
CHAPTER 1 INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Endnotes

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