

## KEYNOTE ADDRESS

### 14TH ANNUAL CONFERENCE ON LITIGATING TAKINGS CHALLENGES TO LAND USE AND ENVIRONMENTAL REGULATIONS

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Thanks very much, Peter.<sup>1</sup> I'm humbled. Peter and John<sup>2</sup> brought me to Georgetown for the first time. I spoke at this conference the last time it was at Georgetown, which I think was 1998. I'm delighted to now be Peter's colleague. He is an extraordinary scholar and teacher, and he has profoundly influenced the development of this field. And I've been delighted to watch John's career at Georgetown and now at Vermont, as his powerful influence as a scholar and teacher continues to grow as the years pass. Both of them are visionaries and we're all in their debt. And this conference is extraordinary. When Peter and John asked me if I would deliver this keynote address, I jumped at the opportunity.

As Peter told you, I've been thinking about the Takings Clause since 1983. So, to have the opportunity to talk to a group of the leading academics and leading practitioners in the field, people who are shaping takings law, is a remarkable opportunity. I would like to talk today about my conception of the Takings Clause. Having studied the clause and its history for almost thirty years, I have come to the conclusion that we should just do away with the doctrine of regulatory takings altogether.

Although I have only recently come to that conclusion as a matter of constitutional jurisprudence, I have consistently argued that the regulatory takings doctrine is inconsistent with the original understanding. My student note<sup>3</sup> made that point and was cited for that proposition by Justice Blackmun in his dissent in the 1992 case *Lucas v. South Carolina Coastal Council*.<sup>4</sup> When I began researching that note, I was not at all focused on the question of whether the original understanding included regulatory takings. I was concerned, instead, with discovering why the Bill of Rights included a Takings Clause. As I explored the original understanding and how the Takings Clause came to be part of the Bill of Rights, I found that,

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† Please note that the Speaker reviewed and edited this transcript. Language added by the *Vermont Law Review* appears in brackets, and ellipses indicate omissions of language.

1. J. Peter Byrne, Professor of Law, Georgetown University Law Center.

2. John Echeverria, Professor of Law, Vermont Law School.

3. William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694 (1985).

4. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1056, 1057 n.23, 1059 (Blackmun, J., dissenting).

when first adopted, the Takings Clause only prohibited physical seizures. My editor said, “Do you know that your note shows that the regulatory takings doctrine is not grounded in the original understanding?” It was like a light bulb going off in my head. Until then, I had not realized the primary practical significance of my research.

The two major pieces that I’ve written about the Takings Clause were my student note and then, as Peter said, about fifteen years ago I wrote a large piece in the *Columbia Law Review* on the early history of the Takings Clause.<sup>5</sup> The thesis of that piece was that the best way to understand the Takings Clause was that it protected against political-process failure; that is essentially the approach that Justice Stevens took in takings cases,<sup>6</sup> looking at whether there was a failure of the political process through which a politically powerless group was victimized. In the past fifteen years, however, I have reached the conclusion that the whole doctrine of regulatory takings is problematic because it is fundamentally incoherent and because it is impossible to come up with any manageable standards. The *Stop the Beach* case<sup>7</sup> illustrates that point. While scholars can debate the legitimacy of the judicial takings doctrine, the fundamental problem is that, once you move beyond physical seizures of property by government officials, it is not clear where you draw the line or what lines you can come up with. We should go back to the idea that the Takings Clause is just about physical seizures, that it’s just about eminent domain, and not about regulation.

So, if I’m making the argument, as a constitutional law scholar, there basically are three standard hooks that you have: You look at text, you look at original meaning, and you look at the case law. So what is the text? “[N]or shall private property be taken for public use, without just compensation.”<sup>8</sup> The critical word for me in that text is “taken.” The word connotes some kind of physical seizure. The example that I used when I was speaking to this group the first time was, if I were to say to my daughter Katherine—who was then about one and a half and is now fourteen—if my daughter Katherine was playing ball and I said, “Katherine, don’t play ball in the house,” unless she was deeply steeped in the property-rights movement, Katherine would not say that I had taken her ball. I would have deprived her of the use that was of most meaning to her—playing with the ball in the house—but in any kind of common parlance I would not

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5. William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995).

6. *Lucas*, 505 U.S. at 1061 (Stevens, J., dissenting).

7. *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 130 S. Ct. 2592 (2010).

8. U.S. CONST. amend. V.

have taken her ball from her. The concept of “taking” now and in the eighteenth century connotes some kind of physical occupation, physical domination: It’s a physicalist term. And that’s consistent with the original understanding.

The Takings Clause, of all the clauses in the Bill of Rights, is unique. First of all, it’s not in any of the colonial charters. When the United States were colonies, most of the colonies had charters, but none of those charters had a Takings Clause. Similarly, the Takings Clause is not in the Magna Carta.<sup>9</sup> It emerges for the first time in 1777 in the Vermont Constitution, so it’s very appropriate to be talking about that here, in a conference co-sponsored by Vermont Law School. The territory that we now think of as Vermont was originally in New Hampshire. And then the crown shifted it to New York, which invalidated the land titles of everybody in Vermont. That ultimately led to rebellion and to the creation of a separate state. So Vermont—which was in 1777 not a state but was fighting for its independence—drafted a constitution and its drafters came up with the first Takings Clause. We don’t have any legislative history of it, and we don’t have any early state cases interpreting the Clause, but it seems to me that it grew out of this experience of massive expropriation of land grants. So again, a very physical seizure: essentially an eminent domain-type seizure.

There are two other constitutional documents that had takings clauses before the Bill of Rights was adopted: Massachusetts, which seems to have taken it from Vermont when they drafted their constitution three years later, and the Northwest Ordinance. The Northwest Ordinance, to the extent that we have any evidence of its original meaning—and we don’t have any legislative history—seems to have grown out of a concern about impressments during the Revolutionary War. The first decision interpreting the clause says that it’s about seizure of property for military purposes.

Then, we have the Bill of Rights. When the Constitution was first proposed, states proposed dozens and dozens of amendments. When Madison drafted the Bill of Rights, he essentially picked and chose from this group with one exception: the Takings Clause. The Takings Clause is the only clause in the Bill of Rights that was not requested by a state ratifying convention. It’s only there because of Madison. We don’t have any legislative history. So in the congressional debates we don’t have any evidence of what it meant; they didn’t talk about it. It’s not talked about in

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9. The provision in the Magna Carta that most resembles the Takings Clause is Article 28, which states: “No constable or other royal official shall take corn or other movable goods from any man without immediate payment, unless the seller voluntarily offers postponement of this.” MAGNA CARTA art. XXVIII. The provision is limited in scope, covering only taking of movable goods. Most relevant to this Keynote Address, it pertains only to physical seizures.

the state ratifying conventions on the Bill of Rights. It doesn't seem to have been that important to anyone. The best evidence that we have as to what its original meaning is from St. George Tucker. St. George Tucker is the author of the first constitutional law treatise, which came out in 1803; he was a Virginia jurist, also a politician. He wrote that the Clause was "probably intended to restrain the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressment, as was too frequently practised during the revolutionary war."<sup>10</sup> So again, the most on-point evidence that we have from this period is that it's about seizure of goods by the army. Madison has an essay called *On Property*, which he wrote as a critique of Hamilton's economic policies. Madison wrote:

If there be a government then which prides itself in maintaining the inviolability of property; which provides that none shall be taken directly even for public use without indemnification to the owner, and yet . . . which indirectly violates their property, in their actual possessions, in the labor that acquires their daily subsistence . . . such a government is not a pattern for the United States.<sup>11</sup>

Here, he is contrasting the Takings Clause, which prohibits direct takings, with the evils of the Hamiltonian economic policy, which are regulatory policies; he is arguing that Hamilton's policies violate the spirit of the Takings Clause, but he is not contending that they violate the Takings Clause itself. He's contrasting the direct, which is the Takings Clause, with the indirect, which is the Hamiltonian policies. Similarly, that notion that the Takings Clause only prohibits direct seizures is reflected in the early cases. In 1871, the Supreme Court in the *Legal Tender Cases* summed up these early cases:

[The Takings Clause] has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. . . . A new tariff, an embargo, a draft, or a war may inevitably bring upon individuals great losses; may, indeed, render valuable property almost valueless. They may destroy the worth of contracts. But whoever supposed that, because of this, a tariff could not be changed, or a

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10. 1 WILLIAM BLACKSTONE & ST. GEORGE TUCKER, COMMENTARIES 305-06 (1803).

11. 14 THE PAPERS OF JAMES MADISON 267-68 (Robert A. Rutland et al. eds., 1983) (emphasis omitted).

non-intercourse act, or an embargo, be enacted, or a war be declared?<sup>12</sup>

And that overwhelmingly captures the early case law.

There are a couple of cases in the Civil War era that go beyond physical seizure, really only a handful, a few cases involving revocation of franchises, the earliest of which I found was in 1834. Chancellor Kent, who was strongly committed to property rights, has a case from 1816 and a few subsequent cases in which consequential damages are found to be takings and there are, again, a handful of other consequential damage cases that are takings. But the bottom line is the kind of things that we look at today as regulatory takings—regulations—are not recognized as violations of the Takings Clause in the pre-Civil War era.

The one other thing that's interesting and relevant about the original understanding, and Madison's intent especially, is that he thinks that the Takings Clause would require compensation in the case of abolition. Which is striking because it goes directly to the *Kelo*<sup>13</sup> point: What does public use mean for the original generation? Does it mean public benefit? Or does it mean public control? Madison, in a letter that he writes about the Takings Clause, writes to a friend that if there is emancipation, Congress will have to authorize compensation under the Takings Clause. So, for Madison, his understanding of the Takings Clause reflects this conception of public benefit rather than public control. That was the norm in the abolition era. In the pre-Civil War era, when the northern states abolished slavery, they always provided compensation.

So how do we get a regulatory takings doctrine? Originally you have two boxes. You have the takings box and the due process box. And the challenges to the police power are brought under the due process box. So when we look in the post-Civil War era, the case law is exemplified by *Mugler v. Kansas*. *Mugler* arose after Kansas went dry; and there was a challenge by a beer-maker to the loss of value of the plant. The Court rejected the challenge. Justice Harlan wrote:

A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking, or an appropriation of property for the public benefit. . . . The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the

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12. *Legal Tender Cases*, 79 U.S. 457, 551 (1870).

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

health, the morals, or the safety of the public, is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.<sup>14</sup>

So, again, there are two boxes in the early case law. There's the takings box, which is about physical seizure; if the government physically seizes property, it has to pay compensation. And then there's the due process box, and if the activity is noxious, if it violates health and safety, the government can regulate it, and it can destroy the value of it. But if it's not acting to protect health, safety, and welfare, it can't regulate. So you've got these two boxes: the due process box and the takings box.

And then what happens that makes it confusing—and that really is a critical step in the development of regulatory takings—is the case of *Munn v. Illinois*. *Munn v. Illinois* is a case in which the Supreme Court says that it doesn't violate due process for the state to regulate grain storage, the rates charged by the owner of a granary, because it's a business "affected with a public interest."<sup>15</sup> That all of a sudden creates a third box. So you've got the physical seizure box, the takings clause; you've got the health and safety box, which is the due process box; and now you've got businesses "affected with a public interest." Nobody says the granary is noxious, and yet it's permissible for the state to regulate it. So then the question becomes, if the state can regulate it, can it regulate it without regard to the effect of the regulation on the value of the property? That's contested. And then the Supreme Court ultimately, in *Smyth v. Ames*, establishes a test for businesses affected with the public interest, that rates cannot be set "unreasonably low."<sup>16</sup> So that's the test: "unreasonably low." It's a due process case, but it's understood that we are essentially taking the takings principal and embodying it in due process. If the rates are set too low, then compensation must be owed.

Now, you have three boxes. You've got due process, classic due process: police power. You've got takings: physical seizure. Finally, you've got the Due Process Clause with the takings principal embodied in it for businesses affected with a public interest. The contours of the last box are heatedly debated by the Court in the early part of the twentieth century. In conceptualizing what a business affected with a public interest was, there

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14. *Mugler v. Kansas*, 123 U.S. 623, 668–69 (1887).

15. *Munn v. Illinois*, 94 U.S. 113, 130 (1876).

16. *Smyth v. Ames*, 169 U.S. 466, 526 (1898).

was a liberal take and a conservative take. The liberals on the Court viewed that category expansively and the conservatives viewed it narrowly. And then there was a debate about what was noxious. The liberals viewed the category of harmful activity expansively, and the conservatives viewed it narrowly. *Lochner*<sup>17</sup> is a case in which, for example, the liberals and conservatives are split on whether this is a legitimate health and safety regulation. So you've got those three boxes.

Holmes thinks that this is incoherent. He thinks the idea of businesses affected with a public interest just doesn't make any sense. As a matter of fact, after the *Pennsylvania Coal*<sup>18</sup> case he says, in another decision, in dissent, that the idea of businesses affected with a public interest "is little more than a fiction intended to beautify what is disagreeable to the sufferers."<sup>19</sup> He thinks it's an incoherent doctrine. In his decisions, he pushed first for an expansive reading of what businesses "affected with a public interest" were, but then in *Pennsylvania Coal* he abandons the category and essentially applies the business "affected with a public interest" test to regulations more generally, not limiting it to businesses affected with a public interest. In *Pennsylvania Coal* you have a split, so Holmes is coming up with this new test and Brandeis in dissent is taking what is the standard liberal take on the Court: The underlying activity is noxious, this is a health and safety regulation, and therefore the statute is okay. *Pennsylvania Coal* is brilliant, and it's also unworkable.

The *Pennsylvania Coal* test is in large part a reflection of Holmes and his love of aphorisms. I wrote a piece in the *Georgetown Law Journal* about *Pennsylvania Coal*, which I called *Jam for Justice Holmes*,<sup>20</sup> that developed this point. When Justice Holmes was a little boy, his father, who was the great doctor and man of letters, Oliver Wendell Holmes, Senior, used to encourage Oliver Wendell Holmes, Junior, to say clever things by giving him a teaspoon of jam at the breakfast table if he said something clever. That then became an addiction. *Pennsylvania Coal*, rather than being a workable legal principal, is a reflection of his love of logical rigor, the idea that businesses "affected with a public interest" is an unmanageable and unintelligible category, and the test is really about his love of aphorisms. But then, strikingly, it has almost no influence on the Court, originally.

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

18. *Penn. Coal Co. v. Mahon*, 260 U.S. 393 (1922).

19. *Tyson & Bro.—United Theatre Ticket Offices, Inc. v. Banton*, 273 U.S. 418, 446 (1927) (Holmes, J., dissenting).

20. William Michael Treanor, *Jam for Justice Holmes: Reassessing the Significance of Mahon*, 86 GEO. L.J. 813 (1998).

Take *Euclid*,<sup>21</sup> for example; it's just after *Pennsylvania Coal*. You would think that *Euclid* would apply the *Pennsylvania Coal* test, but the test is not in *Euclid*. It's not in *Nectow*,<sup>22</sup> which is the Cambridge zoning case decided shortly thereafter. Again, you would think that *Pennsylvania Coal* would have been central to the decision. And then strikingly, just in terms of the way in which it totally disappears from the legal culture from 1935 to 1958, *Pennsylvania Coal* is not cited in a single majority opinion. It's a very idiosyncratic Holmes opinion at the time. It reflects his beliefs, but it doesn't have any legs. But then, when the Supreme Court returns to the land use area, returns to zoning, which it starts to do in the 1960s, *Pennsylvania Coal* is almost the only case out there which can be worked in to reflect modern categories. The Brandeisian notion of going in and finding out which regulations are health and safety regulations doesn't work in a modern regulatory state.

The basic pre-*Pennsylvania Coal* template did not work. The concept of businesses "affected with a public interest" doesn't make sense in a modern regulatory state where every business is really conceptualized as being affected with a public interest. The scrutiny of what constitutes a health and safety regulation doesn't work either because there's such a broad category of regulation that had been adopted in the post-New Deal era. So the Court, almost for want of anything else, starts to embrace *Pennsylvania Coal*, which it then re-conceptualizes as a takings decision because substantive due process in this period also has a bad name, so even though it's a substantive due process case, it gets re-conceptualized as a takings decision and then it becomes the anchor decision in a case like, for example, *Penn Central*.<sup>23</sup>

Think about that path. Think about what's happened to the Takings Clause. You have the original understanding, which is that it's just about physical seizures. You then move to the businesses "affected with a public interest" test, [and] you then move to the *Pennsylvania Coal* test, and then you re-conceptualize that as a Takings Clause test when it's not originally a Takings Clause test. That's a very tortured history.

Again, if you're thinking about what the anchors are that we use to interpret a constitutional clause, we look to text, we look to original understanding, we look to precedent. The text is really about physical seizures, the original understanding is about physical seizures, and the precedent is tortured and reflects a dramatic shifting over time. The modern case law, similarly, is struggling to come up with some kind of coherent

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21. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

22. *Nectow v. City of Cambridge*, 277 U.S. 183 (1928).

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

principle. Certainly since *Penn Central* we've been struggling and have not been able to come up with any kind of coherent principle that elicits any kind of support. All of those things, I think, point to the need for a return to the original understanding.

So, if you are somebody committed to the original understanding, or if you're a textualist like Justice Scalia or Justice Thomas, you really should embrace this idea of the Takings Clause being limited to physical seizures. And if you are applying normal constitutional metrics, it has become time to recognize that the regulatory takings doctrine is unworkable and doesn't provide any manageable standards. And so again, that would lead us back to the original understanding and to the text. That isn't to say that there are no constitutional hooks concerning constitutional protection of property that are worth consideration. Justice Kennedy's attention to the Due Process Clause may be one way that we should be thinking about looking at land use regulations; it in fact catches our intuitions much better than the Takings Clause. But the best way for us to interpret the Takings Clause moving forward is to return to the original understanding.

It's a privilege for me to be able to be in a dialogue with a group like this. This is something I've been thinking about for a long time, and I have not had the opportunity to work through these ideas in a setting like this. I want to thank John, and I want to thank Peter for giving me this opportunity. I would love to have people's questions or comments or thoughts.

Question:

I've always had a question about this piece of yours from Columbia, which I love and I think I've cited in everything I've ever written about this. I do have one low-hanging question about emancipation. I think this characterization of the Takings Clause as about protecting slaveholders and compromise is fascinating and compelling as a descriptive account, but I've also wondered why it is that emancipation would have been seen as physical expropriation in the way that you suggest the Takings Clause would be limited to. And at the point at which something like emancipation is a physical taking in your view, isn't that in fact indistinguishable from many forms of regulatory taking as we view the term today? In other words, what does the fact that emancipation fits in the physical expropriations box for you tell us about how broadly that original understanding of appropriation should be?

Answer:

I think that's a very good question. One of the things that I argued in the Columbia piece was that this was a driver for Madison, and it's not something that he talks about publicly. The letter is private, but he very much thinks that there's a real challenge to slaveholding in the South from the structure of the federal government. It's a particular concern for him because James Wilson, in the Pennsylvania Ratifying Convention, says that under the Constitution, Congress will have the power to abolish slavery after 1808. The Virginians are all horrified by this because that's not the way they read the Constitution, and Madison drafts the Takings Clause to require that emancipation will require compensation. The early case law is about classic physical seizures and primarily eminent domain. The gray area is about consequential damages. Then the question is: To what extent does emancipation fit within that box? I would say that it's different, that it's more like eminent domain than it is like regulation because, first of all (it's very tough to talk about slavery because the concepts that they use in talking about people are the language of property), it's about taking a person who is another person's property and physically taking that person away from the control of the slaveholder and emancipating that person. It is very much a physical seizure, a taking away from the slaveholder and letting the person be on her own. So that's why I think it fits. It's very close to the paradigm of eminent domain as opposed to regulation. But it's a good question.

Question:

I am a farmer as well as a lawyer. One of the things that I've always heard is that Jefferson really was very much opposed to Madison's concept, because Jefferson [had] seen the feudal system in Europe. Seeing the serfs, seeing a vassal having his property taken away from him, [Jefferson] never wanted that to happen. That was the foundation of the dispute between Jefferson and Madison. Not so much slavery, but because of what they had seen in the feudal system. Clearly slavery got into it, but it was the whole feudal system that drove Jefferson: No, the government doesn't have any right to take your property at all. And the Fifth Amendment was developed as a consequence to get around Jefferson's view.

Answer:

It's interesting. Madison is the one who's the pro-private-property rights champion of the founding generation. Actually, Jefferson has much more the sense—which he expresses at various times, for example when he's ambassador to France—that inequitable property distributions have to

be addressed. Some of his writings reflect a view that is sympathetic to property redistribution in a way that is alien to Madison. Of all of the people in this generation, Madison is the one who is the most concerned about private property; much more than Jefferson. That concern leads him to propose the Takings Clause. One additional point that bears noting is that the Takings Clause shows up in the French Rights of Man, which is a total puzzle to everyone because it's not a French right and historians ask: Where did they get it? What seems to be the case is that Lafayette drafted a large part of the Rights of Man and that Jefferson suggested to him that he include the provision; there is no other apparent source. This is the only evidence that I know that suggests that Jefferson was supportive of the Takings Clause itself.

Question:

I know your presentation is on the history of the Takings Clause, but would you care to speculate on whether the Supreme Court's denial of cert in every case except for *Stop the Beach* in the last seven years, including some cases where they could really develop the regulatory takings doctrine, including the *Penn Central* doctrine. Would you care to speculate on whether they, perhaps, are embracing some of your ideas that there really shouldn't be any regulatory takings and they've gone off on this adventure, and it's really turned out badly for them?

Answer:

Well, I'd like to think that that was right. I would think at some level there's a sense that it's just so difficult, the line drawing, [and] that it's an area they don't want to be involved in. In some ways it's kind of the aftermath of *Lucas*, in some ways that's the high water mark of the conservative wing of the court. It winds up being a very narrow decision. It's hard to say what its intellectual underpinnings are. I think that the Epstein takings position . . . is intellectually coherent, but clearly there are not five votes on the Court to go that far. I think to some extent the Court's avoidance of the issue in recent years may be the sense that there's no intellectually defensible position that the conservative wing feels happy with. That's a good question.

Question:

One of the reasons why supporters of property rights have focused so much on the Takings Clause has been the relative atrophying of the Contract and substantive Due Process Clauses. Would [your curtailing of] takings imply that we would revitalize these other clauses?

Answer:

I think it's worth looking at the Due Process Clause. I don't think the Contracts Clause should be revitalized. This is actually one of my favorite factoids so I will just say it. It's not directly relevant. The Contracts Clause, I think, is the only clause in the Constitution that's actually voted down in Philadelphia. So when the Contracts Clause is introduced, initially, it gets voted down. And then, fascinatingly, at the very end of the convention, all of the clauses of the Constitution go to the Committee of Style. So this is really right at the very end. Gouverneur Morris is the main draftsman of the committee. He says at one point, "with this pen I wrote the Constitution." One of the things that's amazing is the way in which he transformed the Constitution at the very end of the deliberations and nobody pays attention, because they're just exhausted. So many of the things that we think of as bedrock principals of constitutional law: the basic structure of Article One, Article Two, Article Three; . . . the differences in the Vesting Clause—between the Executive Vesting Clause, which gives all powers to the president, and the Congressional Vesting Clause, which only gives to Congress the congressional powers herein granted; "We the people of the United States"—that's all the handiwork of Gouverneur Morris. Some of the changes from the Committee were subject to debate, but others were not. And one of the changes added at the end is the Contracts Clause.

The Contracts Clause was originally voted down when it was first proposed in the Convention; it then emerges, however, out of the Committee of Style, and there's no debate on it. I don't know of any evidence that indicates that anyone on the floor (other than the committee members) was aware of the change. But if you look, if you go to Farrand's debates, it is breathtaking to compare the document that goes into the Committee of Style and the one that comes out of the Committee of Style. I think, from an originalist point-of-view in terms of the larger principles of the era, the Contract Clause is not, I think, a fundamental principle for this period. I would tend to give it a fairly narrow reading. You obviously can't read it out of the Constitution. It's there, but I would not look at it as the handle to resolve these kinds of questions. I think due process is something that is a better hook. Again, I say that even though I haven't worked out what that would mean, and I don't think Justice Kennedy has worked out what that would mean. It is actually one of the problems that you get in constitutional law where the right hook is abandoned, and there's this sense that we still have to find some way to deal with the problem the clause addressed, and then you come up with a text that just doesn't work for the problem. So I think it's appropriate for us to revisit due process and think

where the appropriate due process line would be. Again, I haven't worked out where that would be. That's my inclination.

Question:

Justice Scalia recently compared *Kelo* to the *Dred Scott* decision, saying it was the worst Supreme Court decision since *Dred Scott*. Any take on that?

Answer:

I would disagree. *Kelo* has, obviously—and everybody in this room knows that—hit an emotional chord. My secretary at Fordham had an anti-*Kelo* poster over her desk, I think partly to tweak me. The case has generated this incredible outcry. One of the things that's striking to me is to think why that's the case because it seems to me, [and] I've talked to Justice Stevens about this, it was so well-established in terms of precedent—*Berman v. Parker*,<sup>24</sup> *Hawaii Housing Authority v. Midkiff*<sup>25</sup>—it was a very well-established case. So the idea of applying the precedent and treating that as a departure from precedent has always puzzled me. The case reflects the underlying view that majoritarian decisionmakers make decisions about property and that's appropriate, and some of the decisions may be bad and some of them may be good, but that's what a democracy is about. It seems to me that this is well within my sense of the way constitutional law should work. I look at the dominant view in the early case law of what public use is as being public benefit, which again, supports the majority opinion. And again, the Madisonian view that the abolition of slavery would fall within the Takings Clause is an example of public use being public benefit. So *Kelo* is consistent with the original understanding.

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24. *Berman v. Parker*, 348 U.S. 26 (1954).

25. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984).