

**Property Rights Foundation of America®**  
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**Opening Address**

**Is the Doctrine of Regulatory Takings Constitutional?**

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So, it is good to be back here in Upstate New York. What Carol did not tell you is that before I became a Californian I used to be a legitimate member of society. I went to school at Hamilton College in Upstate New York as an undergraduate. So, this is almost like coming home to me or coming back to my roots. And I always appreciate it and I appreciate this group because what you people are involved with in defense of property rights is extremely important. Whether it's your family farm that's being affected by undue regulations, to somebody trying to put an easement across your property, a variety of things can happen to property. It's only if we understand how important property is, and property rights are, that we can best protect them.

I'm going to talk about the doctrine of regulatory takings and whether or not that is actually a constitutional doctrine because presently enough there's quite a bit of debate about that.

The first thing you have to think about is, what does the Fifth the Amendment of the Constitution say? It says "...nor shall any person be deprived of life, liberty or property without due process of law..." and here's the important part, "... nor shall private property be taken for public use without just compensation." So, what does the word "taken" mean when you talk about property rights being taken? We all know it's an obvious thing if the government wants to take your farm or your home to build a post office or to build a highway, that's been taken. But what about this idea that your property can be regulated into nonexistence? If the government tells you, "No, we don't want to build a highway on your property, but we want your property to be set aside for habitat for the dusty gopher frog or some such species." That's a regulation. But is that a taking of your property? You can't use it just the same, but the dusty gopher frog can use it and you can't. In a case that was argued at the Supreme Court about a year ago called *Murr v. State of Wisconsin*, the issue came up as to what was the parcel that may have been taken.

What was the parcel taken? It's an issue about regulatory takings. And it was an issue that the court decided unfortunately to throw everything into a balancing test that has no meaning. But that's another story, another lecture, another time. But Justice Thomas, he's *the* Supreme Court justice who cares most about what the original text and language of the Constitution means, the idea of originalism. He is very concerned about that. He had the dissenting opinion in the *Murr* decision where he said, "The Court, however, has never purported to ground those precedents in the Constitution as it was originally understood."

In my view, those precedents were referring to regulatory takings precedents.

[He further said,] "In my view, it would be desirable for us to take a fresh look at our regulatory takings jurisprudence, to see whether it can be grounded in the original public meaning of the Takings Clause of the Fifth Amendment or the Privileges and Immunities Clause of the Fourteenth Amendment."

This is the task that Justice Thomas has given us, founding that, what the Constitution actually says about regulatory taking. That's the subject in our journey that we're going to be the taking over the next little less than an hour. What does the Constitution really say about regulatory takings? First off, why do we care about what a bunch of dead white rich man thought 227 years ago? Especially considering that many of them owned slaves, the antithesis of a state where men and women are created equal. The response to that is, I think it's because we have struggled for over two centuries to achieve the promise of the Declaration of Independence, to achieve the promise of the Constitution. We realize, of course, that our Founding Fathers were not perfect. We're not perfect. But we also realize that they set out ideals that should last for eons. The ideals of equality. The ideals of rights owned by individuals, rights that the government cannot interfere with. Those are really very important ideals and although those ideals are not translated to the way all people lived back when the Constitution was first adopted, we certainly know that those ideals are what we should strive for. And I think we are getting closer and closer to those ideals every year but we still have a ways to go. At least, a more fundamental question is what is the purpose of government? Why do we have government in the first place? Is it to preserve our inherent liberties? Is it to give us just those liberties that are most useful to society over all? Is it to erase disparities among people even at the cost of some liberties so everybody is more equal than they would otherwise be? Which style of Constitutional interpretation can best achieve the desired purpose of government?

The Constitution and the Declaration of Independence was really founded on Lockean ideals of the philosopher John Locke. He said in his *Second Treatise of [Civil] Government*, – which I encourage people to go and read, it's actually a fairly good read for an old philosophical tract – he said, "...it is not without reason, that man seeks out, and is willing to join in society with others, who are already united, or having a mind to unite with others who are already united, for the mutual preservation of their lives, liberties and estates, which I call by the general name of property." So, people get together and they form a government to protect their lives, liberties and estates.

There is another contrasting view. Locke wrote this in response to that view. This is the Hobbesian view. Hobbes wrote the *Leviathan*, a philosophical tract much harder to read, by the way, but Delta Airlines has it on an audible book to read. It only takes 23 hours so you can fly across Europe several times and listen to it. He says, "...it is annexed to the sovereignty, the whole power of prescribing the rules, whereby every man may know what goods he may enjoy, and what actions he may do, without being molested by any of his fellow subjects and this is what men call 'property.'" In other words, his idea was that government gives us those rights that are necessary, but no more than that. And the rights come from government, not rights that are natural rights that come from God or come from just simply the way mankind is wired.

There's an alternate view that some scholars today talk about saying really that the founders weren't talking about Lockean principles at all. They say that the end of the state is a promotion of the common good and virtue, this civic republicanism idea. It's really not about individual liberties, it's about what works best for society as a whole. I think ideas like that, first of all, they are not what the founders really believed in, but I just think ideas like that are dangerous because then our liberties could be sacrificed for the greater good. And the greater good can be defined more and more and more to encompass what we do on a day-to-day basis. Of course, I come from California, and I have to give a little plug for California. We have a special way of looking at it. This is Justice Janice Rogers Brown, former justice on the [California] Supreme Court. Then she went to the D.C. Circuit. Unfortunately, she never got to the U.S. Supreme Court. She said in one dissenting opinion, "Where once government was a necessary evil because it protected private property, now private property is a necessary evil because it funds government programs. Actually, she's quite accurate in describing California.

What is the idea of originalism, the idea of how you interpret the Constitution? Attorney General Meese, and General Meese is now with the Heritage Foundation, he's been there for years, he's an amazingly wonderful person. He had given a 1985 speech to the ABA (American Bar Association) and also a speech to the

Federalist Society, where he said, "A jurisprudence," that is how you interpret the Constitution based on first principles, "is neither conservative nor liberal. Neither right nor left. It is the jurisprudence that cares about committing and limiting to each organ of government the proper ambit of its responsibilities." He contrasted that with what was then considered to be an activist jurisprudence. That's "one which anchors the Constitution only in the consciences of jurists, is a chameleon jurisprudence, changing color and form in each era. The same capacity of activism hailed today may threaten the capacity for decisions through democratic consensus tomorrow, as it has in many yesterdays." What he is essentially saying is that the Constitution is a living virus, this living Constitution. It can be reinterpreted by new justices every few years then the Constitution has no constant meaning. And if the Constitution has no constant meaning then, indeed, there is nothing left to the original ideas of protecting liberty. It's whatever justices think make the most sense today. When you have that kind of activist judiciary, you can have cases, for example, that say, well, the Constitution says all men should be created equal but some men are more equal than others. Or "separate but equal" is okay as we had back in the old days. We can have the jurists look at the Constitution and say it's perfectly appropriate to sterilize women because they're not as smart as everybody else – *Buck v. Bell*, a Justice Holmes's decision. Or that it's okay to take Japanese citizens on the West Coast and put them into internment camps. That was the *Korematsu* decision. Those kind of decisions are enabled by the idea that you don't have to pay attention to first principles and what liberties of all of our citizens mean.

That's basically what originalism is. There are several ways of looking at it. One is original intent. What was the intention of the founders? That's a very difficult one and not too many people ascribe solely to that anymore because how can you get into the minds of what the founders were thinking at that time. We look more today at original meaning. Not trying to get into the minds of the Founding Fathers, but what did they actually write down. What does the text say? That's related to the idea called textualism, which means you actually look at the text and you try to find out what those words meant when they were written. So, if you're trying to determine what the Commerce Clause means, you go and you look to see how "commerce" was used in books and periodicals and pamphlets back in the day when the Constitution was adopted to get a better idea what that means and make sure it's not one of these words that changes meaning over time. There are scholars who will go back and look at all the words of the Constitution and look to see how those words were used. That's an important way of finding out what the Constitution means. This is versus what I call the living Constitution going viral, in a mutating virus that the Constitution means whatever you want it to mean.

We're talking about property rights. Does the Constitution protect property? Of course it does, but from what? From a direct physical invasion taking? That is if the government plows your farm to make a highway or from a regulation that deprives of use and value when that same piece of land that is used for a highway is now being used for an endangered species habitat or wetland or whatever. Does the Constitution protect the taking of property from the federal government or the state governments? As we know, the Fifth Amendment when it was passed, it was applicable to stopping the federal government from depriving us of liberties. Not necessarily the state governments. We'll get to a little bit about that later.

But what does the Supreme Court say about the doctrine of regulatory takings? Did it start with *Pennsylvania Coal* in 1922? Justice Rehnquist called *Pennsylvania Coal* the foundation of our regulatory takings jurisprudence. What was *Pennsylvania Coal*? That was a case where coal companies had gone through all the farmers and the fields and they bought the mineral rights underneath the farms and the bought the supportive state, which means they bought the right to have the farm collapse into the mine. Because there were more farmers than coal operators, and the farmers were getting upset about having their homes and their buildings and their farms collapse into coal pits, they got a law passed saying that the coal companies couldn't do that anymore.

Justice Holmes, who, in one of his better days, wrote that is a regulatory taking. He said that regulation can do all kinds of things but if the regulation goes too far it is a taking. So, "too far," is hard to figure out what exactly that means. We've been debating that ever since 1922. But the point is, that is considered by some to

be the origins of the regulatory takings doctrine. As I will say in a bit, I'm not sure that is true. Justice Blackmun in a case called *Lucas v. South Carolina Coastal Council*, another takings case where South Carolina told Mr. Lucas he couldn't develop property on his beachfront property, Justice Blackmun said, "It's not clear from some of the court's opinions where our doctrine of regulatory taking comes from. But it does not appear to be history. In short, I find no clear and accepted historical compact or understanding of our citizens justifying the court's view of regulatory takings doctrine. What makes the court's analysis unworkable in the *Lucas* case is its attempt to package the law of two incompatible eras and peddle it as historical fact." Clearly, there are people that do not think much of the doctrine of regulatory takings. Justice Scalia says, "Prior to our Justice Holmes' exposition of *Pennsylvania Coal Co. v. Mahon* (1992), it was generally thought that the Takings Clause reached only a 'direct appropriation' of property... or the functional equivalent of a 'practical ouster of the owner's possession.' Justice Blackmun is correct that the early constitutional theories did not believe the Takings Clause embraced regulations of property at all. Even he does not suggest (explicitly at least) that we renounce the court's contrary conclusion in *Pennsylvania Coal v. Mahon*. Since the text of the clause is to be read to encompass regulatory takings as well as physical deprivations, we're not going to do that here as well."

Here, by the way, is a picture of the Lucas property. That home under the red arrow is where his property was. An interesting little story there... He was told that he could not develop that property because it would create a nuisance. The nuisance would be that if he built a home there, a hurricane could pick up pieces of that home and smash that into neighboring homes. Okay? I couldn't make this stuff up. I thought when I was much younger I should be a fiction writer but then I realized, "Hey, they're doing it for me at the Supreme Court." The court very oddly pointed out but what about the homes that are already there, could they be picked up? And should not the government tear those down, in fact, tear every home down everywhere because that way nobody could have their home picked up and harm somebody else's home? Ultimately, Lucas won the case. He eventually got paid for his property. Then the government figured, "What are we going to do with this property? It's really not worth much as a park. We'll sell it to somebody who can develop it."

Justice Stevens wrote for the majority in a case called *Tahoe-Sierra* dealing with landowners up in the Tahoe region that, "Our jurisprudence involving condemnations and physical takings is as old as the Republic and, for the most part, involves the straightforward application of *per se* rules. Our regulatory takings jurisprudence, in contrast, is of more recent vintage...."

This is what some of the Supreme Court Justices are saying. There's a lot of scholarship that says that as well. I going to give you the anti-property view first and then, if you can hold on that long without booing me off the stage, I will give you the pro-property rights view. That is scholars, I think, that have more accurately discerned what was going on at the time of the founding and since then. There is a scholar named William Michael Treanor who has written that, "While the evidence of original intent is limited, it clearly indicates that the Takings Clause was intended to apply only to physical takings, and the early case law interpreted it and its state counterparts as not extending to government regulations" He says that he's looked at the history and history is clear there's no such thing as doctrine of regulatory takings.

"Many of the framers," he continues, "believed that government could—and in the interests of society often should—limit individuals' free use of their property; balancing societal needs against individual property rights was left in large part to the political process.

Then he continues noting that only the constitutions of Vermont, Massachusetts, and a Northwest Ordinance contain clauses protecting property rights. He says, "...a plain language reading of the text indicates that it protected property only against physical confiscation, and the early judicial decisions construed them in this way. The Constitutions is drafted only to address narrow abuses where the political process did not provide adequate relief." Then he talks about James Madison. People have written about James Madison's writings

on property, especially this letter on property in the *National Gazette*. He has reasons for the compensation requirement. Madison's belief is that with the growing population of the United States landowners will become a minority. The Takings Clause is necessary to prevent those without property from using their majority power to take away the property of landowners. In other words, Madison, being this greedy, rich white guy only had protection for property because he was afraid that eventually the masses would overwhelm him and take his property from him and that's why he wrote this into the Constitution. And, of course, because of Madison's concern that slave owners must be compensated if slavery were to ever be abolished. Clearly, Madison didn't have good motives. We don't need to pay attention to him.

There's been more scholarship taking a similar view but from a little bit different direction. John F. Hart wrote this *Law Review* article called "Colonial Land Use and Its Significance for Modern Takings Doctrine." I hate to go through all these *Law Review* articles but, trust me, unless you're insomniacs, you probably don't want to read these things yourself, so I did it for you. So, you can get an idea of the scholarship that's going on and the debate that rages. We all here are talking about protecting our farms and our homes. But what are the scholars doing to us? Hart finds that colonial land use regulations were extensive and uncompensated. Regulations included requirements that landowners must continuously occupy and improve their land, fence a land, maintain adequate pace for mining land, utilize potential mill sites for milling, drain swamps, the removal of barberry bushes to prevent wheat blight and even to keep private lands open for public hunting and fishing. Note, that everything he's talking about is the use of land because it was very important in the Colonial Era, especially the pre-Colonial Era, in which he's really getting his information from. The pre-colonials wanted to use property they didn't just want property to be taken by absentee landlords from Europe and England and just lay fallow. They wanted property to be used to promote and develop society. It's very different from the notion today from the elite that property should not be used and that farms should be abandoned, mines should be closed down and everything should go back to nature. That's a very different view of property. Be that as it may, he continues that community planning including aesthetic regulations, such as height restrictions, the choice of building materials, brick instead of wood, for example, and there were proscriptions against unsightly in your regular buildings fences, palisades, post rails etc.

Restrictions against nuisance-like activities are as old as the Republic. You cannot create nuisances that are going to adversely impact your property but among these restrictions that he is talking about were in the early Colonial Era. Our founders really had different ideas and I'll talk a little bit about that in a bit, about liberty and the use of property. Hart is going back, I think, to a time and thinking before the founders really starting coming into their own to talk about Lockean ideas and principles of property and rights. He continues that, "When substantial parcels of land were taken for public facilities, courthouses, prisons, churches, fortifications, statutes normally specify that the landowner would receive compensation equivalent in value to the land taken. Thus evidence concerning the framers experience with land-use regulations suggests the Takings Clause means what it says about land-use regulation – nothing." So says Hart.

But there's other scholarship out there. There is significant scholarship that says the doctrine of regulatory takings *is* compatible with an original view of the Constitution. One of the earliest works is written by Kris Kobach. He later has some fame or notoriety depending on your political views when working for President Trump on the voter registration issues. He wrote, when he was a mere law professor, he wrote this article to refute explicitly the statements of both Justice Scalia and Brennan and their respective majority dissenting opinions in *Lucas* that the doctrine of regulatory takings is of recent vintage. His approach is to review a number of post-Constitution ratification cases from states that suggest that there were early expressions of the courts providing compensation for regulatory takings. He says, "I challenge the notion that recognition of regulatory takings first occurred in *Mahon*, the *Pennsylvania Coal* case from 1922, arguing that this jurisprudential step took place not in the 1920s but in the 1810s. State courts interpreting the takings clauses of other constitutions and refining state common law delineated the earliest contours of eminent domain doctrine in America. Many of these early expressions of takings law embrace what we now call regulatory takings."

Kobach looked at a lot of these early decisions and what was actually going on in the courthouses across the country. He found that when regulation took people's ability to use their property, they were being paid. That's perfectly consistent with the understanding in that era of the doctrine and especially in 1861. This is a key date because it's right before the Civil War and the Civil War Amendments. But he says, "By this time, numerous courts required compensation when property remained in the possession of its owner but the state restricted use rights or diminished the property's value. Several Twentieth Century doctrines have analogs and they have a century of jurisprudence before the Civil War. He talks about what he calls the myth of Holmesian creation thus Justice Blackmun's assertion that until the end of the Nineteenth Century state courts did not require compensation for government takings short of outright possession is simply incorrect. The requirement of compensation for non-acquisitive takings was commonplace in state constitutional interpretation of common law doctrine by the end of the 1860s. He finds similar faults with Treanor's view, the first article that I quoted from earlier. Kobach, unlike Brennan, and unlike Scalia, actually went back and read the early cases to see what people were doing at that time.

Scalia and Blackmun – and I love Justice Scalia, God rest his soul – but he wrote this one off the top of his head. Kobach says there are three constraints of the power of the government use of eminent domain power that prevented – in the early days – government from using property. One was the state constitutions, two is natural law, and three was common law. Natural law being the idea that God, or the Creator, has given us inalienable rights. You find something like that in something called the Declaration of Independence. And, of course, the common law is the history of the law as it changes and evolves from one century to the next. All these sources Kobach says, protected property not only from government coming in and actually taking it, but also from government restricting its uses. So, Kobach, when he talks about state constitutions and natural law he notes that while only two states had compensation clauses when the Constitution was adopted, and two right afterwards, the absence of compensation clauses in several early state constitutions did not significantly impair the recognition of compensable takings and the jurisprudence of the early republic. In other words, cases in states without compensation clauses provided compensation just the same as those with compensation clauses.

Most judicially recognized restrictions on the power of eminent domain were drawn from an older, deeper well, that of natural law. One of the early legal scholars that lot of the early lawyers in the republic relied heavily on was Blackstone. Blackstone wrote some treatises on the law, which were essentially *the* legal books that our early lawyers in the Republic relied on for understanding the relationship between government and law. Blackstone wrote, "There's nothing which so significantly strikes the imagination, engages the affections of mankind, as a right of property or that sole and despotic dominion which one man claims and exercises over the things of the world, in total exclusion of the right of any other individual in the universe." In other words, our property rights are really important and when we are on our land in our home we can keep everybody out. We have the right to keep even the king out unless the king has a really good reason and the law allows him to do that. "So great, moreover, is regard for the law of private property that it will not authorize the least violation of it. No, not even for the general good of the whole community." He goes on to say if it's taken you have to pay money for it. But, clearly, that shows the importance of property. Or John Locke, who the founders based some of his language on in the Declaration of Independence, he said, "Whenever legislators endeavor to take away and destroy property of the people they put themselves into a state of war with the people who are thereupon absolved from any further obedience." That is the basis of our Declaration of Independence. It's the idea that when government no longer protects our rights then we have a right to change governments.

Of course, I should give the other side. Thieves respect property. They merely wish other property to become their property so they become more perfectly respected. Just a little aside there. It has nothing to do with constitutional interpretation.

Kobach talks about "natural and common law, also. Indeed, natural law argues because they were still malleable. And because they reflected the prevailing judicial philosophy of the period providing the

underpinnings for much of the common law that was created in American courts in the early Nineteenth Century. Accordingly, when there are no specific constitutional provisions to invoke, most state courts afforded property interest protections in the common law and these common law rights were in turn shaped with references to the principles of natural law.” Not only do these cases protect property but these cases are based on a very deep source of the law, a source that really cannot be minimized to something that was just dreamed up in Justice Holmes' head in 1922. As I said earlier he has this exhaustive study looking at cases where compensation is provided first to the taking of riparian rights, from streams and water, and then as opposed to physical property and then to restrictions on the use of non-riparian property. Essentially, he argues that as time passes, Colonial Era style of land-use control began to result in compensation. He talks a little bit about what happened. Why did we forget this? And we did indeed forget this. From 1870 to 1878 federal courts recognized, *federal* courts recognized regulatory takings.

There's a case called *Yates v. Milwaukee* about wharfage rights, the right to build a wharf on property along the coast or along Lake Michigan in that case, or one of the lakes. The Supreme Court found that that was a taking of the property. This riparian right is property and it's valuable. And though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which once vested the owner could only be deprived of in accordance with established law. It is necessary that if you take the public good upon due compensation. The idea that you can have riparian property and you can't use it, well, in 1870 the Supreme Court said you can be compensated for that. But what happened? The court seemed to forget about that for a while. One more detail that Kobach does... After the Civil War we passed the Civil War Amendments – the Thirteenth, Fourteenth, Fifteenth Amendments – which applied a lot of the privileges and immunities, a lot of the rights, to states in what states were doing. But there was a movement in the court to back away from that. Some of the Justices of the Supreme Court were very concerned that too much power was being taken away from the states, especially in the former slave states.

Kobach says, "Nothing in the post-*Yates* retreat is difficult to explain. The mid-1870s witnessed a profound acknowledgment by the court of the vast scope of regulatory powers available to state legislatures. Indeed, two of the most important Supreme Court decisions of the era, the so-called *Slaughter-house Cases* and *Munn v. Illinois*, which was essentially a rent regulation, were after common core expressions of the court's deference to the state's internal regulation of economic affairs. And so, this retrenchment by the court saying, “We're going to defer to the states and what they're doing to regulate the economy,” was why we began to forget about the doctrine of regulatory takings such as it existed up until that time and which we remembered again in 1922.

There's more scholarship favoring originalism. Andrew Gold wrote an article called “Regulatory Takings and the Original Intent: The Direct, Physical Takings Thesis ‘Goes Too Far.’” He says, “Due to a scant and ambiguous historical record, the original intent of the Fifth Amendment Takings Clause cannot be known. Yet, with increasing frequency, commentators have declared that the original understanding of the Takings Clause only covered ‘direct, physical takings.’ In fact, this ‘direct, physical takings’ thesis lacks historical support.” He continues, “Contrary to most recent scholarship, the text and historical record of the Takings Clause arguably support a just compensation requirement for regulatory takings. The existing evidence, however, is sufficiently ambiguous to preclude a clear sense of the original understanding.”

The founders did not write down that if you regulate property so much that you have to be compensated for it, mainly because I don't think they conceived of assertive regulations that we have today where property is rendered valueless for the dusty gopher frog or for the wetland, or for getting a better view as you drive down the highway, making sure buildings are not put up that will obstruct your view of the hillsides or the ocean or whatever.

The founders didn't write this stuff down because I don't think they could have imagined the kind of regulations that we have today. And Gold continues, "Modern scholarship does not address the actual original understanding. In contrast, the post-ratification commentary of James Madison and the influential philosophies of William Blackstone, John Locke and Hugo Grotius appear to support a regulatory takings analysis." I will spare you from talking about Hugo Grotius in the original Dutch or at all. Gold is talking about Madison. He takes issue with the arguments that Madison thought to structure the Constitution, that the structure was enough to protect property. The idea was that we didn't really need to have an explicit recognition of private property because the way the Constitution is built with the checks and balances and the separation of powers is enough to preserve property. He says this ignores that the Constitution did not apply to the states. Madison wanted the clause to extend to the states but he didn't prevail. He originally had a proposal that would have the Fifth Amendment apply to states. The ratifiers did not agree with that but he intended the Fifth Amendment, if nothing else, to educate that it's important to protect property. Nobody knows because Madison is not around to answer questions.

As far as this slavery issue, Gold notes that Madison believed that the best policy for the nation would be for the government to purchase the slaves so they could be repatriated to Africa. This, Gold indicates, if they were emancipated, Madison wrote, the owners would have to be compensated. Madison did write that. It indicates that Madison believed that compensation is due for denial of use like regulatory use of denial of real property.

This is a really uncomfortable and somewhat untenable, in my opinion, defense of regulatory takings because slavery has such a negative connotation. And when we talk about property rights we have to be really careful to understand and to explain that people have a right to use their own property. People have, in the Lockean theory of property, that if you take unused property and you put your labor into it, your labor converts that land into your own private property. The idea that you can have, that you can gain property from the benefit of other people through slavery, I think, is incompatible with that although there is also a time when people did not understand that African-Americans were truly people and humans in every sense of the word. They really had different ideas back then. I say it's important because I recall when I was once speaking at the University of Hawaii about property rights. I was debating one of the professors there. They had me, the Conservative pro property rights person, and a left wing professor. She put up a slide of an African-American slave covered with welts on his back. She left that up through her entire presentation. She talked about how evil the early founders were because they owned slaves and that's what they considered to be property. I think that it's unfortunate when we talk about property in those terms because truly people cannot be property of others under no natural law understanding of property.

The idea that we can say that because the founders owned slaves we have to destroy the entire principle of property rights, the entire concept and understanding of property rights, is not at all accurate. It's simple our understanding of property quite frankly is more enlightened and better because we recognize that human beings cannot be property. But looking at the early founders there are these difficulties that in the doctrine that we have to recognize.

Treanor concludes that Madison's post-ratification statements uniformly indicate that the clause only mandated compensation when the government physically took property. Actually, Madison's post-ratification remarks appear to lean toward compensation for regulatory takings as well. Let me read a little bit of Madison. It's a little hard to read up here but this is from the *National Gazette*: "If there be a government then which prides itself in maintaining the inviolability of property; which provides that none shall be taken *directly* even for public use without indemnification to the owner, and yet *directly* violates the property which individuals have in their opinions, their religion, their persons, and their faculties; nay more, which *indirectly* violates their property, in their actual possessions, in the labor that acquires from their daily subsistence, and in the hallowed remnant of time which ought to relieve their fatigues and soothe their cares, the influence will have been anticipated, that such a government is not a pattern for the United States."

Now there's a lot packed into there. But, most importantly, when he talks about their opinions, religion, persons and their faculties, Madison has a very broad view of property in that context. That property rights and our rights of religion, property rights and our First Amendment rights of freedom of speech, property rights and the right to earn a living, these things are closely interconnected. They can't be separated out from one another. Under that kind of thinking that if you cannot enjoy the faculties of your property, you cannot have your right to earn a living if your property's diminished through regulation, there has to be compensation somewhere in there. He continues, "If the United States mean to obtain or deserve the full praise due to wise and just governments, they will equally respect the rights of property, and the property in rights: they will rival the government that most sacredly guards the former; and by repelling its example in violating the latter, will make themselves a pattern to that and all other governments." It's a model that we should obtain, we should ascribe to for protection of property.

Gold concludes that the historical record for the Fifth Amendment's Takings Clause is limited. There is enough material for a party on either side of the regulatory takings debate to muster argument for his or her position. But there's nothing remotely sufficient to prove that the Takings Clause was originally intended to cover only direct physical takings.

So, we have scholars going back and forth on this. Let me just give you a few more on this. Eric Claeys has written on property theory, and what property is. I skipped out some of the early more esoteric stuff. He says that in the second part of his thesis, "The nineteenth-century cases provide a different way to conceive of property rights. Most modern property theory is strongly utilitarian; the nineteenth-century cases justified the free use of property as an extension of the moral freedom inherent in being human."

When we talk about utilitarian justification for property, that means you look at systems that have property rights. They work better. People are richer, they're happier, they're more free, and that's a justification for having property rights. That is too shallow a justification for property rights in Claeys' view and my view as well. Because a good communist can tell you that if we had a true communist utopia where everybody is equal and there is no property, everybody could be happy. How many argue against that from a philosophical standpoint? Sure, we can say that everywhere it's been tried it hasn't worked, but fundamentally getting into that kind of utilitarian argument of which system works best is nice but I think it lacks something. It lacks the moral character of private property. That's what Claeys was getting at. That as human beings we have an inherent desire to work hard to make ourselves better, to acquire things to provide for our families, to provide for our children, to achieve some sort of fame in our lives or at least some sort of recognition that we have worked hard and we have done good things for our community and for ourselves. These are all extensions of property. It's why we work. This is innate to human beings. So, the moral component or the God-given component, if you are a religious man, is critically important to understand that this is what the founders were believing. They weren't thinking of this in terms of, "oh, this is a system of property rights that works better than, say, a socialist system". They were thinking more in terms of "this is why we are what we are because property is part of what a human being is."

He says, "Finally, the distinction these cases drew between 'regulations' and 'invasions of right' provide important insights into the original meaning of the Takings Clause in the Fifth Amendment to the U.S. Constitution." He talks about "The nineteenth-century cases should dispel any notion that *Penn Central's* 'muddle'" and I'll talk about *Penn Central* in a moment, "is a necessary or inevitable legal development. Rather, they suggest, the doctrinal problems that have accreted around *Penn Central* over the last 25 years..."

*Penn Central* was the case where the Supreme Court had before it the question of whether or not a restriction on building a skyscraper on top of Grand Central Terminal was a regulatory taking. The court had a lot of trouble. It came up with a balancing test. It said that you have to look at the economic impact of the regulation on one hand and you have to look at the investment-backed expectations of the owner on the other hand and you have to look at the character of the regulation on the third hand. Some state courts in

California have taken this to the tenth hand of this and that that you have to look at and you have all these balancing tests that are really hard to understand. What does it mean? What is a legitimate investment-backed expectation? What if you inherit property? What is the character in the government regulation? What does that mean? It means whatever you want it to mean.

We've had, ever since *Penn Central* in the 1970s, where the court came up with these balancing tests, a very confused system. Regulatory takings cases are extraordinarily difficult because courts can't figure out what this stuff means. And what Claeys' point is that if you went back to original principles, if you went back to the understanding of what property rights were in a natural law context this would be much easier.

We have all these muddled cases. And true to the muddle they're never quite seen to stop the government from winning these cases. *Penn Central* in the modern scholarship on regulatory takings is a mess. He talks about natural rights and the freedom of action.

“Natural-right theory centralizes the concept of freedom of action in property law. Property is an individual right. It gives owners a moral entitlement to a zone of freedom because that freedom encourages people to respond to self-centered motivations, like the acquisitive and industrious passions that spur them to work. By encouraging these productive passions, property encourages people to pursue obvious personal goods like self-preservation and advancement.”

Then Claeys talks about some of these cases. He talks about some others. We have some bizarre cases. We have a case called *Loretto* [*Loretto v. Teleprompter Manhattan CATV Corp.*] where putting a cable box on a piece of property which was a physical invasion which really costs the owner virtually nothing, that was considered to be a taking. But we have other cases where property loses millions of dollars in value and because the owner has some other property, it's not considered to be a taking.

So, Claeys says, “...a strange picture of human psychology...” is here. “According to *Penn Central*, when a regulation strips use rights, people tend not to suffer any loss of utility—even when they lose tens of millions of dollars. But according to *Loretto*,” the cable case, “when a regulation restrains the right to exclude, demoralization profiles spike off the charts.” “Are human beings naturally this schizophrenic, and is it reasonable to found a system of takings law on the assumption that they are?” If you lose a million dollars or if you lose a couple of hundred dollars, why should the couple of hundred dollars be prohibited but tens of millions of dollars not?

There has been other scholarship even more recent that has a new way of looking at this. I'll go for about three or four minutes and then I'll open up for questions.

Michael Rappaport wrote this article, “Originalism and Regulatory Takings: Why the Fifth Amendment May Not Protect Against Regulatory Takings But the Fourth Amendment May.” Justice Thomas cited to this *Law Review* article in his decision in *Murr*, the one that I started out this presentation with.

Let's talk about the Fourteenth Amendment. “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law...” Rappaport began – and I'm not going to read all this – but he essentially says that. Well actually I will read it. He argues that the doctrine of regulatory takings may be completely consistent with understanding the ratifiers of the Civil War Amendments. Remember, the Civil War Amendments, the Thirteenth, Fourteenth and Fifteenth Amendments changed dramatically the landscape of our rights ensuring that states would not take away our rights just like the federal government could not do that beforehand. Those ratifiers of the Fourteenth Amendment coming from the tradition of the Abolitionists were of the view that the original Bill of Rights could and should have been applied against the states. Indeed, it was an article of faith among many Abolitionists that the principles of the Declaration of Independence – all men are created equal – combine with the Equal Protection Clause in the Fourteenth Amendment make for an argument that slavery itself, in the original Constitution as well, that slavery itself

was unconstitutional even before the adoption of the Civil Rights Amendment. Indeed, there were people like Frederick Douglass who have argued that slavery was incompatible with the Declaration of Independence and Constitution, which should be read together, and that the Declaration of Independence should not be ignored as it often was as a founding document.

Here, I argue, there's a strong case for the possibility that the incorporated Takings Clause that is incorporated by the Fourteenth Amendment, has a different meaning than the original Takings Clause. In particular, that the incorporated clause protects against nonphysical takings, even though the original clause does not. I'll just take issue with that, that last clause that says that the original clause of the Fifth Amendment does not protect against regulatory takings. Clearly, you can see what he's driving at: if that doesn't work the Fourteenth Amendment does.

While the Fourteenth Amendment does not contain a direct Takings Clause from the Fifth Amendment despite Senator Bingham's initial draft. Senator John Bingham was one of the drafters of the Fourteenth Amendment. It actually had a takings clause in it but it was taken out through debate. Despite that it does contain the Privileges and Immunities Clause which was designed for the same effective purpose that you recall I read from the Fourteenth Amendment that states shall not deprive citizens of the privileges and immunities of their citizenship. Privileges and immunities meaning their rights. Of course, this is problematic because several years after that in the *Slaughter-house Cases* the Supreme Court rendered the Privileges and Immunities Clause pretty irrelevant. But many of us think that was a mistake and that the *Slaughter-house Cases* should be overturned. That's one of our goals, actually, of the Pacific Legal Foundation and other groups as well. We'll get that overturned someday. It hasn't happened yet but we're working on it. And so Rappaport continues, "on the understandings of the mid-Nineteenth Century, state decisions had recognized that takings could occur not only from physical seizures but from consequential and regulatory actions as well. While Treanor and others have argued that the takings principles only covered physical takings until the Civil War or until Justice Holmes' decision in *Mahon*, most scholarship has challenged this view. This is now a scholarship of the law. Now, the new scholarship argues that the law prior to the adoption of the Fourteenth Amendment grew to incorporate understanding of takings that extended beyond the visible seizures of property."

These are important decisions. I have a few more slides but I'm going to stop here because I want to give you all time for questions. Basically, the slides are of one last *Law Review* article that's rather a minor one that I'll give to Carol for written remarks. I want to give us time to answer any questions you might have. I know this has been a lot because normally you don't have people read from *Law Review* articles to you but I knew that this crowd if any crowd would like it, this one would. I want to leave you with the idea that when you hear the idea, the notion that the doctrine of regulatory takings is really not in the Constitution you should recognize that there is a tremendous amount of debate about that. I think the better debaters are those that have looked at the actual history, the actual law and the actual cases where they found that in the early days of the Republic people were being compensated when regulations deprived them of use and value of property. Therefore, it's important that we continue to protect property rights in the courts today and not be apologetic for the doctrine of regulatory takings. Not to say, "Well, it's only been here since 1922, etc." That's not true. It's been here since the early days of the Republic and I would go so far as to say even before that we have scholars like when Blackstone wrote his Commentaries. He was an English scholar. This is something that is much older than any of us, and surely, even older than the Republic.

Thank you very much and I'm happy to answer any questions.

*Mr. Brace:* Jim, I really enjoyed your presentation. I'm Bob Brace. I've been involved for thirty-two years now. But what I get out this is you mentioned at the last part that the public has a God-given right to own and use property. It wasn't these complex stuff about what you did or didn't do. It all came, in my mind, from Chevron's efforts in administrative law. You can't make this up right. You can't get right. You talked

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about the Civil War and when I started my case it was under the Tucker Act. It was put in place in 1888. You go back and forth, you know?

*Mr. Burling:* Yes, I do.

*Audience member:* You know, this is the problem. It's so complex and so intertwined. People still think the Republic still stands. As far as I'm concerned what they put me and other people like me through has destroyed this country. The Clean Water Act, the Endangered Species Act – you can't get through it. You just can't. Like you said in '72, '73 when these acts were enacted and then in the '85 Food Security bill. We have seven agencies in this country and you go back and forth with them.

*Mr. Burling:* Bob, you're absolutely right. We have a huge regulatory leviathan that is in the way of our property rights. That's why people like you that will fight these things for year after year and don't give up are what we, this country, needs. You need success. We need you. God bless you for working so hard on this but it is a tremendous problem. The administrative state and Chevron Deference is another one of our goals to deal with that. But it is a tremendous problem and I understand that. This gentleman here, yes?

*Audience member:* Could you tell us why there are some people that reject the notion that the Declaration of Independence with the vision for the country and Constitution is the implementing document of that instrument, of that vision, because once you accept that if you get rid of the Declaration of Independence you get rid of the notion of God-given rights you're now left with government-given rights and whatever the government grants the government could take away. I have a problem with divorcing the Declaration of Independence from the Constitution.

*Mr. Burling:* Well, I think you answered the question because if your goal is to make government more powerful and government to be the entity that controls everything then you have to get rid of the notions of the Declaration of Independence. The Declaration of Independence has been often called "the conscience of the Constitution." If you're going to try to understand what the framers of the Constitution were doing in creating the Republic why they wanted a strong republic that would protect us from external forces, that would prevent the internal bickering that was going on, and yet to make sure that our liberties were protected, you have to look at the Declaration of Independence as the motivating factor of that. I think it's important that you look at both of them.

Some people that look at this in a very legalistic way, say that the Declaration of Independence has no legal weight. Legally speaking, it's not a law that governs us like the Constitution does. But it's important for understanding the Constitution and if you have any doubt about what the Constitution means, think about what the Declaration of Independence said. Kurt?

*Audience member:* Yes sir, I know Justice Kennedy wrote the opinion in the Pacific Legal Foundation, your case. Justice Kavanaugh is now on, thank God. How do you see the jurisprudence on this issue going forward with Justice Kavanaugh.

*Mr. Burling:* I think that we are in for a better times. I talked about the *Murr* decision briefly and it was the decision in which Justice Kennedy wrote this multi-factored balancing test where he basically pulls stuff out of the air, as many of his balancing tests were, or maybe other parts of his anatomy. What he came up with is a highly amorphous license for the government to argue any way it can out of three or four sides of its mouth, if it can. I think that Justice Kennedy was someone unique in his embrace of this Gestalt way of thinking that we have to consider all factors and let wise people balance things.

I think we're going to have a lot less of that with Kavanaugh. Looking at his opinions he seems to be a much more straightforward justice. And I like that. I like being straightforward. So, where before we had to argue our cases pointed toward Kennedy, to try to get his vote as a fifth vote, I think we're going to be more

ambitious in what we can argue to the courts now. When we had the *Murr* case Justice Scalia was not with us. We had an eight-member court. That made it even more difficult because not only did we have to try to get Justice Kennedy but we had to get one of the liberals in order to get five votes. As it turns out, we got Justice Kennedy with his amorphous balancing tests that nobody wins, everybody loses at the same time. I am optimistic that we're going to do better with Kavanaugh. I can only say I think that some of the hard left realize that extremely well which is why they've decided to pull out any stop and pull out every stop they possibly could no matter how distasteful. I'll just leave it at that.

Carol? I'm going to Carol since it's one after ten, I'm going to give you the last question.

*Ms. LaGrasse:* Thank you. When I was a young woman, that's a long time ago, I worked as a civil engineer in this particular job and a certain law was passed by the federal government. It was called the Clean Water Act and I read it because it was of my interest.

*Mr. Burling:* I've heard of that.

*Ms. LaGrasse:* It says that pollution control methods had to accomplish all achievable methods of removing pollutants and [people] went crazy because anything can be done but it would put a company out of business. So then I saw the law as it was carried out and I learned later who passed it, why it was passed, and the forces behind it. But leave all that out, it was a way of enabling lawsuits to be brought. And the lawsuits were then always settled because they'd pick a large company and the large company would find it cheaper to pay off. They just got money to build up enough profit that they wanted to fund. Every time they brought a lawsuit the judge would allow them to settle. My question is this: Is there any hope of actually repealing something as awful as the Clean Water Act?

*Mr. Burling:* So, is there hope that the Tooth Fairy is real? I think that's what you asked. Hope springs eternal. If I were not an eternal optimist, I wouldn't be here doing what I'm doing, Okay? We have been before Congress, attorneys of the Pacific Legal Foundation, myself and others, a number of times to testify on fixes to the Clean Water Act especially the wetlands portion of it and Congress does what Congress will. I think that the environmentalists had a major coup when they passed this series of statutes in the early '70s that Nixon signed before anybody realized actually what was in them. I think the people who wrote them, as you know, were very clever and very diabolical in a lot of ways. Now that they're there, there is so much vested interest in the status quo of being able to sue. Every time you try to make the tiniest reform the headline blare, "Congress thinking about gutting the Endangered Species Act," "Congress thinking about allowing polluters to run wild," and things like that. It's difficult. I suppose if we had a strong majority for reform in Congress – the Senate and the House – and a president committed to that, we could get there. We have had one or the other at various times in the last thirty years but having all three of those at the same time, we don't. Not even now because we just don't have enough of a majority in the Senate. We need to have a significant change. We need to get a lot more Senators than fifty-one. I don't know when it's going to happen. I'd like to think as things look worse and worse with time that eventually we'll get some reforms but, Carol, I don't know. By the time that happens I may not be a young man anymore.

Thank you.