

FROM A “DARKLING PLAIN” TO WHAT?: THE REGULATORY TAKINGS ISSUE IN U.S. LAW AND POLICY

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It is a pleasure to be here this evening in the great State of Vermont, at this preeminent center for environmental legal education, with the opportunity to talk in the shadow, so to speak, of Professor Norman Williams. I am grateful to Dean Shields and to Marc Mihaly for extending the invitation.

It is appropriate to begin with a few words about Norman Williams, for whom this lecture series is named. In a modest way, my own work has trailed his, from advocacy of fair housing policies in New Jersey, to promotion of sensible land-use programs, to study of the regulatory takings issue. My last interaction with Professor Williams was by telephone, in the course of working on a friend-of-the-court brief for the environmental community in the landmark takings case, *Lucas v. South Carolina Coastal Council*.¹ I was in the midst of a frantic effort to figure out what we could possibly say to persuade the U.S. Supreme Court not to overrule the South Carolina Supreme Court’s rejection of Mr. Lucas’s taking claim—an effort that ultimately failed.² Professor Williams was at the time in semi-retirement in Florida. I don’t remember the purpose or much of the substance of our conversation. What I do remember and fondly recall are his tone of enthusiastic encouragement and his indication that he was gratefully passing on the baton to others. While this is a distinctive memory for me, I imagine this is a familiar story to many of you, because Vermont Law School and the field of land-use law is littered with Professor Williams’s grateful students, research assistants, and other heirs.

My topic this evening, generally speaking, is the takings or property rights issue. As a constitutional issue, it involves interpretation and application of the Takings Clause of the Fifth Amendment of the U.S. Constitution: “Nor shall private property be taken for public use, without just compensation.”³ In addition, essentially every state has an analog of the Takings Clause in its own constitution. As Patrick Leahy, the distinguished senior Senator from Vermont likes to remind audiences, Vermont was the very first state to include a takings clause in its

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1. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

2. *Id.* at 1009–10, 1032.

3. U.S. CONST. amend. V.

constitution.⁴

The hydra-headed takings issue is in part about property owners suing in court for financial compensation based on alleged economic burdens imposed by regulatory programs. But it is also a legislative issue and, beyond that, a matter for wide-ranging social debate. It arises at the international, national, state, and local community levels. It is an issue full of fascinating ironies and strange crosscurrents. Legal victories for one side or the other sometimes appear, with the benefit of hindsight, to have had unpredictable, sometimes adverse consequences. What might be regarded as progress, depending on your point of view, in the legal arena has been matched by less progress, and even some serious reverses, in the political arena. Finally, in a very fundamental way, the environmental community is deeply conflicted about the takings issue, arguably even at war with itself. My goal this evening is to see if I can make a coherent whole out of all this.

As my point of departure, I thought I would use one of Professor Williams's last academic articles, published in 1989, entitled *And Now We Are Here on a Darkling Plain*, published in volume thirteen of the *Vermont Law Review*.⁵ Surveying the then current state of Supreme Court takings jurisprudence, he invoked the famous words of the poet Mathew Arnold, "And we are here as on a darkling plain[;] [s]wept with confused alarms of struggle and flight, [w]here ignorant armies clash by night."⁶ Professor Williams was not happy with how things stood, to say the least.

Professor Williams's bleak assessment had two roots. The first was his sense that regulatory takings law was incoherent to the point of unintelligibility.⁷ Williams was by no means alone in this assessment. For example, I recently unearthed a book published several decades ago by the Natural Resources Defense Council entitled *Land Use Controls in the United States*.⁸ The book includes a chapter on constitutional issues, with about half a dozen pages surveying takings law.⁹ The survey comes to this frustrated conclusion: "Thus the body of law on the takings issue has no consistent unifying rationale and cannot be regarded as a coherent whole."¹⁰

4. VT. CONST. ch. I, art. 2; *The Kelo Decision: Investigating Takings of Homes and Other Private Property: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 2 (2005) (statement of Sen. Leahy, Member, S. Comm. on the Judiciary), available at <http://digbig.com/4rjwg>.

5. Norman Williams & Holly Ernst, *And Now We Are Here on a Darkling Plain*, 13 VT. L. REV. 635, 673 (1989).

6. *Id.* (quoting MATTHEW ARNOLD, *DOVER BEACH AND OTHER POEMS* 86 (Stanley Applebaum & Candace Ward eds., 1994)).

7. *Id.* at 664–65.

8. NATURAL RES. DEF. COUNCIL, INC., *LAND USE CONTROLS IN THE UNITED STATES* (Elaine Moss ed., 1977).

9. *Id.* ch. 2.

10. *Id.* at 11.

We have recently gained one amusing insight into why takings law has been so confused. One of the leading Supreme Court takings cases is *Penn Central Transportation Co. v. New York City*, in which the Court ruled that the City of New York did not effect a taking by designating Grand Central Terminal as a historic landmark and barring the Penn Central company from constructing an office tower above the building.¹¹ While the case is celebrated as a major victory for the historic preservation movement, the outcome has always been somewhat troubling because the company was clearly singled out to bear a relatively severe economic burden, and because Justice Brennan's opinion for the Court reflects, to be charitable, scattered reasoning. At a conference in 2003, attorney David Carpenter, who served as law clerk for Justice Brennan, helped illuminate why *Penn Central* is so confusing. He explained that Justice Potter Stewart was one of the swing votes in the case, and Stewart's clerk reportedly advised Carpenter, if Brennan wished to keep Stewart's vote, that the opinion should be very narrow.¹² When Stewart's clerk saw a draft of the opinion a few weeks later he congratulated Carpenter on his work product, saying he was "pretty sure it [didn't] say anything at all!"¹³ In this fashion, hard facts can sometimes make bad law, or at least confused law, even if one is inclined to support the result.

Professor Williams repeatedly observed that there was also a more practical explanation for the Court's confusion: the justices knew next to nothing about local land-use regulation.¹⁴ The Supreme Court had issued a pair of decisions in the 1920s addressing the validity of municipal zoning under the Due Process Clause.¹⁵ Thereafter, the Supreme Court essentially abandoned the issue of the constitutionality of land-use regulation until the *Penn Central* case. Small wonder, Professor Williams suggested, that the Supreme Court was out of touch with contemporary realities of local land use.¹⁶ Small wonder as well that the Court, in resolving the *Penn Central* case, referred back to its older due process cases, producing a serious muddling of takings and due process jurisprudence that the Court did not

11. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 115–18, 138 (1978).

12. David Carpenter, Partner, Sidley & Austin, Panel 1 at the Sixth Annual Georgetown Law Conference: The *Penn Central* Case (Oct. 31, 2003). For more information on the conference, see Georgetown University Law Center, CLE Environmental Law & Policy Institute, *Litigating Takings and Other Constitutional Challenges to Land Use and Environmental Regulations* (2003), available at <http://digbig.com/4rkbr>.

13. Carpenter, *supra* note 12.

14. Williams & Ernst, *supra* note 5, at 664.

15. *Nectow v. City of Cambridge*, 277 U.S. 183 (1928); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

16. Williams & Ernst, *supra* note 5, at 665.

successfully unravel until decades later.

The other reason for Professor Williams's bleak assessment was the ideological direction of the Court's decisions. Over the course of the 1980s, with several Supreme Court appointments by President Reagan, laid on top of earlier appointments by President Nixon, the Court had moved toward a more pro-property, less communitarian, interpretation of the Takings Clause. This trend reached a high point with the trilogy of Supreme Court decisions in the 1987 term.¹⁷ Two of these cases, in which the takings plaintiffs prevailed, appeared to herald a bold new era in takings law.

One case involved the question whether the California Coastal Commission could require a coastal property owner, as a condition of receiving a permit to reconstruct a coastal residence, to grant the public access to the property's beachfront.¹⁸ As skillfully presented to the Supreme Court by plaintiffs' counsel Robert Best, the case appeared to raise the specter of teaming masses traipsing in front of Mr. and Mrs. Nollan's ocean-view picture window.¹⁹ Justice Scalia, writing for the Court, said that to avoid a successful takings challenge, a condition of this type had to have an "essential nexus" to some legitimate regulatory objective.²⁰ Applying this relatively stringent standard, the Court ruled that the Commission's condition effected a taking.²¹

The \$64,000 question raised by *Nollan v. California Coastal Commission* was whether the "essential nexus" test applied, not only on the relatively extreme facts of that case but also in all types of regulatory takings cases. The question was a momentous one because Justice Scalia explicitly said that the standard of review under the "essential nexus" test was less deferential than the rational basis standard under the Due Process Clause.²² The Court seemed to suggest that the Takings Clause provided an opening to the kind of searching judicial review of the wisdom and effectiveness of government regulations not seen since the era of *Lochner v. New York*,²³ prior to the New Deal.

17. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *First English Evangelical Lutheran Church of Glendale v. County of L.A.*, Cal., 482 U.S. 304 (1987); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987).

18. *Nollan*, 483 U.S. at 827.

19. *Id.* at 826.

20. *Id.* at 827, 837.

21. *Id.* at 841-42.

22. *Id.* at 834 n.3.

23. *Lochner v. New York*, 198 U.S. 45 (1905).

The other major case of the 1987 term resolved a longstanding debate about the proper remedy for a regulatory taking.²⁴ The Court ruled that the usual and ordinary remedy is payment of financial compensation.²⁵ Thus, if a community adopts a stringent new regulation, a landowner sues under the Takings Clause, and the courts later (often many years later) conclude that a taking occurred, the government can rescind the regulation prospectively, but it cannot escape the duty to pay compensation for the period while the regulation was in place.²⁶ Professor Williams was the leader of the wing of the takings bar that opposed this theory of takings liability. In his famous *White River Junction Manifesto*, also published in the *Vermont Law Review*, and written with other leading land-use lawyers, Professor Williams argued that the proper remedy for a taking was an injunction, not an award of financial compensation.²⁷ The authors of the manifesto were concerned that, as a practical matter, the prospect of potentially massive (and almost invariably uninsurable) takings awards would deter governments from adopting regulations that even hinted at approaching the constitutional line.²⁸

These two Supreme Court decisions were followed by other government losses in the Supreme Court in the early 1990s, most famously in the *Lucas* case, involving a challenge to South Carolina's coastal setback law.²⁹ Collectively, these decisions seemed to portend a revolution in takings law.³⁰ Justice Scalia appeared to be fully in charge of the takings issue in the Supreme Court; well-funded conservative legal advocacy groups such as the Pacific Legal Foundation were on a roll; and certain lower federal courts were enthusiastically experimenting with ever more expansive takings theories.³¹ It is difficult now to recreate the sense of dread, even panic, that Professor Williams and like-minded people experienced each time the Supreme Court handed down another decision. Slowly, various groups and individuals, aided by farsighted charitable donors, began to respond by filing briefs, writing articles, holding

24. *First English Evangelical Lutheran Church of Glendale v. County of L.A.*, Cal., 482 U.S. 304, 310 (1987).

25. *Id.* at 316, 318.

26. *Id.* at 321.

27. See Norman Williams, Jr., et al., *The White River Junction Manifesto*, 9 VT. L. REV. 193, 240-41 (1984) (suggesting as an alternative to the damage remedy that if a restriction is found invalid twice that the developer be able to get whatever the developer has asked).

28. *Id.* at 240.

29. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1008-09 (1992).

30. Ted Gest & Lisa J. Moore, *The Tide Turns for Property Owners*, U.S. NEWS & WORLD REP., July 13, 1992, at 57.

31. David Helvarg, *Legal Assault on the Environment: 'Property Rights' Movement*, NATION, Jan. 30, 1995, at 126.

conferences, in short mounting a counteroffensive.³²

The takings agenda of this period did not simply spring from the conservative legal ether. Rather, these decisions represented steps toward the implementation of a quite specific and very radical law-reform agenda developed by University of Chicago law professor Richard Epstein, most famously in his 1985 book, *Takings: Private Property and the Power of Eminent Domain*.³³ In a nutshell, Epstein believes that every regulatory imposition affecting private property interests should be regarded as a taking—unless the owner’s proposed property use constitutes a common law nuisance that the owner has no right to engage in to begin with, or the regulation creates such perfectly balanced benefits for regulated owners that the law imposes no actual net loss.³⁴ In addition, explicitly advocating a revival of the activist judicial review of the *Lochner* era, Epstein argues that courts should routinely invalidate regulation of property if they are not persuaded there is a close logical relationship between the regulatory means selected and some worthy public purpose.³⁵ Attorneys charged with implementing the Reagan administration’s antiregulatory agenda seized upon Epstein’s book as their bible.

Today, approximately twenty years later, the apparent threat posed by the Court’s decisions of the 1980s has evaporated and the Epstein law-reform agenda has failed spectacularly in the Supreme Court. In a string of decisions over the last several years, the Court has read its earlier decisions narrowly and embraced an increasingly constrained reading of the Takings Clause. In general, the Court has resolved that the clause, at its core, is concerned only with outright expropriations and physical occupations of private property; regulatory takings can arise only when otherwise legitimate regulations have such severe, disproportionate economic impacts that they are the “functional equivalent” of actual takings. More specifically, the Court has decided that the per se takings rule announced in *Lucas* applies only in the narrowest of circumstances, embraced the so-called parcel-as-a-whole rule for evaluating the economic impact of regulations, and concluded that the reasonableness of a claimant’s investment expectations is a crucial, if not dispositive, factor in most if not all takings cases.³⁶ As a result, generally speaking—and takings law still

32. Kirstin Downey, *A Conservative Supreme Court Addresses Property Rights*, WASH. POST, Feb. 16, 1992, at H1.

33. RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

34. *Id.* at 101, 112.

35. *Id.* at 128.

36. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 330–31, 341 (2002).

permits few absolute absolutes—reasonable regulatory programs, including urban growth boundaries, agricultural or forest zoning, wetlands laws, endangered species protections, stream-side setback requirements, and so on and so forth, should all be immune from constitutional takings challenges.

In calm retrospect, there are some obvious reasons why the takings agenda foundered so badly in the Supreme Court. Some hard legal work by many people had something to do with it. President Clinton's appointments to the Court pushed the Court back toward the ideological middle. And the strongest takings advocates on the Court plainly overreached, both in substance and in style.

But more fundamental factors were at work as well. First, the radical takings agenda, even if a favorite of some "conservative" justices, conflicts with the methods and values that animate a "conservative" approach to constitutional interpretation. More specifically, a broad interpretation of the Takings Clause conflicts with an emphasis on fidelity to constitutional text and original understanding. To borrow Dean Bill Treanor's metaphor to explain the Takings Clause's plain meaning, if his young daughter was noisily bouncing a ball, and he removed the ball from her possession, he would have "taken" the ball.³⁷ But if he simply told her not to bounce the ball, he would be regulating her use of, not "taking," the ball.³⁸ In the same vein, the historical evidence, unearthed by such legal historians as John Hart, shows that the founding fathers did not adopt the Takings Clause to promote an antiregulatory agenda.³⁹ They were primarily motivated by concerns about the quartering of troops during wartime and the potential abolition of slavery,⁴⁰ not land-use regulations, which actually were remarkably common in the colonial period.⁴¹ Vermonters included a takings clause in their 1777 Constitution because they were still smarting over the fact that the New York colonial government had refused to recognize the validity of land grants previously made by the New

37. William Michael Treanor, *The Original Understanding of the Takings Clause 2* (1998), available at <http://digbig.com/4rknj> [hereinafter Treanor, *Original Understanding* (Georgetown University Law Center)].

38. *Id.*

39. John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1292–93 (1996).

40. William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 835–36, 851–55 (1995) [hereinafter Treanor, *Original Understanding* (COLUM. L. REV.)]; Treanor, *Original Understanding* (Georgetown University Law Center), *supra* note 37, at 2–3.

41. Hart, *supra* note 39, at 1253, 1259–81; Treanor, *Original Understanding* (Georgetown University Law Center), *supra* note 37, at 3–4.

Hampshire colonial government.⁴²

There also is a powerful tension between the takings agenda and the strong support on the Court for “our federalism.” In the name of preserving state sovereign immunity, a series of Court decisions over the last decade has provided the states new protections against congressional enactments subjecting them to suits seeking financial relief. These rulings have been justified in part based on the need to avoid imposing intolerable financial burdens: “A general federal power to authorize private suits for money damages would place unwarranted strain on the States’ ability to govern in accordance with the will of their citizens.”⁴³ The same basic reasoning supports avoiding an expansive reading of the Takings Clause; as Justice Kennedy once observed, a broad reading of the Takings Clause would “subject [the] States and municipalities to the potential of new and unforeseen claims in vast amounts.”⁴⁴ In short, a committed federalist, as a matter of logic, can only go so far in supporting the takings agenda.

Another embarrassment for the expansive takings agenda has been that it rests in part on a patently nonsensical melding of takings and due process jurisprudence. As I have described, after the Court reentered the arena of local land-use regulation in the 1970s, it borrowed liberally from due process cases in interpreting the Takings Clause.⁴⁵ The resulting confusion produced the theory that a government action effects a taking if it “fails to substantially advance” a legitimate state interest.⁴⁶ This ostensible takings test is foreign to the core concern of regulatory takings doctrine—that is, the economic burden imposed by regulation—and conflicts with the premise of every taking claim that the government action must serve a public use—that is, a legitimate public purpose. Nonetheless, the test had been repeatedly recited in Supreme Court decisions and provided the linguistic hook for Justice Scalia’s suggestion in the *Nollan* case that the Takings Clause might provide the vehicle for reviving searching judicial review of economic regulation. For over a decade, a small band of us has been insisting that this particular emperor is truly wearing no clothes. Finally, in the recent case of *Lingle v. Chevron U.S.A. Inc.*, the Supreme Court unanimously agreed to undo its mistake, completely repudiated the “substantially advance” test, and put it back in the deferential due process

42. Treanor, *Original Understanding* (COLUM. L. REV.), *supra* note 40, at 827–30; Treanor, *Original Understanding* (Georgetown University Law Center), *supra* note 37, at 6.

43. *Alden v. Maine*, 527 U.S. 706, 709 (1999).

44. *E. Enters. v. Apfel*, 524 U.S. 498, 542 (1998) (Kennedy, J., dissenting in part).

45. *See supra* notes 15–16 and accompanying text.

46. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (citing *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928)).

box where it belongs.⁴⁷

Ironically, the Court's rejection of Professor Williams's point of view on the remedy question in *First English* probably encouraged the Court to embrace narrower substantive rules of takings liability. Recognizing that expansive readings of the Takings Clause would necessarily impose significant financial liabilities on governments, some justices have opted for narrower interpretations specifically to avoid this result. Interestingly, though he probably intended it as a warning to the Court rather than an outcome to be deplored, Professor Williams and the other authors of the manifesto predicted that making compensation the mandatory remedy for a taking would lead to a narrowing of regulatory takings doctrine.⁴⁸

Finally, the opponents of an expansive reading of the Takings Clause have largely prevailed in the underlying economic policy debate. The basic policy argument for a broad reading of the Takings Clause has been that takings liabilities will encourage government officials to take into account the costs of regulations to property owners, leading to fairer and more economically rational regulatory programs. Opponents have developed several powerful responses. The first is that extending a promise of financial compensation to those who invest in environmentally sensitive areas creates a classic "moral hazard," encouraging investors to invest more in such areas than they otherwise would. In addition, the "internalization" argument suffers from a fundamental asymmetry because many of the benefits of sound regulation, such as healthier and more attractive communities, cannot be internalized by government officials in the same way takings awards are internalized. As a result, expansive takings liabilities can be expected to lead to unbalanced decision making by forcing government officials to place far too much weight on potential regulatory burdens. In addition, extensive economic research shows that the reciprocal advantages for all owners in a community from sound regulations are much more important and pervasive than property rights advocates have acknowledged. Finally, the takings argument looks at the effects of government action through too narrow a lens, ignoring the significant counterbalancing "givings," from public investments in highways to agricultural subsidies. For all of these reasons, a rigorous law and economics perspective did not support, but actually undermined, the takings agenda in the courts.

47. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 545 (2005).

48. Williams, Jr., et al., *supra* note 27, at 245.

Like every declaration of victory, this one needs to be qualified. *First English* undoubtedly remains an influential precedent; fear of takings liability continues to deter regulatory initiatives, especially at the local government level. Furthermore, the Court has said forcefully, perhaps too forcefully, that rules requiring owners to grant the public access to their property are almost always takings.⁴⁹ Attorneys representing the government side are partly complicit in this development, because, for tactical reasons, we have highlighted the distinction between physical invasions and use restrictions in an effort to better insulate use restrictions from takings claims. But the virtually absolute takings rule for physical invasions is problematic, because some invasions, in truth, impose only modest burdens on property owners. Great Britain recently adopted national legislation affirming the public's "right to roam" across unenclosed, rural lands.⁵⁰ For better or for worse, such a measure would be dead on arrival constitutionally in the United States, at least for the foreseeable future.

One obvious question is whether this declaration of victory, even if somewhat qualified, is premature, to be shortly undone by President Bush's recent appointees to the Supreme Court, Chief Justice John Roberts and Justice Samuel Alito. I think not. In contrast with the situation twenty years ago, takings is now a relatively robust, well-articulated field of law. Now, unlike in the era when the law was more confused and more unsettled, a great deal of judicial capital would have to be expended to fundamentally redirect the law. Moreover, neither of the newest members of the Court has exhibited any particular interest in advancing the takings agenda. While in private practice, John Roberts represented clients on both sides of the issue. But, as discussed during the confirmation process, the Chief Justice served as government counsel in the *Tahoe-Sierra* case, one of the most important takings cases of the last decade. A staff member of the Pacific Legal Foundation was so alarmed by the nomination of Roberts to the Supreme Court that he publicly declared it a "bitter defeat" for the property rights movement.⁵¹ Justice Alito is more of an unknown because, so far as I know, he has no track record on the issue, although, in a due process case before the Third Circuit, he adopted an extremely deferential stance on federal court review of local land-use regulation.⁵² In short, okay

49. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434–35 (1982).

50. *Countryside and Rights of Way Act*, 2000, c. 37, § 2 (U.K.).

51. James S. Burling, *John Roberts: A Supreme Property Rights Disaster in the Making*, ENTER STAGE RIGHT, Aug. 15, 2005, <http://digbig.com/4rknw>.

52. *See United Artists Theatre Circuit, Inc. v. Township of Warrington*, 316 F.3d 392, 399–401 (3d Cir. 2002) (replacing a standard that looked at the bias of a government official with one that looks

so far, as near as I can tell.

So has Professor Williams's "darkling plain" been transformed into the Elysian fields, and can we all safely go home? For better or for worse, the answer is "no." While the public interest side has largely prevailed in the legal debate, the same cannot be said on the political front. In some respects, the takings agenda is as threatening if not more threatening to environmental protections than it was twenty years ago. New tools and new ideas will be required to confront the takings agenda today. I will touch briefly on four aspects of the contemporary property rights debate.

The first issue, perhaps inevitably, is the use and abuse of the eminent domain power and the public controversy arising from the Supreme Court's 2005 decision in *Kelo v. City of New London, Connecticut*.⁵³ The Court, by a five-to-four vote, upheld the authority of the city to seize private property from unwilling sellers through eminent domain so that a portion of the community could be comprehensively redeveloped.⁵⁴ While the Court came down on the government's side, this victory, somewhat like the victory for the property rights side in *First English*, threatens to turn sour over the long-term.

The City of New London's narrow margin of victory was a surprise to most objective legal observers. After all, in an unbroken line of cases extending back over a century, the Supreme Court had consistently, and more recently unanimously, upheld the use of eminent domain for economic development purposes. The most surprising vote in *Kelo* was that of Justice O'Connor, who wrote a unanimous, sweeping decision for the Court in 1984 upholding the use of eminent domain to break up the land oligopoly in Hawaii.⁵⁵ But in *Kelo* Justice O'Connor wrote a strong dissent, characterizing eminent domain as a threat to virtually every property power in the United States.⁵⁶

While *Kelo* has been attacked as an outrageous decision across the right-wing spectrum, Professor Tom Merrill has accurately observed that the decision can be viewed as a model of judicial restraint.⁵⁷ Just as the original understanding of the Takings Clause does not support an expansive theory of regulatory takings, it also does not support barring use of eminent domain for economic development purposes. In addition, the decision

at whether the local governmental decision "shocks the conscience").

53. *Kelo v. City of New London, Conn.*, 545 U.S. 469 (2005).

54. *Id.* at 473-74, 488-89.

55. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 231-32, 239-43 (1984).

56. *Kelo*, 545 U.S. at 494 (O'Connor, J., dissenting).

57. *The Kelo Decision: Investigating Takings of Homes and Other Private Property: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 15 (2005).

faithfully follows the relevant precedents. Finally, and perhaps most importantly, the decision does not place the courts in the business of deciding how and when the eminent domain power should be used, but instead leaves those policy choices in the hands of the people's elected representatives. In principle, conservative advocates of judicial restraint should be thrilled.

The policy argument in defense of the eminent domain power also is compelling. Eminent domain responds to the problem of the "holdout," the prospect that one owner among many may refuse to sell, or refuse to sell at a reasonable price, making the efficient use of property difficult if not impossible. The use of eminent domain to establish rights of way for pipelines, utility lines, or roadways, while hardly uncontroversial, is widely accepted as unavoidable and legitimate, even if a private firm, such as a utility, may end up owning the property. The same holdout problem can be and frequently is an obstacle to major downtown redevelopment projects. Without the ability to overcome holdouts, rejuvenation of urban cores would become far more difficult, discouraging downtown investment and promoting more sprawl on the urban fringe.

Despite the defenses available for the *Kelo* decision, it remains troubling to many people and it is not difficult to see why. Unlike land-use regulation, eminent domain does not merely block possible future uses of property but terminates established, ongoing uses of property. Moreover, *Kelo* was a case involving the taking of several owner-occupied homes, including a home belonging to several long-time, elderly residents. In that situation, eminent domain does not merely force the sale of a piece of property, it also threatens to destroy the personal traditions and social network that are part of living in a particular community. On top of this, of course, there is typically the concern, though it was not terribly prominent in *Kelo*, that a private developer may have persuaded local officials to embrace a project designed to benefit the developer as much if not more than the community. Thus, even though it is accompanied by payment of fair market value or "just compensation," eminent domain can be considerably more problematic than typical land-use restrictions.

The decision has spawned myriad proposals for reform in Congress and the state legislatures. My sense is that local officials, perhaps encouraged in part by the Court's former "hands off" attitude, have not been as judicious in the use of eminent domain as they should be. Positive steps can and should be taken legislatively to ensure that eminent domain is only used to address genuine holdout situations, that this power is exercised to advance thoughtfully developed, community-planning objectives, and that affected residents are treated fairly. Eminent domain practices should

be updated and reformed, but this invaluable tool should not be discarded.

In the larger context of politics and social debate, the more interesting question raised by *Kelo* is whether the negative public reaction to eminent domain, which actually raises a quite distinct set of issues, will generate renewed political support for the property rights agenda generally. Judging from the rhetoric of property rights advocates across the country, they certainly hope so.

Which brings me to my second topic of contemporary concern, the renewed interest in Congress and in the states in proposals to rein in regulatory programs by expanding on the concept of a regulatory takings legislatively. In the mid-1990s, fueled in part by property rights advocates' successes in the courts, there was a major push in Congress and the states to enact takings bills. To make a very long story very short, that effort failed in Congress and achieved only limited success in the states.

Now, however, the issue is back with a vengeance, largely due to the decision in November 2004, by voters in Oregon, the vaunted center of progressive land-use regulation in America, to approve an extraordinarily sweeping takings measure.⁵⁸ The measure empowers property owners to demand financial "compensation" from the state or local governments, subject to various narrow exceptions, for any reduction in property value resulting from enactment of land-use regulations following their family's purchase of the property.⁵⁹ The measure gives government defendants the option, in lieu of paying compensation, of waiving the regulations.⁶⁰ At this particular instance, implementation of the measure is on hold while its constitutionality is being tested in the Oregon courts.⁶¹

In practice, not a single dime of compensation has been paid to any Oregon property owner in response to any of the 2000-plus claims filed so far under Measure 37.⁶² Instead, in response to each valid claim, state and local officials, without bothering to do any detailed analysis of whether property values have actually been reduced, have simply waived the law.⁶³ Thus, unless invalidated by the courts or promptly fixed by the legislature

58. OR. REV. STAT. § 197.352 (2005).

59. *Id.* § 197.352(1)–(2).

60. *Id.* § 197.352(10).

61. At the time this Lecture went to print, the Oregon Supreme Court had found Measure 37 to be constitutional under both the Oregon and United States Constitutions. *Macpherson v. Dep't of Admin. Servs.*, 130 P.3d 308, 322 (Or. 2006).

62. Keith Aoki, *All the King's Horses and All the King's Men: Hurdles to Putting the Fragmented Metropolis Back Together Again?* *Statewide Land Use Planning Portland Metro and Oregon's Measure 37*, 21 J.L. & POL. 435, 436 (2005) (citing *What the Legislature Did—and Didn't—Do*, OREGONIAN, Aug. 7, 2005, at A14).

63. SHEILA A. MARTIN & KATIE SHRIVER, DOCUMENTING THE IMPACT OF MEASURE 37: SELECTED CASE STUDIES 4 (2006).

or the voters, Measure 37 threatens to destroy the Oregon land-use program by authorizing unconstrained development across millions of acres of previously protected agricultural and forest lands.

In simple political terms, the success of Measure 37 is quite astonishing. Public surveys have repeatedly shown continuing strong public support for the Oregon land-use program. Yet the voters have approved a measure designed to eviscerate the program. Moreover, most Oregon voters undoubtedly benefit from the protections provided by the land-use program. If there is a logical explanation for the adoption of Measure 37, it apparently lies in the voters' belief, fueled by well-honed political advertisements, that the land-use program had become fundamentally unfair in certain respects, for example, by interfering with the ability of certain agricultural producers to build homes on their properties, and the ability of other rural property owners to subdivide their land to provide homes for family members.⁶⁴ Thus, just as the sanctity of the home may be the key to understanding the public reaction to *Kelo*, it may go a long way toward explaining the success of Measure 37. In reality, of course, Measure 37 goes far beyond addressing the needs of homeowners, by authorizing massive residential subdivisions, commercial development, billboards along scenic highways, and so on. But the key point is that Oregon voters, misled about the scope of Measure 37 or not, were willing, contrary to their apparent self-interest, to vote on the basis of their values in support of fundamental fairness.

Measure 37's success in Oregon has unleashed a new interest in takings legislation in Congress and in takings bills or ballot measures at the state level. In 2005, the House of Representatives passed a sweeping Endangered Species Act (ESA) reform bill that includes a takings provision modeled after Measure 37,⁶⁵ and leaders in the House have vowed to push a separate free-standing takings measure this year.⁶⁶ In the states, a takings measure will be on the ballot in Napa County, California, in June 2006,⁶⁷ and probably on the Washington ballot in November 2006,⁶⁸ and still other

64. Blaine Harden, *Anti-Sprawl Laws, Property Rights Collide in Oregon*, WASH. POST, Feb. 28, 2005, at A1.

65. H.R. 3824, 109th Cong. § 13 (2005).

66. The measure that was subsequently passed was H.R. 4772, 109th Cong. §§ 5–6 (2006).

67. Napa Valley Land Stewards Alliance, Fair Payment for Public Benefit—Initiative Text, <http://digbig.com/4rqap> (last visited Feb. 26, 2006); Napa Valley Land Stewards Alliance, Measure A: Fair Payment for Public Benefit Act, <http://digbig.com/4rqaq> (last visited Feb. 26, 2006). The measure was subsequently defeated after this Lecture was presented. Jay Goetting, *Voters Say 'No Way' to Measure A*, NAPA VALLEY REGISTER, June 7, 2006, available at <http://digbig.com/4sawn>.

68. Eric Pryne, *Big Victory in the War of Words*, SEATTLE TIMES, Mar. 16, 2006, at B2. The ballot measure was subsequently defeated after this Lecture was presented. Eric Pryne, *Key Counties Reject Property Measure*, SEATTLE TIMES, Nov. 8, 2006, available at <http://digbig.com/4sawq>.

proposals are in the works.⁶⁹

While one can certainly discuss the variety of harmful and perverse consequences of takings measures, at the end of the day those who seek to defend land-use regulatory programs need to engage on the issue of fairness. One necessary step is to acknowledge the importance of home ownership and to accommodate as much as possible the interest of individuals in being able to build a home on their property. But beyond that, defenders of regulatory programs have a compelling fairness story to tell. Effective regulatory controls, applied broadly across the community, create a so-called reciprocity of advantage, meaning that even as landowners are limited in their use of their property, they benefit from their neighbors' compliance with the same laws.⁷⁰ In many instances, stronger regulations mean higher, not lower, property values.⁷¹ Data collected by the U.S. Department of Agriculture shows that the per-acre value of heavily restricted agricultural lands in Oregon has actually increased faster over the last forty years than the value of comparable lands in Washington, California, or the rest of the country. When one also factors in givings to property owners in the form of use value-assessment programs, agricultural subsidies, and publicly financed infrastructure,⁷² the public can and should win the fairness argument.

The third contemporary development worthy of note is that there is a boomlet in regulatory takings claims under international law. Following its characteristic split-the-difference approach to policy making, the Clinton administration, while it opposed domestic takings proposals in Congress in the mid-1990s, also supported ratification of the North American Free Trade Agreement (NAFTA), negotiated by the previous Bush administration.⁷³ While NAFTA includes numerous provisions relating to conventional cross-border trade in goods and services, chapter 11 of NAFTA establishes, in effect, an international regulatory takings litigation process.⁷⁴ It authorizes Canadian and Mexican firms that invest in the

69. *E.g.*, Erin Neff, *Initiative Fever*, LAS VEGAS REV.-J., Mar. 7, 2006, at 9B (discussing the Nevada initiative that would appear on the ballot); Marie Price, *Eminent Domain Petition Signatures Certified*, TULSA WORLD, Feb. 1, 2006, at A8 (describing the Oklahoma initiative that would appear on the ballot in 2006).

70. Mark W. Cordes, *Leapfrogging the Constitution: The Rise of State Takings Legislation*, 24 *ECOLOGY L.Q.* 187, 234–36 (1997).

71. *See* Lawrence Katz & Kenneth T. Rosen, *The Interjurisdictional Effects of Growth Controls on Housing Prices*, 30 *J.L. & ECON.* 149, 159 (1987) (stipulating that land use regulations have increased the prices of houses in the San Francisco Bay Area).

72. Cordes, *supra* note 70, at 234.

73. WILLIAM A. ORME, JR., *UNDERSTANDING NAFTA: MEXICO, FREE TRADE, AND THE NEW NORTH AMERICA* xiv, 33–34 (1996).

74. North American Free Trade Agreement arts. 301–1025, ch. 11, art. 1110, U.S.-Can.-Mex.,

United States to sue for financial compensation based on federal, state, or local actions that affect the value of their investments.⁷⁵ As the United States has progressively entered into additional bilateral and regional trade agreements over the last decade, the scope of this so-called investor-state-dispute-resolution process has expanded.⁷⁶ While the United States has yet to be held liable under these provisions, it is only matter of time before a claim against the United States succeeds.⁷⁷

This emerging international takings litigation process raises two basic concerns, one substantive and the other procedural. The substantive question is the scope of international legal protection against regulatory takings and whether it goes beyond U.S. law. Chapter 11 contains a few words that are familiar to domestic takings experts, but the language is ultimately quite different from the language of the federal Takings Clause. It has taken more than two hundred arduous years to arrive at a reasonably settled interpretation of the Takings Clause; NAFTA chapter 11 apparently relaunched the process of interpretive lawmaking from scratch. Some early decisions by NAFTA panels suggest that chapter 11 will be interpreted more expansively than the Takings Clause.⁷⁸ The key point is that the rulings of NAFTA tribunals are essentially unreviewable in U.S. courts, practically ensuring that the international law of takings will evolve along a separate and independent path from domestic takings law.⁷⁹

The procedural concern is that the judges hearing chapter 11 claims possess none of the traditional attributes of independence we value in the United States. Judges in chapter 11 cases are appointed by political officials on a case-by-case basis and often are drawn from the ranks of practicing lawyers who may represent one side or the other in other disputes involving other firms and other countries.⁸⁰ Abner Mikva, the former Chief Judge of the U.S. Court of Appeals for the D.C. Circuit, recently related that when he was appointed to serve on a chapter 11 panel he was instructed by a U.S. political official on what outcome the United States preferred in

Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA].

75. *Id.* art. 1110.

76. See Kenneth J. Vandavelde, *A Brief History of International Investment Agreements*, 12 U.C. DAVIS J. INT'L L. & POL'Y 157, 180 (2005) (discussing the proliferation of bilateral and regional trade agreements with investment-related provisions since the 1990s).

77. Meg Kinnear & Robin Hansen, *The Influence of NAFTA Chapter 11 in the BIT Landscape*, 12 U.C. DAVIS J. INT'L L. & POL'Y 101, 109 (2005).

78. Vicki Been & Joel C. Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine*, 78 N.Y.U. L. REV. 30, 59 (2003).

79. NAFTA, *supra* note 74, art. 1136.

80. Jack J. Coe, Jr., *Taking Stock of NAFTA Chapter 11 in Its Tenth Year: An Interim Sketch of Selected Themes, Issues, and Methods*, 36 VAND. J. TRANSNAT'L L. 1381, 1436 (2003).

the case in order to protect NAFTA from political attack. For those of us who value the tradition of judicial independence, with NAFTA in place we're certainly not in Kansas any more, as Dorothy would say.

The fascinating issues for the long-term relate to how the international takings universe may or may not interact with the domestic takings universe. For example, if international takings law becomes more expansive than U.S. law, why would a U.S. company sue under U.S. law in federal court when its foreign parent or subsidiary might be able to prosecute the same claim under international law? In addition, to what extent, if at all, will the evolution of takings law at the international level be influenced by domestic takings developments, and vice versa? Many groups have decried the alleged threat to U.S. sovereignty posed by international law, but this concern has barely been raised in the context of NAFTA, even though the international-takings-litigation process arguably represents the single most severe international law intrusion into U.S. domestic affairs.

The final issue worthy of note is the growing philosophical divide on property rights within the environmental community between regulatory advocates and land-buying groups. When NRDC published its book *Land Use Controls in America* many years ago, it compiled a long list of federal, state, and local regulatory tools, ranging from the Coastal Zone Management Act to local subdivision controls.⁸¹ But the book included not a word about land acquisitions or conservation easements. What a difference a few decades makes. Today, while traditional regulatory programs have by no means disappeared, environmentalists are increasingly relying on the acquisition of permanent fee and partial interests in land from willing sellers to achieve conservation purposes.

There are several explanations for the rise of the land acquisition tool. Most importantly, a 1980 amendment to the federal tax code authorized landowners to take deductions for gifts of partial interests in land, reversing Congress's prior insistence that charitable gifts include the full fee interest.⁸² This boost from the tax code has spawned hundreds of local land trusts, led at the national level by the Land Trust Alliance, as well as the expansion of regional and national land conservation groups.⁸³

81. NATURAL RES. DEF. COUNCIL, INC., *supra* note 8.

82. Tax Treatment Extension Act of 1980 § 6, Pub. L. No. 96-541, 94 Stat. 3204 (codified as amended at 26 U.S.C. 170(h) (2000)).

83. Nancy A. McLaughlin, *Increasing the Tax Incentives for Conservation Easement Donations*, 31 *ECOLOGY L.Q.* 1, 21 fig.1 (2004); Barton H. Thompson, Jr., *The Trouble with Time: Influencing the Conservation Choices of Future Generations*, 44 *NAT. RES. J.* 601, 604 (2004).

Increased use of the land-acquisition tool is also partly a conscious response to the takings debate. Paying volunteers to preserve land responds to the objections by property rights advocates that regulation constrains landowners' liberties and imposes unfair economic burdens for public benefit. While few if any environmentalists have welcomed the property rights agenda, it is fair to say that some land-buying groups have recognized the takings issue as an opportunity to increase their market share in the crowded field of environmentalism, as well as an opportunity to attract financial support from firms and individuals sympathetic to the property rights argument.

On one level, reliance on these two quite different approaches to land protection may appear to make a good deal of sense. In some instances one tool may work better than another, and in other instances the opposite may be true. The more tools that are available, the more conservation that can be achieved, or so the argument might proceed.⁸⁴ And certainly there is some truth to this: there is pressing need for more public parkland in many rapidly growing communities, and the need for some basic level of building regulation is widely recognized.

But there also can be serious practical tensions between these approaches. For example, if the goal is agricultural land preservation, and the decision is made to pay farmers *A*, *B*, and *C* to restrict future uses of their land, it will be difficult if not impossible to persuade farmers *D* through *Z* that they should accept the same restrictions imposed through regulation. And if some farmers are being provided the option of voluntarily participating in conservation programs, other farmers may naturally bridle at mandatory requirements. For all these reasons, there is a substantial danger that the compensated, voluntary approach will drive out the regulatory option, even if regulation offers more comprehensive and effective protection.

On a more conceptual level, these two different approaches are based on very different premises about the issue at the heart of the takings debate, the fairness of land-use restrictions. As I have discussed, lawyers and economists have made significant progress in explaining why government's treatment of landowners, including comprehensive regulatory programs, do not systematically reduce property values and therefore are often more than fair to landowners. Accordingly, defenders of regulatory programs criticize the idea of paying landowners to abide by land-use restrictions on the ground that it would confer unjust windfalls on property owners at

84. Peter M. Morrisette, *Conservation Easements and the Public Good, Preserving the Environment on Private Lands*, 41 NAT. RES. J. 373, 376-78 (2001).

considerable public expense. On the other hand, the purchase or donation of conservation easements is based on the premise that removing one or more sticks from the bundle of property rights invariably does negatively affect property values. At the operational level, there is also a tendency, reported on by *The Washington Post* and other newspapers, to exaggerate the values assigned to these partial property interests, in order to maximize the return to the participating landowner and to encourage other owners to participate in the future.⁸⁵ Whether environmentalists like it or not, one approach or the other has the better claim to fundamental fairness, and defense of the fairness of one approach or the other necessarily implies the unfairness of the other approach. To put it bluntly, if the Nature Conservancy and the Trust for Public Lands are pursuing the fair approach in buying land for conservation purposes, then why aren't the proponents of Measure 37 right after all? If the proponents of Measure 37 are not on the right track, have the land-conservation groups somehow gotten off on the wrong track?

So where are we now, other than at the end of this talk? We plainly are not on Professor Williams's "darkling plain" anymore. The legal revolutionaries that Williams feared have been thwarted in the courts, at least for the time being. But the property rights movement has obviously not gone away and it poses as great or a greater threat in the political arena than it ever did. Molly McUsic has said that this is ultimately a good thing, because the property rights issue is at bottom a political issue, the results in the courts are ultimately a reflection of the outcomes in the political process, and so we might as well welcome the opportunity to engage in the political arena where this issue will ultimately be won or lost. For reasons I have alluded to, I have real trepidation about the environmental community's ability to wage this political battle. The community seems altogether too focused on what it wants, protecting this and stopping that, than on what it believes in and where it thinks fundamental fairness lies. The experience in Oregon seems to suggest that the community ignores these larger issues at its peril.

But all I really know is that some years from now, hopefully as I sit in a beach house in Florida or in a farmhouse in Vermont's Northeast Kingdom, I'll receive a call from some young lawyer looking for advice. And I'll provide what advice I can but, following Norman Williams's example, I'll be sure to close by saying, "It's your turn now."

85. Michelle Boorstein, *Developer's Tax-Credit Donations of Land Scrutinized*, WASH. POST, Aug. 1, 2004, at C5; Michelle Boorstein, *Virginia Scrutinizes Tax-Credit Land Gifts*, WASH. POST, Aug. 1, 2004, at C4; Joanne Kelley, *Congress Uneasy over Easements*, ROCKY MOUNTAIN NEWS, June 14, 2005, at 1B; Joe Stephens, *IRS Starts Team on Easement Abuses*, WASH. POST, June 9, 2005, at A6.