CHAPTER 6
IMPLICATIONS AND CONCLUSIONS

TAKINGS LAW 1998

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

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

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

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

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

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

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

CONCLUSION

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

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

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

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

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

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

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

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

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

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

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

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

Endnotes

[1] While it is always dangerous to read too much into a decision by the Supreme Court not to review a case, it seems possible here to also read too little. A petition from the government to review as important a takings case as *Florida Rock* unquestionably got the attention of all the justices. At the very least, the decision not to review the case would seem to indicate that there is some discord among the members of the current court about the appropriate response to Judge Plager's handiwork.

[2] A decade ago, Justice O'Connor, joining Justice Stevens' dissent in First English, seemed to question the Takings Project's objective of imposing upon government agencies a new and burdensome compensation requirement. *See* First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 322 (1987) (O'Connor J. joining portions of dissent authored by Stevens, J). Since then, however, Justice O'Connor has been uncompromising in her support for the Project. *See* Nollan, 483 U.S. 825 (1987) (O'Connor J. joining majority); Lucas, 505 U.S. 1003 (same); Dolan, 512 U.S. 374 (same); Preseault, 494 U.S. at 20 (O'Connor J. concurring)(addressing the merits of the Preseault's takings claim and suggesting that their claim had merit); Suitum, 117 S.Ct. 243 (O'Connor J. joining Scalia J. and Thomas J. in concurring)(arguing that transferable development rights (TDR's) received by a property owner are not relevant to whether a taking has occurred); Parking Ass'n v. City of Atlanta, 115 S.Ct. 2268 (1995) (O'Connor J. joining Thomas, J. in dissenting form the denial of certiorari)(arguing that the means/ends scrutiny established in Nollan and Dolan should apply to legislative as well as adjudicative determinations); Stevens v. City of Cannon Beach, 510 U.S. 1207 (1994)(O'Connor J. joining Scalia, J. in dissenting form the denial of certiorari)("[t]o say that this case raises a serious Fifth Amendment takings issue is an understatement"). For a more nuanced, analysis of each Court member's voting in takings cases, *See* Lazarus, *supra* Ch. 3, note 48 at 110 - 121.

[3] *See* Lazarus, *supra* Ch. 3, note 48 at 109-121.

[4] See Oliver Houck, *With Charity for All*, 93 Yale L.J. 1415, 1470-74 & 1544-45 (1984) (questioning whether PLF's litigation on behalf of developers qualifies as "public interest law" within the meaning of Section 501 (c)(3) of the United States tax code).

[5] *See* Jorden, *Specialized Courts: A Choice?*, 76 Nw U.L. Rev. 745 (1981); Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U.L.Rev. 1 (1989); Richard Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U.Pa. L.Rev. 1111 (1990); Daniel J. Meador, *An Appellate Court Dilemma and a Solution Through Subject Matter Organization*, 16 U.Mich. J.L.Ref. 471 (1983).

[6] S. Jay Plager, *The United States Courts of Appeals, the Federal Circuit and the Non- Regional Subject Matter Concept: Reflections on the Search for a Model*, 39 Am.U.L.Rev. 853, 866-67 (1990).

[7] Id.

[8] *See* e.g. Randall R. Rader, *Specialized Courts: The Legislative Response*, 40 Am. L. Rev. 1003, 1008-1009 (discussing the need for judges with

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

[9] Most of the subject matters within the jurisdiction of the Federal Circuit are statutory, rather than Constitutional, and because Congress has granted the Federal Circuit's exclusive jurisdiction over claims under the statute, the Federal Circuit is the sole interpreter of the statute, subject only to the discretionary review of the Supreme Court *See* generally Plager, *supra* Ch. 6, note 5 at 853-854.

[10] To be clear, a large and effective coalition *has* formed to oppose property rights legislation, including the procedural reform legislation that has been proposed this term We believe that a similarly intense and focused opposition must form to combat all aspects of the litigation campaign being waged in the nation's courts.

[11] We suspect, for example, that if Judge Plager was creating rights on behalf of criminal defendants or minorities instead of developers, he would be a household name by now, *see*, eg. H. Lee Sarokin, *A Judge Speaks Out*, Nation, Oct. 13, 1997 (Judge Sarokin, one of the right's favorite "liberal judicial activists" explains that he "retired from the federal bench . . . over the politicization (what I characterized as the "Willie Hortonizing" of the federal judiciary."), but note that there is not a single story in the NEXIS database discussing Judge Plager's activism in takings cases. We also find it hard to believe that Project proponents continue to derive political mileage from an attacking judicial activism when the activism they are promoting — the Takings Project — is perhaps the single most significant form of judicial activism to come from the federal courts over the last decade.