprises v. Chater*, 110 F.3d 150 (1st Cir. 1997), *cert. granted*, Oct. 20, 1997, *Eastern Enterprises v. Apfel*, No. 97–42.

expansive version of Epstein's handiwork. In *Del Monte Dunes v. City of Monterey*,³⁹⁴ a 1996 case, the Ninth Circuit Court of Appeals applied *Nollan* 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.

V. IMPLICATIONS AND CONCLUSIONS

A. *Takings Law 1998*

As we noted in introducing the Article, 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, safety, 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*,³⁹⁵ 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 threatening significant federal laws and regulations.³⁹⁶ The success the Project has had to date is a lesson to those who questioned

³⁹⁴ See *Del Monte Dunes v. City of Monterey*, 95 F.3d 1422, 1428-34 (9th Cir. 1996).

³⁹⁵ 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 also to 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 by the Court not to review the cases 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.

³⁹⁶ See *Broadwater Farms Joint Venture v. United States*, 1997 WL 428516 (Fed. Cir. Jul. 31,

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 summary, 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 among judicial interpretations of the 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.³⁹⁷ The most likely fifth vote, Justice Kennedy, has a record on takings issues that is both less developed and less consistent.³⁹⁸ The fate of the Project thus depends in large part upon

1997) (reversing a ruling that a 28% diminution in value was not a taking 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).

³⁹⁷ 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 (1987) (O'Connor, J., joining portions of dissent authored by Stevens, J.). Since then, however, Justice O'Connor has been unfaltering in her support for the Project. See *Parking Ass'n of Georgia, Inc. v. City of Atlanta*, 515 U.S. 1116, 1116-18 (1995) (O'Connor, J., joining Thomas, J., in dissenting from the denial of certiorari) (arguing that means/ends scrutiny established in *Nollan* and *Dolan* should apply to legislative as well as adjudicatory determinations); *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (O'Connor, J., joining majority); *Stevens v. City of Cannon Beach*, 510 U.S. 1207, 1335 (1994) (O'Connor, J., joining Scalia, J., in dissenting from the denial of certiorari) ("[t]o say that this case raises a serious Fifth Amendment takings issue is an understatement"); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (O'Connor, J., joining majority); *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 20 (1990) (O'Connor, J., concurring) (addressing the merits of the Preseault's takings claim and suggesting that their claim had merit); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (O'Connor, J., joining majority); see also *Suitum v. Tahoe Reg'l Planning Agency*, 117 S. Ct. 1659, 1670 (1997) (O'Connor, J., joining Scalia, J., and Thomas, J., concurring) (arguing that transferable development rights (TDR's) received by a property owner are not relevant to whether a taking has occurred). For a more nuanced analysis of each Court member's voting on takings cases see Lazarus, *supra* note 127, at 109-21.

³⁹⁸ Justice Kennedy was appointed to the Court in 1988, after the Court decided *Nollan*, *First English*, and *Hodel v. Irving*. In the cases he has decided since being appointed, he has joined

the jurisprudence of Justice Kennedy and the ideology of the next several justices appointed to the Court.

For opponents of the Project, this is not a comfortable position. Like Professor Blumm, we think it 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.

B. *Conclusion*

We began this Article 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 significant 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 group-developers—that already do 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.

the majority in *Dolan* and *Suitum* and filed a concurrence in *Lucas*. See *Suitum*, 117 S. Ct. at 1659; *Dolan*, 512 U.S. at 374; *Lucas*, 505 U.S. at 1032 (Kennedy, J., concurring); see also Lazarus, *supra* note 127, at 109–21.

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 developers, 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 developers,³⁹⁹ 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 exclude 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 need not be cloistered, but there is a line that can and should be drawn between these 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.⁴⁰⁰ Judge Plager, in an article written shortly after he was named to the Federal Circuit, argued that the critics of such non-regional, subject

³⁹⁹ 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 § 501(c)(3) of the United States tax code).

⁴⁰⁰ See generally Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111 (1990); Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1 (1989); Daniel J. Meador, *An Appellate Court Dilemma and a Solution Through Subject Matter Organization*, 16 U. MICH. J.L. REFORM 471 (1983); Ellen R. Jordan, *Specialized Courts: A Choice?*, 76 NW. U. L. REV. 745 (1981); Reports of the Commission on Revision of the Federal Court Appellate System, *reprinted in* 67 F.R.D. 195, 234-36 (1975) ("The Commission has concluded that, on balance, specialized courts would not be a desirable solution either to the problems of the national law . . . or to the problems of regional caseloads.").

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.”⁴⁰¹ This Article 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”⁴⁰²—are valid and serious concerns.

The most often cited advantages of subject matter based appellate courts—the need for judges with expertise and the need for uniformity of decision—also do not apply with any particular force to takings law.⁴⁰³ 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.

Similarly, because takings challenges are constitutional, rather than statutory,⁴⁰⁴ 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

⁴⁰¹ 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).

⁴⁰² *Id.*

⁴⁰³ See, e.g., Randall R. Rader, *Specialized Courts: The Legislative Response*, 40 AM. U. L. REV. 1003, 1008–09 (1991) (discussing the need for judges with expertise in highly specialized and technical areas and the need to promote uniformity of decision).

⁴⁰⁴ Most of the issues within the jurisdiction of the Federal Circuit are statutory, rather than Constitutional, and because Congress has granted the Federal Circuit 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* note 401, at 853–54.

conflicting interpretations of the Takings Clause and provide any real uniformity or certainty in the interpretation of the Takings Clause.

In summary, rather than expanding the jurisdiction of the Federal Circuit over takings cases as Takings Project advocates are promoting,⁴⁰⁵ 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 organizations, progressive foundations and non-profit organizations have made no concerted effort to combat the Takings Project,⁴⁰⁶ 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,⁴⁰⁷ 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 *amici* briefs. The stakes—our nation's health, safety, and environmental laws—are high enough to justify such a coordinated response.

⁴⁰⁵ See *supra* notes 189–96 and accompanying text.

⁴⁰⁶ 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.

⁴⁰⁷ 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, e.g., H. Lee Sarokin, *A Judge Speaks Out*, NATION, Oct. 13, 1997, at 15 (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 we did not find a single newspaper or magazine article discussing Judge Plager's activism in takings cases. We also find it hard to believe that Project proponents continue to derive political mileage from 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.