Environmental Law & Property Rights

Judicial Activism or a Return to First Principles?

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MR. MARZULLA: Welcome to the breakout session of the Property Rights and Environmental Law Practice Group. My name is Roger Marzulla. I am the chair of that practice group, and I will be moderating the panel this morning, which is titled unprovocatively "Property Rights: Judicial Activism or Return to First Principles?"

It seems to me that the title adequately states the key question here, which is whether the developing jurisprudence, most notably at the United States Supreme Court, since 1987 is a discovery or rediscovery of principles imbedded in the Constitution itself, or whether, as others will contend, it is a march down a road toward the creation of judicial doctrines which do not trace their legitimacy to the Founding Fathers.

We have a distinguished panel here this morning, and I am not going to take any of their time because I am as anxious as you are to hear from them.

We will speak in the order in which people are arrayed before you. Our first speaker will be Professor James Ely of Vanderbilt University, a noted authority not only on property rights but also on the legal history of the South. Maybe that will be next year's program.

Professor Peter Byrne of Georgetown University Law School. Peter has written and spoken extensively on property rights issues, and I have had the pleasure of seeing him in action explaining his writings to, I think, the Senate, at least, and maybe the House in connection with property rights legislation. He is a very articulate spokesman for the judicial activism side of this analysis.

Our third speaker will be Dr. Roger Pilon of the Cato Institute, a gentleman who is probably not unknown to most of you in this audience because if you are here, you probably know something about property rights or are interested in it, and if you are interested in it, then you have doubtless read Roger Pilon's writings over a very long period of time. He was involved in property rights long before it was cool.

Our fourth speaker will be Douglas Kendall with the Community Rights Counsel. Doug has been an ardent critic of the property rights movement for a number of years. He wrote a piece not too long ago , called something like The Takings Project with Charles Lord, in which he said some interesting things about property rights advocates and their cause.

Finally, to sum up today, I am especially pleased to welcome the new dean of the law school at Catholic University, the Columbus School of Law, Doug Kmiec. Welcome back to the East Coast after having been out West for a long time. Doug and I had the pleasure of working together at the Justice Department where I became completely committed to the recognition that Doug is a scholar on a number of levels. He has written extensively on property rights and is one of the leading authorities. He spoke last week at the Court of Federal Claims and did a heck of a job explaining *Palazzolo*, which may figure a little bit in his presentation today.

So without further ado, let's find out whether or not the property rights jurisprudence coming to us from the Supreme Court is, in fact, a return to first principles or, alternatively, judicial activism.

Jim.

PROFESSOR ELY: Thank you very much, Roger. It's a daunting prospect to be the lead-off speaker on this very distinguished panel. I would like to start by suggesting that we should explore both aspects of the question that Roger has posited: judicial activism as well as return to first principles.

First, I think we should ponder what we mean by activism. The word has taken on a kind of pejorative flavor in quite a few circles. It seems to constitute a kind of illegitimate use of judicial power by judges to impose their particular views or values rather than the norms expressed in the Constitution.

Unfortunately, if you take a historical view, activism so defined is very much in the eye of the beholder. Over the range of our judicial history, the Marshall court, the Fuller court, and certainly the Warren court have been accused of judicial activism. But whereas some have seen the activities of all of these prominent courts in very dark terms, others have contended that they were, in fact, robust defenders of constitutional rights.

At the end of the day, much of one's response to vigorous judicial decisionmaking seems to depend upon whose ox is being gored. There is, for example, a veritable cottage industry today of scholars trying to reconcile, it seems to

me, the activism of the Warren Court era, which was good, with the supposed activism of the Rehnquist era, which is bad. They are trying to work through whether we should once again be returning to the virtues of judicial restraint. One must take this with a grain of salt, since it seems to be advanced by people who were extremely enthusiastic when other sets of judges were doing the decisionmaking.

Now, our question posits that there is, in fact, some sort of judicial activism in a Fifth Amendment mask, to paraphrase the question put. I am prompted to ask, what activism? A handful of Supreme Court decisions putting some small degree of muscle into the Takings Clause is not much in the way of judicial activism, certainly when measured by historical standards. It strikes me that the takings decisions to which reference has been made since 1987 have been more hesitant, more piecemeal, more tentative, and certainly do not add up to any sweeping new direction in the law of takings jurisprudence. This may disappoint some, but it seems to me that is in the reality situation.

Moreover, the line of Supreme Court decisions endeavoring in a small way to reinvigorate the Takings Clause have hardly curtailed state regulatory authority in any meaningful way. In fact, a recent study by Professor David Callis suggests that state courts have in the main largely resisted this new takings jurisprudence and have tended, with some exceptions, to consistently put the narrowest possible reading on the decisions with respect to the Takings Clause. You might ponder whether the state courts simply are not listening, or whether they are listening and do not like the message. But the fact is that to this point, the takings decisions by the Supreme Court do not seem to have crimped state regulatory authority in any very significant way. I think it is simply fanciful to suggest that there has been some activist overhaul of all local land use regulations.

I am well aware that there are cries of alarm, and doubtless you are going to hear some shortly, from persons of the land use regulation community. But it seems to me that their alarm is exaggerated and their fears are overstated.

In truth, during the many years of judicial disinterest, officials became used to the idea that they could regulate any property to any extent and nobody would ask any questions at all. Now at least occasionally judges are reviewing decisions, and it appears, touse regulators, at least, that there is some kind of a judicial revolution afoot. I think that this notion is much overstated.

Now, let me turn to the other side of our question. Is this a return to first principles? As you can guess by now, I am going to argue yes.

It is hardly a news flash that the Framers of the Constitution and the Bill of Rights were deeply concerned about protecting the rights of private property owners and protecting commercial relationships. They frequently linked respect for property rights with individual liberty, a theme that comes up again and again at the Philadelphia Convention, is touched upon in the Federalist Papers, and is mentioned in numerous of their private writings and declarations.

Various clauses in both the Constitution and the Bill of Rights attest to this commitment to private property ownership. The Takings Clause, of course, is just one among others. Particularly important would be the Contract Clause, as well as the Due Process Clause.

Now, at the time the Constitution was framed, states had been the primary source of regulatory activity, and in this vein the Framers clearly saw that state authority was a source of concern and would have to be restrained. Security of property rights depended, at least to some extent, upon restraint of state autonomy. The Federal courts, as it is well known, early took the lead in protecting property and contractual rights through the enforcement both of the Constitutional provisions, to which I have made reference, as well, often in diversity cases regarding common law property rights. In fact, I would suggest that the protection of property rights and the protection of property rights of individual liberty were central themes in American jurisprudence down to the so-called Constitutional revolution of 1937.

The U.S. Supreme Court had very little occasion until after the Civil War to consider the scope of the Takings Clause. But thereafter, in a number of decisions, the Court began to develop the Takings Clause into a significant protective shield for property owners. I think perhaps particularly significant for this conference, in 1897, the just compensation principle was found to be an essential element of the due process requirements of the 14th Amendment and thus in effect became the first provision of the Bill of Rights to be incorporated and applied against the states.

The Takings Clause does not restrict state authority to any greater or lesser extent than other provisions of the Bill of Rights. Chief Justice Rehnquist pointed out a few years ago, "There is no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or the Fourth Amendment, should be relegated to the status of a poor relation."

There is a promise implicit in this statement that the Takings Clause will receive the same degree of judicial solicitude as other provisions of the Bill of Rights, but we all know that has yet to be realized. In point of fact, there is much less judicial attention paid to the Takings Clause than to other provisions of the Bill of Rights. But it no more restricts state authority on the face of it than the First Amendment or the Fourth Amendment or any of the other provisions of the Bill of Rights. We are not, and have not been since the Philadelphia Convention, operating under the Articles of Confederation.

The scope of the Takings Clause was little debated at the time of that ratification in the late 18th Century. This in some ways has been a boon to those of us who write in the field because you can pick over the very sparse evidence and argue a number of positions as to what was intended.

The Framers of the Bill of Rights lived an age with very little in the way of modern land use regulation. Property, even before the 18th Century, had been understood and defined in terms of value. The notion that the right of property encompassed the right to use and enjoy it had been recognized by scholars as far back as the 17th Century. It certainly was not understood as entirely limited to possession of physical things.

Given the high value that the Framers attached to the rights of property owners, it is inconceivable to me that they envisioned that the Constitutional protection to property could be satisfied by leaving the owner with mere legal possession or title, stripped of all economic value. Thus to the limited and belated extent that courts have begun to recognize this point, they are certainly engaged in the return to first principles that animated the Constitution and the Bill of Rights.

I think by way of conclusion, there might be some more profitable questions that we could ponder. Why has the Supreme Court under Chief Justice Rehnquist, which rhetorically exalts the importance of property rights, not done more to actually check encroachments on the rights of property owners? And why are some scholars so anxious to place a cramped interpretation on the Takings Clause when they seem so receptive to sweeping interpretations of other provisions in the Bill of Rights?

Well, I thank you. I look forward to hearing what the other panelists have to say.

MR. MARZULLA: Doug Kendall, did he get it right?

MR. KENDALL: Good morning, and thanks for coming to this panel so early on a weekend morning. The attendance today confirms my worst fears that conservative lawyers get up earlier in the day and work much harder than those of us on the progressive side. Maybe that is the real reason why our side has lost the last half dozen or so takings cases that have gone before the U.S. Supreme Court.

I also want to thank the Environment and Property Rights section and Roger for hosting this debate on the important topic of whether or not expansive regulatory takings doctrine under the Takings Clause constitutes judicial activism.

I note that other panels in this year's meeting addressed similar topics, and I applaud the Society for addressing this important critique of some of the emerging Rehnquist Court jurisprudence.

That said, it strikes me that the inclusion of me on this panel makes this debate considerably less interesting than it could be. You will not be surprised to find out that I think that the recent takings jurisprudence and regulatory takings developments constitute judicial activism. After all, I make my living defending state and local governments in regulatory takings challenges. I believe that the health, safety, and environmental protections that are the principle subject of takings challenges constitute perhaps the hallmark legislative achievement of the 20th Century.

I think a far more interesting debate would pit Professors Kmiec and Ely and Dr. Pilon against Judge Robert Bork, who openly supports Professor Richard Epstein's goal of repealing, "much of the 20th Century legislation", but nonetheless harshly criticizes Epstein's proposed regulatory takings revolution as, "not plausibly related to the original understanding of the Takings Clause". Or perhaps my esteemed co-panelists should be debating Justice Scalia, who admitted, perhaps too candidly, in his opinion in *Lucas* that before *Pennsylvania Coal v. Mahon*, "It was generally thought that the Takings Clause reached only direct appropriation of property or the practical ouster of the owner's possession." Later in his opinion, Justice Scalia states that "early Constitutional theorists did not believe that the Takings Clause embraced regulation of property at all."

Certainly if my co-panelists are serious in contending that expansive regulatory takings rulings do not constitute judicial activism, they should be talking to Clint Bolick and his colleagues at the Institute for Justice who are pursuing expansive regulatory takings jurisprudence and simultaneously viewing their mission as convincing conservatives that, "conservative judicial activism is neither an oxymoron nor a bad idea."

But alas, Peter Byrne and I were invited to take the position that takings rulings are judicial activism, and I accepted that task. Rather than bemoan my selection further, I will proceed to the task at hand.

The so-called property rights movement is advocating blatant, improper judicial activism that contravenes the text and plain intent of the Framers of the Constitution's just compensation clause.

Judges like Antonin Scalia on the Supreme Court and Jay Plager on the Court of Appeals for the Federal Circuit, who are advocating and adopting expansive readings of the Takings Clause, are doing the very things that the Federalist Society says it opposes. They are making up the law as they go along, they are trampling on notions of federalism, they are acting as judicial imperialists, using their power on the bench to make social policy.

These are strong claims. What is my proof? Well, let's start with the text of the Takings Clause. "...nor shall private property be taken for public use without just compensation." What does that mean? Well, I think "take private property" means expropriate, appropriate. I think it means when the government uses its power of eminent domain and takes private property for use in a military exercise or for use in building roads.

I think it is plausible to read the clause to include regulatory restrictions that are so severe that they are the functional equivalent of an expropriation.

I think Professor Epstein undermines his credibility considerably when he argues that the plain meaning of the text of the Constitution means compensation must be paid whenever the government, "diminishes the rights of the owner in any fashion no matter how small the alteration." Take does not mean diminish, and it never has. There is simply no way to justify from the text of the Constitution Professor Epstein's conclusion about the meaning of the Takings Clause.

Now, you may fairly be saying, who cares what Kendall thinks? What about the Framers? Well, that is a good question, and the answer is that the Framers, including James Madison, the author of the Takings Clause, also thought the clause was about expropriations, not regulatory impositions.

Historians have demonstrated this both through extensive analysis of Madison's papers and through analysis of regulatory impositions that were in place at the time of the drafting of the Constitution. No one, even Madison, thought that the Takings Clause would affect the scores of regulations in place at the time that regulated the use of, and in many case severely diminished the value of, private property.

This original understanding of the Takings Clause is embodied in the Supreme Court's jurisprudence for the first 150 years of interpreting the Takings Clause. For example, in 1870, in the legal tender cases, the Supreme Court stated plainly, "The Takings Clause has always been understood as referring to direct appropriation and not to consequential injuries resulting from the exercise of lawful power. Certainly, it would be an anomaly for us to hold an act of Congress invalid merely because we think its provision is harsh or unjust."

The evidence on this point is so clear that Justice Scalia was forced to acknowledge it in *Lucas,* and Professor Epstein was forced to recognize that his interpretation of the Takings Clause, "does not take into account the historical intentions of any of the parties who drafted or signed the Constitution."

Now, finally, I want to turn to the most commonly employed historical justification for an expansive regulatory takings doctrine. The argument goes something like this, and I think it's along the line of what Professor Ely has just said:

The Framers cared a lot about private property. An expansive regulatory takings jurisprudence protects private property; ergo, an expansive regulatory takings doctrine is consistent with original intent (even if the Framers understood the clause as limited to physical expropriations).

First, let's observe that this is not a textualist or originalist argument; it's an argument based on political philosophy. But even on its own terms, the argument is deeply flawed, and I will make three observations about it as a way of response.

First, as Professor Ely has written, for all their devotion to property rights, the Framers were intent to rely primarily on institutional and political arrangements to safeguard property owners. The Framers did care a lot about property, but, as explained in Federalist No. 10, they protected property primarily through the checks and balances that were set up in the political process. Correspondingly, there is no reason to think that the Framers would view expansive regulatory takings doctrine as either necessary or wise.

Second, while the Framers undoubtedly cared about protecting property and were influenced by philosophers like John Locke, it is not credible to call the Constitution a Lockean document. The nearly unanimous view of constitutional historians is that both Lockean liberalism and civic republicanism powerfully influenced the founding generation. The Framers, in other words, cared both about protecting property and ensuring that the government had the power to advance a common good.

As Benjamin Franklin put it in 1789, private property is a creature of society and is subject to the calls of that society whenever necessity shall require it, even to the last farthing.

Third, it is not clear that even John Locke or William Blackstone would support the extreme interpretation of the Takings Clause proposed by Epstein and others in the property rights movement. A portion of Blackstone's definition of property often edited out or ellipsed out by the property rights movement says that free use of property is subject to the "laws of the land."

Similarly, Professor Epstein was forced to "correct" the portion of John Locke's theory of property that opines that property rights can be exercised, "only where there is enough and as good left in common for others."

This correction led Charles Fried to quip that Locke was not sufficiently Lockean for Professor Epstein, and that Professor Epstein is, "moved to complete not only the text of the Constitution by reference to Lockean spirit, but Locke's text itself."

We should not forget the Lockean influence on our Founding Fathers. We should protect property rights. But we cannot so imbibe the Lockean spirit as to forget the limited text and original intent of the Takings Clause. Employing the clause to strike down health, safety, and environmental protections that present generations overwhelmingly support is judicial activism at its most dangerous and unprincipled.

I would like to finish by pointing you to Judge Jay Plager's 1994 opinion in *Florida Rock v. United States,* perhaps the most activist opinion to date in takings law, in which Judge Plager creates basically from whole cloth the notion of partial regulatory takings.

In an article in the Journal called Environmental Law written right after the *Florida Rock* opinion, Judge

Plager acknowledged that this partial takings issue had, "not been fully briefed and argued before his court." And he explains that "sometimes you have a problem of fitting the issue you want to write about into the case that is before you." Let me read that again. "Sometimes you have a problem of trying to fit the issue you want to write about into the case that is before you."

He then responded to the critics of his opinion with the retort: "One of the advantages of being an Article III judge with lifetime appointment is that you never have to say you're sorry."

This, in my mind, goes beyond activism and into the realm of lawlessness. This arrogance and lawlessness from the bench I thought was precisely what the Federalist Society was founded to combat.

I would hope that members of the Society will have the courage to combat judicial activism and judicial imperialism in all of its manifestations.

MR. MARZULLA: Forcefully stated case. Roger Pilon, let's talk about arrogance and lawlessness, shall we?

DR. PILON: I'd be glad to, Roger. I am well qualified to talk about arrogance.

You have just heard the attack on property rights from the left, claiming that the Supreme Court is engaged in judicial activism. You will not be surprised to learn that there is also an attack from the right, framed likewise in the language of "judicial activism." Both attacks show similarities with recent attacks on the Supreme Court's new federalism jurisprudence.

In fact, the attack from the right was brought home to me a decade ago when I published a piece in the *Wall Street Journal* under the title "Property Rights and Constitutional Principles." The article appeared just before oral argument in the *Lucas* case. A month later the *Journal* ran a letter from my erstwhile colleague in the Justice Department, Gary McDowell. The heading of the letter said it all: "Scratch a Libertarian – Voila, a Judicial Activist."

The letter began by claiming that "the libertarian molestation of the Constitution continues apace," and it went downhill from there. McDowell claimed, for example, that "political legitimacy is rooted in consent," which of course is wrong. Legitimacy is rooted in both consent and reason. If it were rooted in consent alone, none but new citizens would be bound by the law since most of us never gave our consent to be ruled as we are. In fact, it is reason, not consent, that will help us sort out the issues before us today.

But let me get to the heart of McDowell's machinations. "The federal structure," he said, "left some things to the states – the regulation of private property was one." And then he added, "Since *Barron"* – that's *Barron v. Baltimore* – "the Takings Clause has been applied to the states – but never legitimately. It has been as it only could have been short of an amendment – a matter of judicial musing and finagling. It has been an egregious example of judicial revision of the Constitution by a court bent on doing good."

There you have it from the right. And you will hear the same strains, of course, from Lino Gragia, Raoul Berger, Robert Bork, and even, to some extent, from Antonin Scalia – all pointing to the much mooted incorporation issue.

Before addressing that issue, let me speak directly to the question before us of whether the Court's recent protection of property is judicial activism or, instead, is a return to first principles. I will argue that it is a return to first principles. And I will do so by focusing precisely on that idea of first principles.

Let me divide my remarks into two main parts: first, concerning the jurisdiction or authority of the Court, which will involve the incorporation issue; and, second, concerning the substantive issue, the Takings Clause – or what the law requires on the merits. Both of those involve the question of judicial activism, but they are separate aspects of the question.

With respect to the jurisdiction or authority of the Court, here, too, we need to divide the issue into two parts: first, the federal side; then, with respect to the States. And on the federal side, here again there is a two-part division: first, prior to the ratification of the Bill of Rights; then, subsequent to that point in time.

Now, why would I start with the situation prior to the Bill of Rights? Well, let's remember, we lived for two years without a Bill of Rights. Does that mean that we had no rights vis-à-vis the Federal Government? Of course not. What was protecting us and our rights was the doctrine of enumerated powers – the idea that where there is no power, there is a right – and that takes us straight back to state-of-nature theory and to the whole justificatory apparatus that stands behind the Constitution, as first set forth in the Declaration of Independence: we start with our rights; we give up only certain of those in the form of powers; we retain the rest. That was the justificatory theory of this nation, even before the Ninth and Tenth Amendments made it explicit.

The fundamental idea behind the doctrine of enumerated powers, then, is simply this: the Federal Government has only those powers that have been delegated to it, by the people, as enumerated in the Constitution, plus those instrumental powers that are "necessary and proper" for pursuing any of its enumerated powers or ends. (And "necessary," by the way, does not mean "appropriate," as Marshall said in *McCullough v. Maryland*. After all, if the Framers had wanted to write "appropriate," they could have.) Thus, if we take the doctrine of enumerated powers seriously, it turns out that the eminent domain power itself, prior to the adoption of the Bill of Rights, is problematic – first, because it is nowhere enumerated in the Constitution; and, second, because none of us had such a power in the first place to yield up to any government

we might create. Not by accident was eminent domain known in the 17th and 18th centuries as "the despotic power." At best, it was an "incident of sovereignty," surrounded by an air of illegitimacy, and cabined by the sovereign's need to pay compensation when property was taken.

To be sure, once the Bill of Rights was ratified, the eminent domain power was brought to the surface – although it was still only implicit, framed in a clause that spoke directly and explicitly to the right of private property. Along with the rest of the Constitution, however, that was enough to allow courts to recognize the power, provided it was exercised consistent with the requirements of the Takings Clause – and even if the inherent illegitimacy of eminent domain remained unresolved. Still, as the Court would later say in *Barron*, the Bill of Rights was good only against the government created by the document it amended. Thus, state Takings Clauses aside, it remained to apply the federal Takings Clause against the states.

We turn, then, to the state side of the issue, to incorporation, and to the Civil War Amendments that brought it about. This is a complex and vexed issue, of course. Suffice it to say here that the long pre-Civil War battle between liberty and democracy led to the demise of the Missouri Compromise, to the Kansas-Nebraska Act of 1854, to the formation of the Republican Party, and to Lincoln's vision of a Constitution informed by the majestic principles of the Declaration of Independence. With the Civil War Amendments, that vision was finally realized. The Fourteenth Amendment in particular, written against the background of the "black codes" that emerged in the South after the war, was meant to constitutionalize the Civil Rights Act of 1866 and, for the first time, to give *federal* protection against *state* violations of individual rights. And the amendment's Privileges or Immunities Clause was meant to be the principal font of those rights, not the Due Process or Equal Protection Clauses.

The Framers of the amendment and those who ratified it understood what the Privileges or Immunities Clause meant, for they looked back over its long history. Blackstone had used it to refer to our "natural liberties." Colonial charters often spelled out its meaning. The Article IV version was said by Hamilton to be "fundamental" and "the basis of the Union." And the then-definitive interpretation of the clause had been given in 1823 in *Corfield v. Coryell* by Justice Bushrod Washington. In a word, the clause was meant to protect such basic rights as property, contract, personal safety, and the procedural rights necessary to enforce those substantive rights. Those were the rights that "no state shall abridge."

Unfortunately, as we all know, a bitterly divided Supreme Court effectively eviscerated the Privileges or Immunities Clause in 1873 in the notorious *Slaughterhouse Cases*. For a further analysis, let me simply refer you to the excellent essay on the subject in the 1989 *Harvard Journal of Law & Public Policy* by then-Judge Clarence Thomas, which traces the issues back through Thurgood Marshall's brief in *Brown v. Board of Education*, the elder Harlan's dissent in *Plessey*, and the dissents in the *Slaughterhouse Cases*. You will see there the logic of the matter and how it is that states, too, are restrained by the Bill of Rights. Thus, as a practical matter, incorporation may have come about piecemeal as cases have come before the courts. In principle, however, it was accomplished through the ratification process – just as the Constitution itself came into force through that process.

Let me turn now to the substantive issues and to the question of what the courts should be doing to protect property rights, whether threatened by federal or by state actions. The most basic thing courts should do, of course, is ask what rights there are to be protected. To do that however, they might begin by looking at the text of the Takings Clause, which means they will have to define such terms as "property," "take," "public use," and "just compensation."

I'm going to focus on the word "property" because that's what Doug Kendall focused on – and because that's where a good part of the current problem rests. What is striking to me is that in this area of the law alone, "property" seems to mean simply the underlying estate, whereas in every other area of the law the term is used to refer not only to that bundle of rights we call "property" but to each of the rights in the bundle. Thus, in everything from trusts and estates to tax law we divide property into as many "estates" as human imagination allows. Yet in the takings context, it's only the bundle that seems to count.

We saw that, in a way, in *Lucas* – a case that had Justice Scalia speaking of 70-odd years of ad hoc regulatory takings, even as he was adding yet another year to the string. In *Lucas* he gave us, in effect, the 100-percent rule. Absent a nuisance justification, about which more in a moment, if a regulation wipes out all value in the property, while leaving title with the owner, the government must pay just compensation because the effect of the regulation is tantamount to taking title. "What if the regulation takes 95 percent of the property's value?" Justice Stevens asks rhetorically. Tough, answers Scalia: "Takings law is full of these all-or-nothing situations." Thank you, Nino.

What Scalia has done here, of course, is start at the wrong end of the problem. He tries to determine if there is a taking by first determining what the loss is. If the loss is total, he believes, you have a taking (except, again, in the case of nuisance prevention). He's got it exactly backward. The first question is not whether there is a loss in value but whether there is a taking. Only then does the question of the amount lost arise, for purposes of just compensation. Indeed, one could have a taking, yet have no loss in value.

Thus, if we look at property not as a thing but as a bundle of rights, the question is whether any of those rights has been taken, not whether all have been taken. Scalia began with a 100-percent rule. He should have begun with a zero-percent rule. Take one of those rights in the bundle of rights and you've taken something that belongs to someone.

After all, if a mugger comes along and says, "Your money or your life," and you bargain him down to half your money, no one would say that he hadn't taken what belonged to you – half of your money. Yet if that mugger wears a badge that says U.S. Government, he gets away with it. We have an ordinary word in the English language for that: it's called theft.

In a takings analysis, then, you've got to begin by defining "property." Property is not simply the underlying estate but all the rights, or legitimate uses, that constitute that estate. Madison put it well in his justly famous essay on the subject in the *National Gazette* of 1792: "as a man is said to have a right to his property, he may be equally said to have a property in his rights." All of those uses or rights that legitimately go with the property are themselves property. Take one of those and you take property that belongs to the owner.

We come, then, to the question of what those uses are and, in particular, to the so-called nuisance exception to the compensation requirement. In truth, it's no exception at all, because when a regulation prohibits a use that is illegitimate to begin with, it takes no right. The difficulty, however, is in determining what are and are not legitimate uses. The theory of the matter is rather easy. The application, by contrast, is sometimes difficult and invariably is fact dependant.

Here, Scalia repairs rightly to the common law. But that gets you only so far, because the common law can handle only a certain range of cases before statutory regulation is necessary. This is not the place to go into this complex and difficult area. Suffice it to say that, as in every other area of the law, one needs a theory of the matter. And here, the basic theory, rooted in a concern for equal rights, says that there is a substantive presumption in favor of "quiet" uses – uses that all can enjoy at the same time and in the same respect – and against "active" uses – uses that crowd out neighboring uses. That principle has to be applied in a factual context, of course. And I say "substantive presumption" because there is – or should be – a procedural presumption in favor of nearly all uses, leaving the burden of objecting to a use on those who object.

Once those procedural and substantive details are worked out, however, the claim one hears so often from the other side – that a principled takings jurisprudence would require government to pay polluters not to pollute – is put to rest. Nothing could be further from the truth. Since there is no right to pollute in the first place, regulations that prohibit uses that pollute are perfectly legitimate under the police power, requiring no compensation under the eminent domain power. For no right – no property – has been taken, even if the owner is "wiped out" by the regulation. On the other hand, if a regulation takes an otherwise legitimate use, the owner is entitled to just compensation for his loss, even if it's small relative to the value that's left.

Thus, if a regulation takes legitimate uses, not to protect public or private rights but to provide the public with such goods as lovely views, wildlife habitat, or historic sites, the public has to pay for those goods, just like any private individual would have to pay for them. Government cannot simply take those uses, however valuable the goods that result may be. If they're that valuable, pay for them. Otherwise we're engaged here in theft, plain and simple. Indeed, the modern property rights movement can be reduced to a simple proposition: "Stop stealing our property; pay for it."

Now, what happens when the public doesn't have to pay, when the goods go "off-budget"? As any economist will tell you, when the price is zero the demand is infinite. It's no accident, therefore, that in recent years we've seen an explosion in the public's demand for environmental goods – they're free! What so many environmentalists fear, in fact, is that if those goods go on-budget, if the public is made to pay for them, the public will demand fewer of them. What a surprise! When you have to pay for something, you demand less of it. That's exactly what will happen, and that's why the other side is opposed to a principled takings law.

So I come back to the bottom line. This is not a matter of judicial activism. It's a matter of returning to first principles. Clarence Thomas put the deeper issue well when he talked about the Privileges or Immunities Clause. The clause was meant, he said, to protect us against the willfulness of both run-amok majorities and run-amok judges. The same can be said about the Takings Clause. It permits public projects to go forward, but not at private expense. Judges who understand and apply that principle are not imposing their own vision on the rest of us. They're applying the law, which is what they're bound by oath to do.

Thank you.

MR. MARZULLA: Professor Byrne, would you like to speak up for theft?

PROFESSOR BYRNE: Yes. Well, we may disagree about theft, but still it is comforting to be in a room of people who are hard-core enough to show up on a beautiful Saturday morning to hear about regulatory takings. That is a taste we certainly share.

Discussions of this sort are bedeviled by questions of definition. What is judicial activism, and how can we talk about judicial activism without having a sense of a baseline of appropriate judicial exercise of authority?

I want to suggest today that judicial activism can be best understood as enhancement of judicial power by expanding the scope of vague terms in the Constitution without serious engagement with the text, history, or some other limiting principle, joined with the disregard for the Constitutional primacy -- and I suppose this is a political philosophy judgment -- of democratic law-making by elected representatives, Federal and state.

In using this definition, I want to stand in a tradition that originated with Holmes' dissent in substantive due process cases, the essence of which is captured in the statement that the Constitution is made for people of fundamentally different views.

This tradition of arguing for judicial restraint found flower in liberals' critique of the Court's blocking of New Deal legislation articulated, for example, by Felix Frankfurter. It found fresh energy in criticisms of the Warren Court's pursuit of social egalitarianism through Constitutional rulemaking associated with justices such as John Harlan or William Rehnquist.

To analyze judicial regulatory takings developments from this perspective, I thought it would be helpful to concentrate on the jurisprudence of a single and central justice, and Justice Scalia is an attractive choice for several reasons.

First, he has been the most vehement critic on the current Court when it has engaged in what he believes to be unwarranted judicial displacement of the prerogatives of the legislative process. He gave passionate statement to this in his dissent in the *Casey* case, castigating an imperial judiciary for Constitutional decisions based on philosophic predilection and moral intuition.

Secondly, as Doug Kendall indicated and as everyone here agrees, he has eschewed any reliance in interpreting regulatory Takings Clause on the original meaning of the clause, frankly acknowledging that the consistent interpretation before 1922 was that it embraced only expropriations and physical invasions. And he offered as authority for what the Court is doing today only a vague salute to a mythical historical compact which he neither identified nor explicated.

Justice Scalia's frankness here allows me to put aside, at least for a moment, the question of the appropriate baseline of what the Framers intended. I hope in the question and answer session, we can talk about some of the theories advanced.

Third, Justice Scalia has eschewed result orientation as such, which I want to contrast with activism, orientation being maintaining a kind of judicial flexibility that allows the Court to resolve every case in a way that comports with its notions of justice. He rather has paid attention and has tried to articulate rules, and in the process of articulating rules, he has tried to ground them in principle. This allows us to discuss some principles that are actually extant in Constitutional law today, and he always writes with intelligence and flair, so it is fun to argue about him.

Rather than take you through all of Scalia's opinions in the brief time I have, I want to summarize what I believe are the three most salient themes in his regulatory takings jurisprudence and explain why I think they represent inappropriate judicial activism.

First, Scalia has revived the heightened means-ends analysis of regulations of property employed in economic substantive due process cases from before 1937 and eschewed by most judges of all persuasions in the period after 1937.

He has transferred this inquiry to the Takings Clause without real explanation of why heightened scrutiny is appropriate for regulations of property in any sort of principal way. This permits judicial supervision of the wisdom of legislative and administrative judgments. Following this lead, lower courts now frequently invalidate land use regulations because of an independent judgment that the legislative program will not, for example, substantially advance an articulated government interest.

I do not want to suggest that this is a return to 1936 or anything like that. The scrutiny is only intermediate, not strict. Moreover, to date, the opinions do not impose a strong substantive limitation on the legislative objectives that can be chosen, characteristic of the old substantive due process cases.

Justice Scalia himself, however, has urged in a concurring opinion in *Pennell v. City of San Jose* that a city has no business in principle reducing a rent increase that otherwise is economically reasonable in order to respond to the hardship of the tenant -- a hard substantive limitation on legislative goals.

It is fair to note that more recently in the *Del Monte Dunes* case, Justice Scalia pointedly expressed no opinion on the propriety of the substantially advanced test in takings cases. It is hard to know what he means by that, because in the same opinion he went on to indicate that whether any legislative purpose is legitimate is a question of law for a court to decide.

Second, Justice Scalia created the first per se test to condemn regulation on an owner's use -- that's the *Lucas* case -- and the point of the per se test is to find a taking without consideration or weighing of the public goals, and the character of the public goals involved.

He has expressed a willingness to consider abandonment of the parcel as a whole rule, a development that would greatly increase the number of regulations condemned without consideration of their social value, and we may see something of whether this thought will bear fruit in the pending *Lake Tahoe* case, which many of you are aware of which brings a blunt per se challenge to temporary development moratorium.

Third, Justice Scalia has indicated an assumption that "property" as used in the Takings Clause has a static Federal constitutional meaning -- dare I say it: a natural meaning -- apart from property law itself.

This would reverse many due process opinions by Justices Stewart and Rehnquist, decisions viewed at the time as conservative and restrained, indicating that property rights are created and their meanings determined not by the

Constitution as such, but by independent sources of law, primarily state law.

I would add my view that such a subsidiary in the development of property norms supports the continued vitality of private property law and the system of private property law by permitting the adjustment of these rules to changing economic and social conditions. That is what I view is at stake in these cases.

The signpost of Justice Scalia's view on the Constitutional content of property may be found in several opinions. First, he has indicated that he would subject state nuisance laws in *Lucas* category cases to Federal review. He has argued that regulatory takings are not about protecting reasonable expectations about the scope of permitted uses at some point in time, but about static or fixed substantive limits on what property rights must permit, and this is how I read his concurring opinion in *Palazzolo*. And he has suggested that a state court lacks authority to find public rights of access to state beaches in the interpretation of the state common law of property.

Besides greatly enhancing the reach of the Fifth Amendment and thereby judicial power, the move to constitutionalize the meaning of property greatly restricts states' law-making authority. States may not, without Federal judicial leave, amend property rules to enhance efficiency and fairness as they have done since Virginia abolished the fee tail estate soon after independence. Moreover, their administration of local land use regimes must be conducted with a firm view to the rear on the attitudes of Federal judges.

A great constitutional achievement of the 20th Century was to place questions of economic and social policy in the hands of elected representatives rather than Federal judges. But Justice Scalia's regulatory takings principles grow from a deep suspicion, particularly of modern environmental legislation. I think he sees these as complex restrictions in the service of obscure ecological values that threaten the legal order based on individual rights and market activity.

He fears the environmental law's concern about harms that traditional economic and personal behavior cause to natural systems potentially will empty the precious category of activities that we can pursue freely because they do not harm others.

Given that these environmental laws are firmly cemented in the people's regard, and attempts at repealing them by political means have been defeated again and again, Justice Scalia seems to have persuaded himself that they often exceed traditional constitutional values even if these values need to be newly articulated or rediscovered. His regulatory takings opinions reflect an attempt to erect new constitutional dikes against the flood waters of an environmentalism and the legal changes such concerns have prompted.

Now, it is fair to say that since 1992, Justice Scalia has not written a regulatory takings decision for the Court majority. The Chief Justice, who has always been in the majority, has assigned writing the Court's opinions to himself or to another justice whom he has viewed as less categorical or overtly ideological. I do think that many of these opinions are unduly opaque about the governing principles of regulatory takings while consistently finding for the property owner, but they have evinced an instinct to move slowly and not to sweep aside social consensus.

Advocates of judicial restraint should prefer even more that the salience of environmental restrictions to property use be debated and decided by the people at their most appropriate level of democratic decision making.

Thank you.

MR. MARZULLA: Well, when the professors disagree, it's time to bring in the law school dean.

So here's Doug Kmiec.

DEAN KMIEC: Thank you, Roger. I thought this was a panel on military tribunals, so I have to my modify remarks. But what the panelists do not realize is that there are several categories of people covered by the military tribunals: terrorists, those aiding and abetting terrorists, those harboring them, and those taking private property without the payment of just compensation.

It is my job as the dean to try and bring synthesis to the excellence of this presentation that we have heard this morning. Because my judgments to some degree have to be candid, and some might view them as harsh, I want to tell all the panelists now that there is going to be an award given at the end of this. I will go through the presentation of each person so that I can justify my rationale, and so the judges in the audience, can see that I worked my way backward to the result that I had in mind all along.

We were told at the beginning by Professor Ely that judicial activism and first principles were both in play, and we need to address both of them. He coined a phrase which I wrote down. He said a lot depends on "whose ox is being gored." I think that phrase is going to catch on. I think the way to work your way out of that phrase in terms of some meaning is, if you view property as a pre-societal natural right, then when a court intervenes to protect it, it is not judicial activism. If, however, you view property as merely a societal or positivist social construct, as Jeremy Bentham did, as to some degree Hobbes did, then when courts intervene to protect it, it is a form of judicial activism.

One of the reasons the area is so difficult to work our way through is because property is both of those things. It is a pre-societal natural right and it is one of the reasons we formed the Republic, but the particular specifications of property often depend upon positive law. This was something recognized by Blackstone in his commentaries when he told

us very helpfully that property was both an absolute and relative right.

One of the things that should be admitted right at the front is that to reach a definitive answer here in each and every case is going to be well nigh impossible unless one recognizes that property has both of these conceptions built within it.

Professor Ely, you more or less conceded that, but it wasn't clear to me, so I cannot give you the award, and I regret that.

PROFESSOR ELY: I'm heartbroken.

DEAN KMIEC: I know. And Doug Kendell you brought Professor Ely back by reminding us of the wonderful Lockean proviso that property is protected so long as there is enough and as good left for everyone else, and that is insofar as our Framers were shaped by Lockean ideas, that also was a reminder of the two sides of the property concept.

But Jim Ely, I do not want to leave you brokenhearted because I thought you asked one of the most trenchant questions here, and that was, "what activism?" We have got a handful of cases from the U.S. Supreme Court: Do they really amount to the protection of private property? I thought that was a particularly good question, because when you actually look at the litany of cases, you have one that says, if they pass a regulation that stations guards on your roof or in your living room, physically invades, physically occupies, that's a taking. If someone leverages regulations so that you have to give up part of your estate, that's a taking. If they totally wipe you out in an economic sense (and we really do mean totally wipe you out, because even Justice Blackman said to old Dave Lucas when he bought those million-dollar lots in South Carolina, well, you can still use them to picnic can't you?) that is a taking.

And then there is the relatively inscrutable *Penn Central* test where we have a set of factors. You know you are in trouble when the Supreme Court admits it's being ad hoc. The factors are not defined, and the definitions of these factors shift over time.

Back to that in a minute.

Now, Doug, I wanted to give you the award just because you called yourself a progressive and I never know what that is. But then you lost the prize because you said the Institute for Justice was a group of just dyed-in-the-wool judicial activists when they were litigating the issue of public use.

One of the things that I think constitutionalists ought to litigate are the words of the Constitution. I've never quite gotten over the fact that a unanimous Supreme Court just wrote the public use words out of the Constitution of the United States in *Hawaii Housing Authority v. Midkiff*. Or the fact that there is a merry band of litigators called the Institute for Justice that will say to the City of Pittsburgh, "Just because you don't think these little shops are pretty does not give you the right to use the power of eminent domain and transfer them to a private shopping mall developer that you think might make a prettier statement in the midst of your public square."

So, Doug Kendell, nice try, but I'm sorry.

Now, I am going to skip over Roger Pilon. But you may sense that he is already the leader. Roger made a concession here this morning that he has never made in any other public forum. Somebody was saying something about too much arrogance being involved here, and Roger said, well, I know something about arrogance. Now, that was the most self-deprecating thing I've ever heard Roger say, so we will come back to you, Roger.

Now, Peter, I must say, you know, I like Georgetown. It's almost a Catholic institution. And I have found your work enlightening. But I think it is not accurate to say that Justice Scalia has revived *Lochner*. I think the Rehniquist Court in its taking jurisprudence has, indeed, been very careful to distinguish itself from what *Lochner* was about.

Lochner was about the second-guessing of legislative prerogative. The Supreme Court in the takings cases is not that at all, or at least the Court has been very careful to say that they're not constraining -- and this goes to the issue of judicial restraint -- the legislature from doing things which it is authorized to do; namely, as Doug Kendall articulated, protect the health, safety, and welfare of the community. We expect local legislatures to do that.

So what Justice Scalia is actually measuring is whether or not regulation really does advance the end that it says it is advancing -- that's what *Nollan* was about -- and whether or not it is proportionate to place a particular burden on a given land owner to advance that end.

Peter made reference to the *Pennell* case, a rent control case, where it apparently got in the mind of the City of San Jose that individual land owners could be singled out to rectify the unfortunate poverty of their tenants.

Well, Justice Scalia rightly put up his hand and said, "I think there's an absence of causation here. This particular landlord did not cause the harm, did not cause the poverty of this particular tenant, and the Fifth Amendment to the extent we want to discover original meaning and original understanding is about the avoidance of the disproportionate burden of the public weal on a particular person." Scalia, I think quite rightly, pointed out that that would be a mistake.

So, I'm afraid, Peter, for that and so many other reasons, including the proposition that Justice Scalia adopts a static definition of property when it is he, the founder of *Lucas*, who told us that at least when all property value has been completley deprived, the state will have some burden to reference back to the dynamic background principles of

property, I can't give you the award. Can we just ask you what you're up to here, South Carolina? Can you justify your regulation in terms of the background principles of state property law, which are not static? Common law is hardly a static doctrine, and, in fact, is quite federalist and quite local and quite well suited to addressing the difficult questions of health, safety, and welfare.

And now I come back to Roger Pilon. He has done so well here today because he said we start with our rights, and he reminded us that in the original framing of the Constitution, there wasn't a list, but there were the rights, that flow from the fact that we are created human beings, and we have some unalienable things that cannot be deprived from us.

Our founders, with the great genius of the time, thought it was quite sufficient to enumerate power and to say nothing more about rights, and that if they did say something more, they would run the risk of leaving something out that would be important, and they were quite right in that supposition.

Well, things were made explicit for better or for worse in the Bill of Rights, and various things that Roger described brought tears to my eyes when he told us what happened to the Privilege or Immunities Clause. But he reminded us that we do need, among other things, definitions to make the Constitution work. We need definitions of taking, of public use, of property, and of just compensation.

Roger Marzulla mentioned when he introduced me at the beginning of this forum this morning that I had the pleasure of talking to the Federal Circuit recently about the *Palazzolo* case. This case put the most remarkable question to the Court: if the government passes a burdensome, oppressive regulation, can it avoid the argument that it amounts to a taking requiring the payment of just compensation merely because it gave notice of it in advance?

Well, had the Court agreed to that rather silly proposition, it would have left the Constitutional document entirely empty. It would have deprived the word property of any meaning or definition. It would have made it entirely circular, and it would have denied the natural rights and natural law foundation that Roger Pilon so eloquently spoke about. I think you see where I am going in tipping my hand in terms of the great award to be given.

But let me just end with a few comments about *Palazzolo*, which I think do have practical significance. Occasionally, deans do like to connect to what lawyers are actually doing.

There were basically three positions in *Palazzolo* that were notable to me. The opinion was written by Justice Kennedy, and he basically said, no, you can not simply take property upon giving notice. But the opinion was unclear because he was joined in a separate concurring opinion by Justice O'Connor of exactly what impact notice of the regulation has. Justice O'Connor in her separate concurring opinion said it's a factor, which is a little bit like saying a taking occurs when the regulation goes "too far". We are not sure where that's going to go, but I want to come back and say something about Justice O'Connor in a minute which I think practitioners will want to focus on.

Justice Scalia, being the principled person that he is, said factor, schmactor; advance notice doesn't have anything to do with the question. The question is whether or not an oppressive disproportionate regulation has been put in place on this land owner. It does not matter whether he has notice of it or not.

On the other end of the spectrum, Justice Stevens would have found no standing for somebody who had notice of the regulation. Anyone on notice, said Stevens, would know that he owned nothing and therefore he could not possibly have suffered a concrete injury in fact. We would really be down the rabbit hole with that one.

But Justice O'Connor said something very interesting about what she thought the word "factor" meant for her, and this is something worth paying attention to because land owners know generally they can't win those cases when they don't have *Lucas* on their side, when they don't have *Nollan* and *Dolan* on their side, when they don't have *Loretto* on their side. In other words, when they can't prove a permanent physical invasion, when they can't prove leveraging, when they can't prove a total wipeout, they are stuck in the residual category of *Penn Central* and its balancing factors, which usually means they are stuck saying goodbye to their life's investment.

But Justice O'Connor said it need not mean that, because when she wrote her concurring opinion in *Palazzolo*, she said the character of the government's activity is not just whether regulation involved a physical invasion. It involves the Court asking the question of whether or not the regulation has served the purposes for which it was intended.

That is an interesting point for Justice O'Connor, swing vote that she is, to make, because that suggests that she is saying that some of the concerns that were articulated in the *Dolan* case may count. In the *Dolan* case, old Florence Dolan out there in Oregon wanted to expand her hardware store, and the government said, oh, fine, you can expand your hardware store, but you've got to put a bike path in the town. She didn't get it — she didn't think that many people were going to buy bathtubs and then ride their bike home.

And Chief Justice Rehnquist didn't get it, either, and he said there didn't seem to be any proportionality or causality related to this, and therefore he didn't understand how the purposes of the regulation were being served by placing that burden on her.

Justice O'Connor suggests in her understanding of the character factor under *Penn Central* that this inquiry can be made. That's very helpful and that gets us closer to a natural rights formulation.

She also suggested that she is interested in knowing under the same factor whether the effects it produced -- *Penn Central* invites analysis of the effects produced by the governmental action -- actually accomplished its stated goal.

And again, that is not *Lochner*; that's the nexus between the regulatory means and whatever regulatory end the government has decided to pursue.

Well, that's my practice tip, and now to the award.

The award has troubled provenance. It is something that I have always thought probably was taken from somewhere – perhaps, the cloak room of a local federal building stolen. It was given to me by a colleague of mine and I have had it ever since, and I have worried about this. And so to expiate my sin, and to now move this artifact elsewhere, I present "the United States District Court Not Responsible for Private Property Award" to Roger Pilon.

DR. PILON: Thank you very much.

MR. MARZULLA: It seems to me that even with respect to that award and its inscription, that it perhaps is subject to debate. We might well be talking about the split of jurisdiction between the District Court and the Court of Federal Claims, and for those of you who, like me, spend a lot of time over at the Court of Federal Claims, you will know that such signs are generally not found over there. Perhaps next time we will invite some of the Claims Court judges over to make their own awards.

Doug is new as dean at Catholic, and so he thinks he gets the last word.

But as everybody who has engaged in the law school community knows, it's really the professors who get the last word. So I am going to invite each of the first four panelists to do a two-minute rebuttal, —three of them as to why they didn't get the award and the fourth to further expand why it has not contributed to his arrogance to get the award.

And then we will follow this up with questions, so be getting ready.

PROFESSOR ELY: I may not be entirely coherent because I am speaking to you through my tears.

But I will endeavor to respond to at least several of the interesting points that were raised.

It may be true that Justice Scalia has indicated that before *Pennsylvania Coal*, there was no recognized notion that a regulation could constitute a taking, but if so, neither he nor his clerks did a very thorough job of investigating the historical record. In point of fact, Justice Holmes, as far back as decisions written on the Supreme Judicial Court of Massachusetts in the 1890s, suggested that a regulation might under some circumstances constitute a taking. Leading treatises on eminent domain law had raised the possibility that a regulation could be so severe as to deprive the owner of all use and enjoyment, and that might amount to a taking, at least as far back as the 1880s.

Since by the 1880s we were moving into an era of modern and more comprehensive regulation, it is not surprising that this might be the first time scholars and jurists would have occasion to address that issue.

There were, of course, land use regulations in effect at the time of the drafting of the Constitution and Bill of Rights, and Doug Kendall is quite right to bring that up; however, I think it is also fair to say that these regulations fell far short of modern comprehensive environmental and zoning regulations. Indeed, many of the early regulations were designed to urge property owners to put their land to use, not to prevent them from putting it to use.

The *Legal Tender Cases* do indeed suggest that a taking must be confined to physical acquisition, but that, of course, was a case that involved regulation of the currency. This was simply a dictum, it was not a central point in the decision at all.

More interestingly would be the discussion about original intent. We are told that the original intent of the Takings Clause was confined to physical appropriation or acquisition of title. Now, as I mentioned before, that mystifies me because there was extremely little debate about the Takings Clause at the time it was added to the Bill of Rights, and so we all have to rest upon some degree of inference in deciding what the Framers in fact had in mind.

But why would we care about the original intent? In most other areas of law, near as I can observe, the law review literature is filled with articles that ridicule original intent. There is no point in looking for it, and it is undecipherable in any event, and besides, who cares? Why all of a sudden with the Takings Clause are we so preoccupied with trying to find the original intent? Do we have any movement to go back to the original intent of the right to counsel as it was understood in the 18th century, or free speech as it was understood in the 18th century, or the Equal Protection Clause as it was probably understood in the 1860s and '70s? I just don't see that.

The only time we suddenly are concerned about original intent is when it comes to the Takings Clause and then, based on what strikes me as unclear evidence, we seek to have the narrowest possible reading placed on that.

One other thought. There have been several potshots taken at the *Lochner* case in the course of the presentation. At the risk of opening yet another Pandora's Box, I want to suggest that; A) I think that the takings cases are quite different, in fact, as Doug has pointed out; but B) I think *Lochner* frankly has had an unfair rap over time. That would certainly be a topic for another conversation and I won't enlarge it here, but I think that much of the criticism of that decision has been rather dramatically overdone.

Lastly, responding to one of Peter Byrne's points about the level of scrutiny, whether it should be heightened scrutiny or intermediate scrutiny, I would like to suggest that all rights, property rights, non-property rights, should have the same level of scrutiny. In fact, we didn't have different levels of scrutiny until the *Carolene Products* case was

decided in the midst of the New Deal period when the New Deal Court was persuaded essentially that it wished no longer to be involved in review of economic legislation. So, amidst considerable controversy, the Court stepped back from that, but then proceeded to indicate that certain other claims of right, however, would continue to receive a high degree of judicial solicitude.

Not only did this coincidentally reflect the political priorities of the New Deal, but I would suggest to you it is the height of activism to be telling us which rights are more important than other rights and which ones are deserving of judicial scrutiny.

I could conceive of people who would be at least as interested in enjoying and using their property as whether they could engage in nude dancing. It's very hard to fully work out why certain rights, except for the subjective values of individuals, get more attention than others. That was not the view of the Framers, who saw all rights as interdependent.

MR. KENDALL: I want to make a couple points. One is that I agree with Professor Ely that the regulations at the time of the framing were different and less comprehensive than the environmental protections that we see now. But Professor John Hart's scholarship on this issue has appeared in some very prestigious law journals and pretty comprehensively documents that the regulations in place at the time of the framing were not of a different mold than the regulation we are seeing right now. They are less encompassing, but they are the same type of regulations that we are seeing now, and they equally diminished the value of private property and in some cases eliminated an aspect, a stick in the bundle, without providing any sort of compensation.

Second, I want to respond to Dr. Pilon and his assertion that private property does not have to mean an estate in land or a thing; it can mean any stick in a bundle. Of course, that's right. Of course there is a narrow and a broad definition of private property, and under the narrow version property is a thing, a piece of property, and, under the broader version, property can be defined as any stick in the bundle, any use, any aspect of property rights. But as Dr. Pilon has also indicated, Madison knew of that distinction. This distinction is not new in property law. There has been this distinction at least since Blackstone. . And if Justice Scalia and I are correct that the original understanding of property was the narrow version, then we have to view that as a choice. It is a choice that was made by Madison and by the framing generations that the narrow version of property was what the Takings Clause protected.

I do not think we are free at this point to say that we should now adopt a broader definition that was rejected, particularly where adopting that broad definition would entail a revolution.

If you say that the Takings Clause prevents any taking of any aspect of any stick in the bundle, there is not much regulation that would be left. I do not think that is an appropriate use of the judicial power. I do not think it's plausibly related to what the Framers and Madison were intending to do, and I think it would work a revolution that not many people in this room would really embrace.

MR BYRNE: Well, I understand we're saving Roger for last. I can't imagine why.

One of the things that I found clarifying about this discussion is that it seems pretty clear from several comments that it apparently does not really matter what the Framers intended or what they enacted. There were natural rights that existed before the Constitution was adopted, and the fact of the matter is that Federal judges are empowered to enforce those natural rights as they think fit based upon their reading of 17th Century philosophers.

That's an alarming prosect for me, and it's not just because of the results that would be reached. In his dissent in *Casey*, Justice Scalia said that questions of basic value in society should be decided through the legislative process because then the losers have at least the satisfaction of a fair hearing and an honest fight.

It may well be that we would live in a better world when you have to pay for any reduction in the value of property. I emphatically do not think so, but if such a world was to come into being, it should come into being through discussion among the people and choice by them of the kind of government that they want to live under.

DR. PILON: Before I launch into my rejoinder, I want to take a moment to thank Doug Kmiec for this wonderful honor he has bestowed on me this morning. I'm tempted to add that it has left me truly humbled, but if I did, he wouldn't believe me, and I couldn't pull it off!

So let me simply proceed to my rejoinder, and begin by repairing to the natural rights theory that is the foundation for this whole American experiment. Indeed, the Declaration makes that clear in its very first paragraph, and in the first line of its second paragraph, which says, "We hold these truths to be self-evident." Self-evident truths are truths of reason. And whether you take the natural rights tradition to be rooted ultimately in rational considerations, as I do, or theological considerations, they pretty much come to the same thing, as both Aquinas and Locke suggested in their different ways. Still, there are differences between the two strains that need to be worked out. This is not the place to do so. But it is the place to say just a bit more about the combination of natural and positive law that Doug Kmiec rightly noted as being central to a full understanding of property rights.

Without going into the fine points that range from the foundations of natural law, on one hand, to issues like the coming-to-the-case defense, on the other hand, we do need to notice that property rights have their origins in natural law notions like first possession, even if the contours of such rules require public consent and thus positive law before the rules can be fleshed out fully. Thus, in response to a point Peter just made, that the Founders did not want to incorporate natural rights theory, I think that he is just dead wrong. Nothing animated them more, even if they realized, at the same time, that positive law would eventually be needed to complete the picture.

Obviously, nuisance is a case in point, an area of property law that calls for line-drawing regarding quanta of particulate matter, decibels of noise, and the like. Natural rights theory tells us that one man cannot use his property in ways that will deprive another man of his property rights. But it cannot draw a precise line that separates one man's active rights from another's right to quiet enjoyment. We can draw such lines on a case-by-case basis. Or we can do so through public law. But in either case we should not delude ourselves into thinking that those are lines drawn in stone, discoverable by reason alone. In both cases we are simply refining the natural law through positive law methods.

There are many other examples I could raise that show how natural and positive law go together in a principled way, but I want to conclude this rejoinder by going back to the original intent issue. After listening to Doug Kendall, I'd like to believe that we're all originalists now, but I'm afraid that Jim Ely has it exactly right when he says that the striking thing about these recent converts to original intent is their selectivity: only in the regulatory takings area are they originalists. And that is so only because they ignore the larger historical picture. True, the Framers may not have talked much about compensating owners for regulatory takings. But they hardly had to. The modern regulatory state is largely a 20th century invention.

Two centuries ago we had nothing like the regulatory state we have today. It was only after *Euclid* sanctioned it in 1926 that massive land-use planning came on the scene, creating a legal regime that turned common-law presumptions on their heads. There was a time when owners could use their property pretty much as they wished, the burden resting with others or with the public to show why a use was wrongful. Today, the presumption is largely against use, with use permitted only "by permit." Not for a moment would we allow speech to be so treated. Yet nearly everywhere, property rights, and economic liberties generally, are subject to prior restraint. They've been reduced to second-class rights, which is hardly what the Framers intended. Indeed, they'd be appalled by the modern administrative state that bleeds the owner with endless procedures until he goes away or goes broke. They fought a war to end such abuse.

One final point: Are property rights opposed to environmental protection? Of course not. Unlike what Doug Kendall suggested, government is perfectly free to engage in all kinds of regulatory restraints on the use of property in the name of health and safety, and no compensation is required – provided the regulation serves that end. That's in part a factual question, of course. And you have to be on guard because there are countless bogus measures parading as health and safety regulations. But assuming the regulation genuinely secures private and public rights, nothing in the Takings Clause stands in its way.

If, however, we're talking not about securing health and safety rights but instead about providing the public with environmental goods of the kind I mentioned earlier – wildlife habitat, lovely views, and the like – then we're operating under the eminent domain power, not under the police power. The public has to purchase those goods. If a private person, to preserve the view that runs over his neighbor's property, would have to buy an easement to that effect, why should it be any different for the public? How can the state condemn those uses, without having to pay compensation, and get the view for nothing? That's just plain wrong, and that's a natural law principle.

MR. MARZULLA: We have about five minutes and we would invite questions to any member of the panel.

AUDIENCE PARTICIPANT: Thanks, Roger. I agree with James Ely that *Lochner* gets a bad rap, and in hindsight, if you look at *Carolene*, what real business would we say today that Congress had in what kind of oil they made margarine of? The substance of these cases indicates the necessity for substantive due process to address just the question of whether or not the regulations are proper.

Whether that's judicial activism really is not what we're talking about today, but I have to support that call to *Lochner*, indeed to cite *Buck v. Bell* where Carrie Buck was sterilized after wonderful procedural due process.

But I would like to address to the two folks who feel that the Fifth Amendment jurisprudence should actually be in the hands of community advisory groups. That's a little reference to the Soviet Union that used to exist across the way.

I would like to address the *Euclid* case cited by Roger. The case *Under* is far more interesting, where the District Judge said that no candid mind could not relate *Euclid* to the zoning cases that were ruled unconstitutional because they zoned by race.

I happen to see the Takings Clause and takings jurisprudence as the main cause of action for those seeking reparations for slavery at this time, and I actually feel that to an extent, they are in the same boat as all of us who are watching the so-called statute of limitations and changing understanding of property.

MR. MARZULLA: Professor Byrne, do you want to respond?

PROFESSOR BYRNE: On the question of block groups, I think it's fair to note that the private property system in the United States has been functioning pretty robustly through this entire period. It is really not a question of property or no property; it's a question of the relationship of property to health, safety, and environmental regulations. Nobody appears to be a Leninist.

As to reparations, I think reparations is classically a legislative question. I think it would be quite wrong for the Supreme Court to say that the descendants of former slaves as a matter of constitutional law are entitled to payment because it would deprive the rest of us of an opportunity to engage in what is a fundamental question of social justice.

MR. MARZULLA: Do we have another question? Jim.

MR. BURLING: Jim Burling from Pacific Legal Foundation.

The type of judicial activism that bothers me the most is the activism that I see at the lower state and Federal court levels when they seem to have an ability to completely ignore the language in the holdings of the U.S. Supreme Court on takings laws.

So my question is, if we are concerned about judicial activism, is there a way that you can see to it that the lower courts can be persuaded to follow more closely the dictates and the intent of the U.S. Supreme Court on takings jurisprudence?

PANELIST: That does I think raise an interesting question and one that was inherent in many of the remarks today. I think Doug Kendall especially criticized the Supreme Court jurisprudence, at least in part, on principles of federalism. Judicial activism obviously speaks to separation of powers. Both of those principles are included in the mission statement of the Federalist Society.

So I guess, Doug Kendall, given that the Supreme Court has handed down these decisions almost exclusively dealing with state court regulation, how do you respond to Mr. Burling's criticism that, in effect, if we are going to have a rule of law, don't state courts have to follow Supreme Court precedent?

MR. KENDALL: States courts or lower Federal courts?

PANELIST: I think he was addressing state regulation, I guess. And as you know, under *Williamson County*, you can never get into Federal court, anyway.

MR. KENDALL: Yes. Actually the ripeness and the procedural questions in takings law are incredibly complex and there is an entire question about whether you can bring a federal claim in federal court before you litigate your state claim under your state constitution.

What the Supreme Court's takings jurisprudence suggests is that you have to go to state court and see if your state is going to compensate under state law before you get to bring a Federal constitutional claim. That's a very complicated and complex Federal procedure and interpretation of the constitutional right question. I do not think that, as a general rule, the lower Federal courts and the state courts are getting it wrong; it's just that it's a complex area that they are figuring out.

I think the state courts and lower Federal courts certainly are struggling to interpret what the Supreme Court means in its opinions in cases like *Lucas*. I think that is a product of how divided the Supreme Court is on this issue. What exactly does *Lucas* mean and how should state courts interpret it? I think they are struggling with that for reasons other than judicial activism. I think there is some confusion in the current state of affairs.

PANELIST: Okay. So state courts are doing their darndest to keep up with Justice Scalia and they just can't do it.

MR. MARZULLA: Okay.

MR. KENDALL: I frankly think that and if you look at Georgia and a few others, some state courts are being quite aggressive in protecting property rights under their state constitution.

PANELIST: There is truth in that.

MR. MARZULLA: Another question.

MR. HOLLOMAN: Christopher Holloman, Small Business Administration, but here in a personal capacity.

My question is for Mr. Kendall and Mr. Byrne. What is their reaction to Professor Ely's comment that the actual decisions the Supreme Court has been rendering are a lot more limited than some of the advocacy groups and scholar say, and do they find these decisions as disturbing as some of the advocacy groups and scholars?

PROFESSOR BYRNE: No. Some of the decisions, in fact, I think are correct. I think, for example, that the per se rule saying that you could never challenge a regulation if you became the owner of the property after it went into effect, I think that's a correct decision.

I think that per se rule grew up out of an attempt by lower courts to try to make sense out of *Lucas* and to try to cabin within what they understood to be traditional boundaries. But I think it was a bad rule.

I think that the objections that I have to the holdings are really that they seem unconnected with a coherent principle, and that they therefore seem like kind of a rolling hairball where the one thing that seems consistent is that the property owner wins. One of the reasons I discussed Justice Scalia, I don't think that they have a big idea.

DEAN KMIEC: Let me suggest that I think the big idea is that property is not subject to redefinition by the legislature at will, that it does have a natural rights component to it.

Now, Peter, you asked in your rebuttal a minute ago does that mean that the courts are about to become philosopher kings that just enforce 17th Century philosophy? I would suggest it's not just 17th Century philosophy; it goes a lot earlier than that. But separate and apart from whatever ancient philosopher we want to rely upon, I think Justice Scalia's very federalist discovery of common law as the source of property definition in *Lucas* is indeed that which gives much resolution to the takings puzzle.

The reason that the takings jurisprudence has not advanced further to actually be fully protective of property rights as our founders envisioned is because *Lucas* has been cabined to that total depravation case, and I think the litigation as it moves forward ought to be incorporating that principle because that's what makes the taking clause more coherent than not.

MR. MARZULLA: Well, I guess Doug Kmiec is learning quickly on his job; the dean did actually manage to get the last word.

This has been an absolutely superb panel, and I think what it has underscored is the notion that many of the principles that are in play in other aspects of our constitutional system are found in sharp relief in the context of the debate over property rights. I don't think anyone here has the illusion that we have yet heard the last word, and we will look forward to doing another program for you next year.

Thanks for coming.