


The Takings Issue: The Historical Background

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June 27, 2006
Washington, DC



The Property Rights Issue Has Been Around for a Very, Very Long Time

The Magna Carta “No free man shall be.. deprived of his freehold or his liberties... except by a legal judgment of his peers or by the law of the land.”

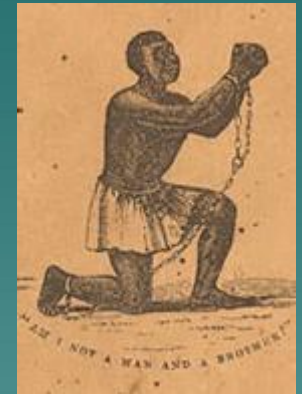
Supreme Court Justice William Patterson: “It is evident that the right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and inalienable rights of man. Men have a sense of property: property is necessary to their subsistence, and correspondent to their natural wants and desires; its security was one of the objects that induced them to unite in society.” (1795)

Theodore Roosevelt: “Every man holds his property subject to the general right of the community to regulate its use to whatever degree the public welfare may require it.” (1910)

Constitutional Protection for Private Property Rights

The Takings Clause of Fifth Amendment to the U.S. Constitution: "Nor Shall Private Property Be Taken for Public Use, Without Just Compensation." Why

Vermont Constitution of 1777: "That private property ought to be subservient to public uses, when necessity requires it; nevertheless, whenever any particular man's property is taken for the use of the public, the owner ought to receive an equivalent in money." Why?



The Nature and Scope of Property Have Constantly Evolved

Feudalism  Capitalism

Rights of Women

Slavery  Emancipation

The Progressive Era

In other words, change in meaning of property is normal, change in property norms is good.

The Property Rights Revolution Circa 1970

The Clean Water Act Amendments of 1972

The Clean Air Act

The Endangered Species Act

The Coastal Zone Management Act

The National Environmental Policy Act

State and Local Land Use Laws

Adirondack Park Agency Act

California Coastal Council

State Wetland Laws

Oregon SB 100



Anticipating the Takings Issue Circa 1970

The U.S. Council on Environmental Quality -- Russell Train, Boyd Gibbons, and Bill Reilly -- commissioned attorney Fred Bosselman to write *The Taking Issue*

"There is little historical basis for the idea that a regulation of the use of land can constitute a taking of the land."

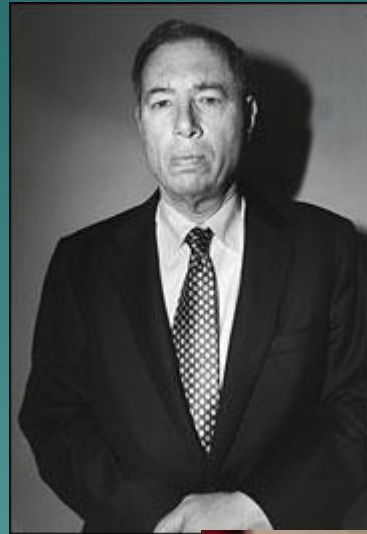
"The popular fear of the taking clause is an even more serious problem than actual court decisions."

The Property Rights Counter- Revolution of the 1980's

◆ Motive

◆ Means

◆ Opportunity

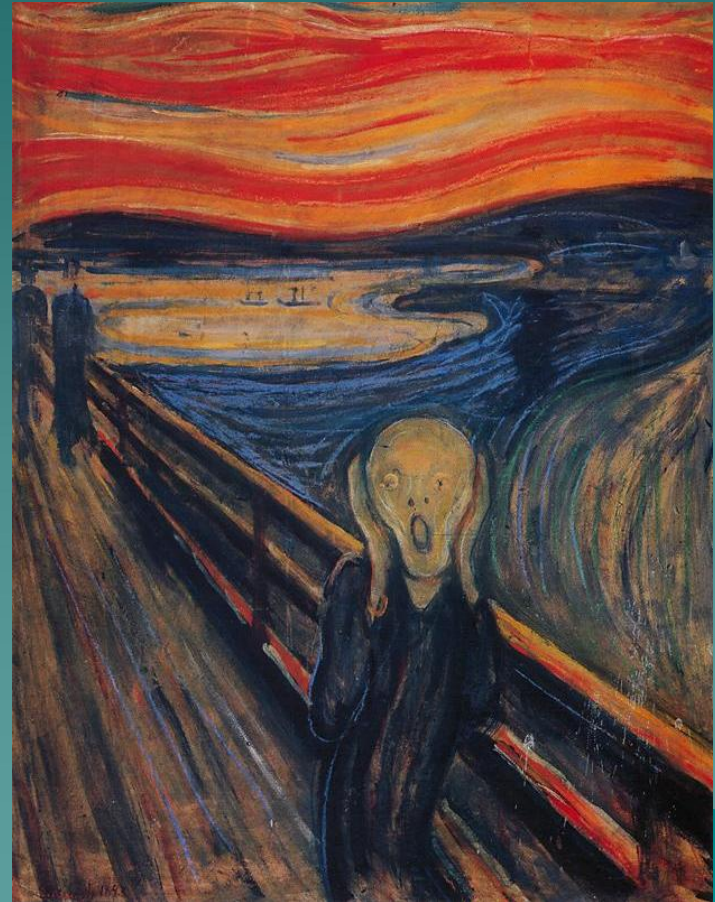


The Short and Surprisingly Happy History of the Regulatory Takings Issue in the Courts (I)

First English
Evangelical Lutheran
Church v. City &
County of Los Angeles
(1987)

Nollan v. California
Coastal Commission
(1987)

Lucas v. South
Carolina Coastal
Council (1992)



The Short and Surprisingly Happy History of the Regulatory Takings Issue in the Courts (I)

Tahoe Sierra Preservation Council
v. Tahoe Regional Planning Agency
(2002)

Brown v. Legal Foundation of
Washington (2003)

Lingle v. Chevron USA, Inc. (2005)



And many other state and lower federal
court regulatory takings decisions.

Why Such Good News on Regulatory Takings in the Courts?

Great Lawyering!

Over the last dozen years, the make up of the Supreme Court has changed to become more receptive to the government position on the takings issue

Decisions of the late 1980's and early 1990's were mostly suggestive

Strong Arguments (4):

- Original Understanding and Language Support a Narrow Regulatory Takings Doctrine
- Takings Agenda is an Embarrassing Call to Judicial Activism
- Broad "Compensation" Requirement Would Produce Large, Unfair Windfalls
- Broad Takings Standard Would Freeze Government

Takings as a Political/ Policy Issue in the 1990's

Ronald Reagan Executive Order on Takings, Executive Order 12630 (1988)

Bills in the Early 1990's designed to codify the Executive Order

Contract with America in the 104th Congress

Sue Local Government Early and Often in Federal Court
Bills, in the 105th, 106th....and 109th Congresses

National Effort in Response to DC Takings Agenda

Anti-Contract with America effort coordinated by
American Resources Information Network (NTHP)

Broad, highly successful coalition:

- State and local governments
- Conservation organizations
- Historic preservation groups
- Religious denominations
- Labor organizations
- Consumer groups
- Public health advocates
- Garden Club of America
- Land Trust Alliance
- National Urban League
- Paul Tsongas
- Etc.

National Effort in Response to DC Takings Agenda (II)

Strong message

While allowing for expression of individual values and priorities.

Takings bills would cost tens of billions of dollars.

Takings bills threaten Americans' most important asset, their homes, by undermining the protections that sustain homes values.

Takings bills would undermine public health and environmental regulatory protections through the back door.

NAFTA etc.

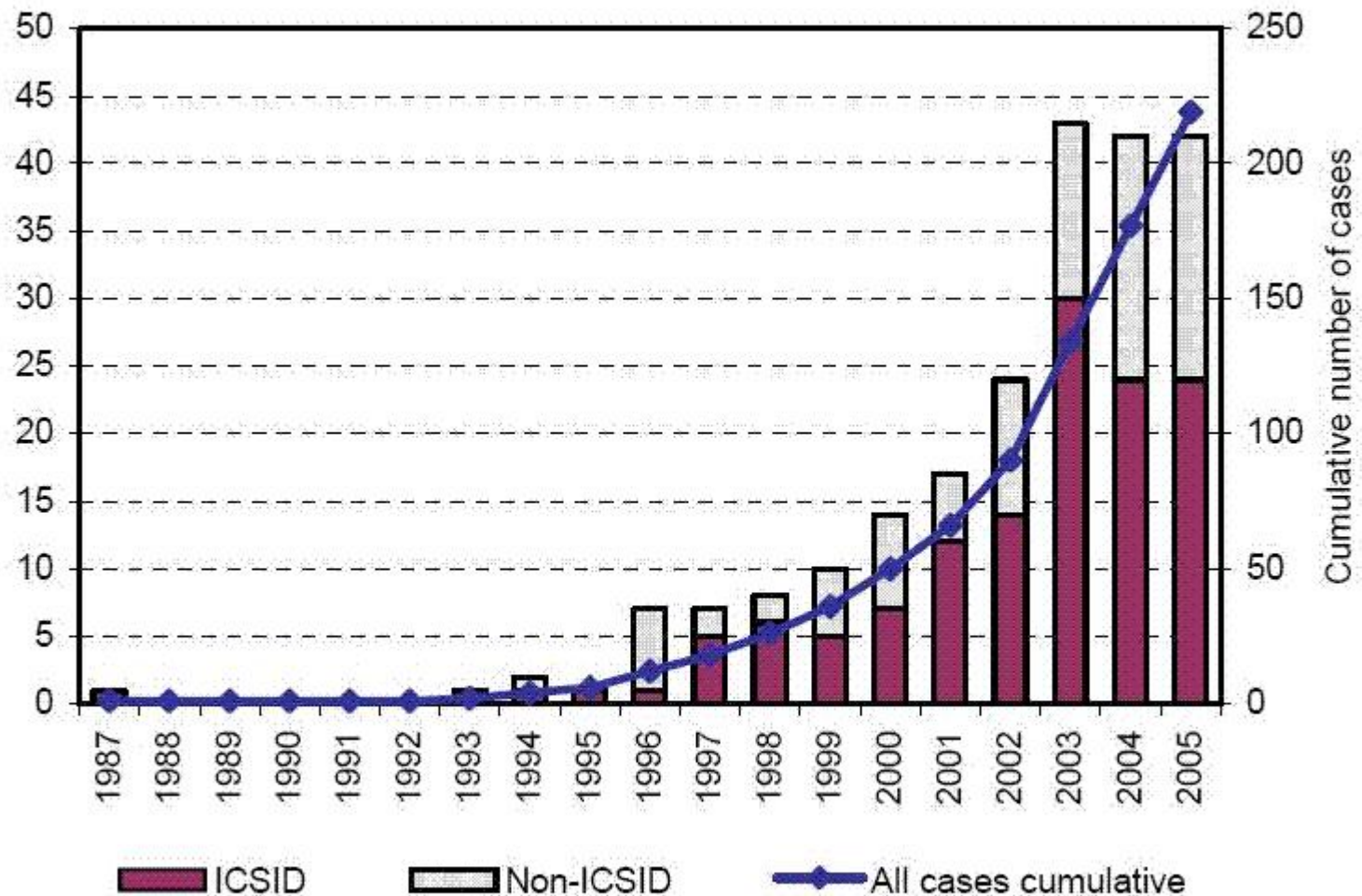
North American Free Trade Agreement

Negotiated under Bush I by, among others, Josh Bolton.
Successfully pushed through the Congress by President Bill Clinton in 1994.

Chapter 11: " No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and Article 1105(1); and (d) on payment of compensation...

And CAFTA, etc. etc.

Known investment treaty arbitrations (cumulative and newly instituted cases, by year)



Source: United Nations Conference on Trade and Development, "Investor-State Disputes Arising from Investment Treaties, A Review" (2005)

State Regulatory Takings Debates in the 1990's

About twenty five states adopted some type of takings bill,
usually largely symbolic

Even seemingly substantive takings bills – e.g. Florida, Texas
– did not have much on the ground impact

Arizona takings measure defeated 60% to 40% in November
1994

Washington takings measure defeated 60% to 40% in
November 1995

And then... quiet... and then two major developments

Measure 37

Oregon Measure 7 adopted 53% to 47% in November 2000; invalidated based on the “single subject” rule for constitutional amendments by the Oregon Supreme Court

Measure 37 adopted 60 to 40 in November 2004, largely reenacting Measure 7 as a statutory measure (making it subject to legislative amendment).

Applies to any “land use regulation” that “restricts the use of real property... and has the effect of reducing the fair market value of the property,” subject to various exceptions, including if the regulation was enacted prior to the owner’s acquisition

Pay or waive approach

Measure 37

Summary of Statewide Oregon M-37 Claims As of April 2006

Claims made against	Total claims	Total acres
City	33	76.20
City & County	4	277.19
City & State	5	31.02
City, County & State	1	10.4
County	1,099	50,333.81
County & State	907	50,711.81
Metro & State	2	5.96
Metro, County & State	4	135.41
Not Specified	2	133.49
State only	42	940.77
Totals	2,099	102,656.1

Source: Institute of Portland Metropolitan Studies, Portland State University (2006)

BUT, major question about transferability of Measure 37 rights.

Measure 37– What happened?

A regulatory program with real teeth.

Oregonians in Action – smart and effective

The proponents had a simple, effective message – fairness.

The proponents had a messenger, who was never rebutted.

The opponents had no clear message

- uncertain costs
- awkward reverse spin on fairness
- no traction on land protection

The opponents identified no villains



Kelo Decision

Decision in *Kelo v. City of New London*,
June 23, 2005, 5 to 4 upholding the use
of eminent domain for economic
development

Campaign surrounding decision led by the
Institute for Justice, libertarian public
interest law firm with funding from major
conservative funders (Bradley, Olin,
Scaife)

Sympathetic facts.

Still, surprisingly close result



Kelo – The Holdout Problem



Kelo Decision – Why the Uproar?

These are *compensated* government actions, unlike taxation or regulation. (Isn't the whole point of the property rights agenda to obtain compensation?!)

Eminent domain is a valuable tool for promoting downtown redevelopment, generating employment, and expanding inner city tax bases ... and discouraging sprawl

But different public perception of restrictions on speculative uses vs. elimination of established uses (especially home occupancy!)

Concern that specific developers (e.g. George Bush) may profit at the expense of the little guy

Concerted effort by property rights advocates to meld eminent domain and regulatory takings issues

Kelo Decision – The Strategic Implications for Combating Takings

Homeownership argument has arguably been turned on its head by the eminent domain issue; can the homeownership argument be reclaimed?

Eminent domain has scrambled property rights politics: Mayor Michael Bloomberg is now the leading opponent of property rights legislation in Congress; Sierra Club is ... where?

Mix of eminent domain and regulatory takings issues creates a major communication challenge

What is the political angle: ED in Connecticut bad; ED in Idaho good.

Critical Needs

Reestablish Networking/Coordinating Function

Conduct Up to Date Opposition Research

Document Positive Affects of Regulation on Property Values

Document Benefits of Urban Redevelopment

Develop More Coherent Position on Use of Regulations and/or "Incentives"