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ENVIRONMENTAL LAW: PROPERTY RIGHTS IN THE UNITED STATES

NOVEMBER 16, 2007

A CONFERENCE PRESENTED BY THE FEDERALIST SOCIETY AND ITS
ENVIRONMENTAL LAW AND PROPERTY RIGHTS GROUP

MODERATOR:

Mr. James S. Burling, Pacific Legal Foundation

PANELISTS:

Hon. Alex Kozinski, U.S. Court of Appeals, Ninth Circuit

Hon. Stephen Reinhardt, U.S. Court of Appeals, Ninth Circuit

JAMES S. BURLING

PACIFIC LEGAL FOUNDATION

Good afternoon everybody. Welcome to the Federalist Society's Section on Property Rights and Environmental Law's discussion of property rights in America today. It's a pleasure seeing everybody here. I just want to do a quick announcement that if anybody from the Society is interested in joining the Executive Committee or learning more about it, there will be a meeting upstairs after the session here in the Madison Room.

I promise that I'm going to have no virtue in what I do today. I was asked to be a moderator, and I've never been called moderate before. So I had to look that up and see what that means, and I remember Barry Goldwater said that, "moderation in defense of liberty is no virtue." So I will be moderate, and I will not be virtuous.

I'm going to give a quick introduction to the topic of property rights and the debate over property rights, and then I'm going to introduce the speakers, sit down, and we're going to go into their opening remarks from the podium. And I will ask questions of the two distinguished gentlemen here today, and then we'll open it up to questions at the end, and end promptly at one o'clock.

My point was that the debate over property rights is certainly of long standing, and I'm going to give you some quotes, not in any particular order, that take both sides, because I'm trying to be moderate, on property rights. So I'll start with John Adams, who said that, "The moment the idea is admitted into society that property is not as sacred as of the laws of God and that there is not a force of law and public justice to protect it, anarchy and tyranny commence." On the other hand, Paul Prudhomme said, "Property is theft," in 1840.

George Bernard Shaw said that, "A government who robs Peter to pay Paul can always depend on the support of Paul."

(Laughter.)

John Locke said that, "Whenever legislators endeavor to take away and destroy the property of the people, they put themselves into a state of war with the people, who are thereupon absolved from any further obedience." Thomas Hobbes, on the other hand, said, "It is necessary to lay down this right to all things that people would otherwise have and be contented with as much liberty against other men as he would allow men against himself."

Joseph Story, Supreme Court Justice, said, "The sacred rights of property are to be guarded at every point. I call them 'sacred' because if they are unprotected, all rights would become worthless and visionary." James Madison said that, "When an excess of power prevails, the property of no sort is duly respected. No man is safe in his opinions."

My next quote here is actually from one of our guests. Stephen Reinhardt said in a William O. Douglass lecture back about seven years ago, "There are exceptions, of course, to the Supreme Court's preference for the interests of the state over the rights of its citizens. First and foremost, the Court is protective of the right to property and indeed generally appears to be far more concerned about that right than it does to the right of liberty."

Al Gore said that, "The environmental problems of our society are the consequences of too much protection given to individual and property rights." William Blackstone: "There is nothing which so generally strikes the imagination and engages the affections of mankind as the right of property, or that sole and despotic dominion which one man claims and exercises over the external things in the world to the total exclusion of the right of any individual in our universe."

Richard Lazarus, Professor Richard Lazarus, who has argued in a number of cases that the Supreme Court on behalf of governments, writes, on the other hand, that "nor does the Court today appreciate that

over the past century, our relationship to the land has fundamentally changed. Law is now a highly regulated commodity, and the ownership is no longer a touchstone of human autonomy or the source of individual freedom." Helen Caldecott, formerly of Union of Concerned Scientists, said that, "Free enterprise really means that the rich get richer. They have the freedom to exploit and psychologically rape their fellow human beings in the process."

And I will close with just a couple of more. "Freedom and property rights are inseparable. You cannot have one without the other." That's George Washington. But I will leave you with Jean-Jacques Rousseau, who in a treatise talking about the understanding at that time of the origins of property right, there is the idea at one time of early society of mankind there were no property rights, and that evolved into something that we now know as property. He said, "What crimes, wars, murders and miseries and honors and horrors would the human race have been spared had someone pulled up the stakes and filled in the ditch and cried out to his fellow man, 'do not believe in this imposter. You're lost, you forget that the fruits of the earth belong to all, and earth to no one.'" You'd never hear me say that again.

(Laughter.)

But I want to introduce our speakers right now because we have two very distinguished guests with us today.

We have Honorable Stephen Reinhardt on my left, really. Stephen Reinhardt is a graduate of Yale Law School and Pomona College. He was appointed to the bench in 1980 by President Carter. He's published numerous articles on various topics relating to the law. Following his graduation, he was a lieutenant in the United States Air Force. He had some reputation of being somewhat liberal in the court. *California Lawyer* recently had a cover story, an article about him titled, "The Last Liberal." And this is on this introduction. I hope you won't be offended if I read this, but James Dobson called him the most notorious liberal judge in the most radical court of America. That of course is our Ninth Circuit. I prefer to call [it] the most interesting of the circuits. And I mean interesting in the concept of the Chinese curse, "May you live in an interesting circuit."

Judge Alex Kozinski to my right is now the Chief Judge of the interesting circuit, and he was appointed in 1985 by President Reagan. He graduated from UCLA, received his B.A. in 1972 and his J.D. in 1975. Prior to being on the appellate bench, he had a number of appointments and offices in the Reagan White House. He was an attorney at Covington

& Burling—no relation—and he was a clerk to Chief Justice Burger and Judge Anthony M. Kennedy.

With no further ado, we'll begin with the justices giving some brief remarks, and then we'll have some questions from me and then questions from the audience.

HON. ALEX KOZINSKI

U.S. COURT OF APPEALS, NINTH CIRCUIT

Good afternoon. It's a great pleasure to be here. What a great convention it's been. It's sort of surprising that we are having this kind of debate, but it's a good point as well. The question of whether or not property rights are individual rights or whether they are somehow separate from life and liberty really is a question that probably could only come up in America. In other places in the world, those of us born under communism, those of us born under and who have lived under other systems of government where property is either severely limited by the government or practically nonexistent, realize full well as a matter of daily life that you really can't have liberty. And in a real sense, you can't have life without property.

We are not ethereal beings. We don't live from ideas alone. Air can't feed us. We can't develop ourselves materially or spiritually without the use of property. So the idea that if you don't have control over your means of survival, if you don't have control over your resources to help you get an education, to help you conduct your business, to help you live your life, if you don't have those things at your disposal, you really don't have freedom at all. You don't have any real rights. Your life is at the disposal of whoever does control those things. We take anything for granted in the United States. We live in a blessed country where it's second nature. It's like breathing. Owning property is like breathing. It's part of your birth-right. But it's really a very precious right.

One of the Founding Fathers very well understood it was part of the concept of individual liberty and individual autonomy, and that's why they have provisions. They have just as many provisions dealing with property as they do dealing with, let's say, speech. And yet, as we know, the courts—I have no problem with this—have created a huge edifice dealing with the right to speech, which I support. I think speech is very important. Having come from a place where speech as well as property was severely limited, I must tell you that I'm greatly in favor of it.

We have the Religion Clause of the Constitution, and they are really no more extensive than what the Constitution says about property. And yet we have a great edifice, great edifices in the law dealing with protection of the right to religion and prohibiting the government from establishing religion. And for the most part, I support those. I think it's important. The right to worship, the right to have free relationships with one's god, is fundamental to human existence.

But when it comes to property, courts have been less generous. And this goes to a more fundamental criticism I have about the way we approach constitutional law, and that is that we take constitutional provisions one at a time. We don't ever weigh them all at once, so we get a case involving speech, we get a case involving religion, we get a case involving property, but we never have to prepare one with the other, compare one with the other. What that does is it gives judges a chance to give vent to their own predilections. Judges like speech, conservative judges as well as liberal judges. We're really very keen on speech. And so we have a great edifice supporting that. When it comes to rights of criminal defendants, which again I think are very important—I think any of us might become a criminal defendant whether we do anything wrong or not—this is one of the great protections of a free society that they can't come after you. The state can't come after you just because they don't like your face, unlike a lot of other places in the world. Judges have been very protective of it.

But judges have not been protective of parts of the Constitution they find unappealing. Look at the neglected Second Amendment. We may get a little more enlightenment on that score, but the Supreme Court hasn't looked at that. It has looked at it once, I believe, in its constitutional history. Judges just generally don't like the idea of guns, so we sort of pretend it's not there. Judge Reinhardt and I had public disagreements on this in a case called *Silvera*. And property is another area where a lot of judges feel it's sort of a second-rate right. This is the kind of right that's really not very important. It's not on a par with life and liberty, which are sacred.

And you know property cases are okay to the extent that the state and the political branches of government wish to allow you, allot you an entitlement to it. And if the political branches don't, the judiciary doesn't have much to say about it. I think that's wrong. I think the Constitution—we should not be playing favorites with constitutional provisions, and I particularly think that the general judicial disdain to property rights is not justified, and I don't think it's faithful to the constitutional scheme.

Thank you.
(Applause.)

MR. BURLING

Judge Reinhardt.

HON. STEPHEN REINHARDT
U.S. COURT OF APPEALS, NINTH CIRCUIT

Judge Kozinski says he's surprised we're having this debate. I'm not sure quite what debate we're having. Nobody is proposing to abolish private property. The question is, to what degree does property exceed in importance rights to liberty or life or other rights? What we do in this country mainly is balance various rights when they come into conflict. It's very easy if there's no other interest, other than property, to protect property. It's a very easy if there's no other interest other than any amendment in the Constitution to say, yes, I'm for that amendment. The difficulty comes when rights come into conflict.

Before I get into that, I ought to say I am a great believer in that statement by Barry Goldwater. I think it's one of the great political statements of all time. I wish I could quote it, but it's something about, moderation in pursuit of liberty is no virtue . . . pursuit of vice is no—extremist. It was made at the 1964 Republican Convention.

JUDGE KOZINSKI

Then you must have (Inaudible).

JUDGE REINHARDT

I was listening, just as I was listening to the Democratic debate while you were all off at your dinner.

(Laughter.)

It was interesting in the debate because the moderator kept trying to get the candidates to say, are you in favor of liberty over security?

That's a constant problem. In one of Judge Posner's recent books, he talks about why we should sacrifice liberty for security.

I think we can have liberty and security. I also think we can have property and other rights. But they sometimes come into conflict, which is when our problems arise. When the right to property comes in conflict with the public interest, that's when the problem arises. I think it started at the very beginning of our Constitution when the question was individual rights against property rights, and slavery won because property rights were determined to be more important than human rights. That was wrong. It's hardly the only time. People have had to give up certain property rights in order to have liberty.

Now, whether all rights are equal is an interesting question, which I've been debating with Judge Kozinski publicly and privately for years. Yes, I do think that life and liberty are more important in the balance than property. I think that human rights are more important than property rights. They're all on the same clause, but until my first debate with Judge Kozinski before a Federalist group, I wasn't aware there were people who thought that property was as important as liberty or human rights. I'm still not persuaded. Maybe it's because I didn't go to the gala. But I'm still not persuaded that property is as important as human rights or life.

I've seen this debate occur in the public interest, in the public wheel, for many years. As I said, the first time—I was not around—was when the property right to slaves was more important than the right of every human being to be treated as a human being. Then the next time I'm aware of that debate was when the New Deal came into being in this country, and the debate then was whether, when you had minimum wage laws, laws to protect children, all of the social welfare legislation of the New Deal, whether that was unconstitutional because it interfered with property rights.

Well, fortunately, until recently the entire country, Republicans and Democrats and others, understood that the social welfare legislation affording individuals the governmental protection that they needed was more important than the abstract concepts of employers' rights to make children work 12 hours a day, pay them five cents an hour if they could get away with it, that there was a reason for social legislation. Ronald Reagan ran for office on the basis that he was like President Roosevelt, and that was his hero. Well, I think Ronald Reagan understood the need for social welfare legislation. It's not until recently that those in power have begun to challenge that.

But I saw civil rights legislation adopted in this country over the violent objections of conservatives who said it was an interference with property rights, that you couldn't have legislation, that said everyone has a right to equal access to hotels, to luncheon counters. I saw people stand up in the South defending property rights so that they could keep blacks out of their establishments. Well, that was the debate that went on at that time. Was it property or individual rights? So you have this debate occasionally in this country. Frequently, the answer is yes, individual rights are more important than property rights.

Now, the idea is to try to accommodate all of those rights. The idea is to try to see that the entire Constitution is vindicated to the extent possible. But it's when those constitutional rights come into conflict that sometimes you have to balance and sometimes make a choice. And I guess my disagreement with Judge Kozinski is that you don't always try to, or you're not always capable of giving total abstract predominance to every single right. It doesn't work. There come times when we have to balance, when we have to try to see that the most important interests are vindicated and protected in this country, and sometimes that means that we will have to modify the extent to other rights and that they aren't just given total protection as if there were no other interests. We have a variety of interests in this country. People's interests, property interests, that all have to be balanced and harmonized, and sometimes, some yield to others.

Incidentally, before I close the opening, I just wanted to say, despite that article in the California law journal, I am not the last liberal. I'm possibly the last liberal around at the moment. But there will be a lot more liberals, I assure you, in the future.

(Applause.)

JUDGE KOZINSKI

You know, part of the problem is talking about these things in the abstract, you know, this idea a balancing against other values. You know, it reminds me of the German saying, which is—I think it's available in other languages—it's easy to pull hot chestnuts out of the fire with somebody else's hands.

(Laughter.)

And it's easy to make decisions about public policy and to serve these other values so long as somebody else pays for them. And just to

bring it down to a concrete example, take the case of *Lucas* from the Supreme Court. This is the case you'll recall, where a guy owned a couple of pieces of property on the beachfront, and South Carolina says you can't build anything on them at all because we need this beachfront access. It's an important public value. Now, you know, you can go on the land. You can sort of look. You're free to pay taxes, thank you. We don't have a problem with that. If you want to tell people you own the property, you can tell people you own the property.

(Laughter.)

You can take pride of ownership. But you can't build anything on it. And he went all the way to the Supreme Court, and the Supreme Court said, well, when you take that much, you know, you regulate property, the state of South Carolina effected a taking, took the property, because basically what they were doing is they were taking it for public use. They were using it for a public to have access to the beach, so they bought the property and created beach access.

Well, afterwards, the case comes back and they do what's necessary, and they pay *Lucas*, and now the state of South Carolina owns the property. And of course, they say, well, now that we own this property we'll provide public access to everybody so they can get to the beach, right? They say, now, wait a minute. This is really valuable beachfront property, and they sell it to a developer.

(Laughter.)

No joke. This is a true story.

It's very easy to make these kinds of decisions if you have the power to use somebody else's, to extract the value of somebody else's property, make public policy decisions, because there's almost nothing that isn't sort of a good deal. If you'd be willing to pay money for it, you can get it for nothing. So there's no value, there is no public value that isn't readily served, so long as the public needs to pay nothing for it, so long as the cost is imposed upon individuals. And that's how these things usually come down.

It's never a case of them, you know, well, we'll take your property or we'll take your life. Or, we'll take your property or stick you in jail. It is usually your property rights against some nebulous interest that somebody on a city council or a state someplace has decided is very, very important—not important enough to pay for it.

(Laughter.)

You know, not important the way you decide, in your life, it's important when you decide, am I going to go out and buy something, that

kind of important. It is important like, gee, wouldn't it be nice to sort of break this window open in the store and take it home. If you do that, there'd be a lot more window-shopping going on.

(Laughter.)

MR. BURLING

Thank you. Judge Reinhardt, do you want to respond to that, or should we move into questions.

JUDGE REINHARDT

If that was just opening statements.

JUDGE KOZINSKI

This was the (inaudible).

MR. BURLING

A sua sponte rebuttal. And who am I to stop the judge from talking? I've learned too long I can't do that, so you can have a sua sponte rebuttal—

JUDGE REINHARDT

No, no. We'll move on to your questions.

MR. BURLING

The first question is one that I've wanted to hear the answers to in a debate like this for about 17 years because the basis is a 1990 decision—

JUDGE REINHARDT

What's it worth to you?

MR. BURLING

—I've been waiting so long—a 1990 decision out of Lake Tahoe dealing with some property rights issues up there. And it was a case where Judge Reinhardt wrote a majority opinion, and Judge Kozinski was on the dissent.

(Laughter.)

And the particular passage gets into the question of—I want to know the panelists' views of the relevance of the Constitutional Framers as opposed to our own views on the importance of property rights in the adjudication of property rights-based cases. And the quote is, "The Framers of the Fifth Amendment saw the wisdom of enumerating life, liberty and property separately, and few of us would put equal value on the First and Third." So to what degree should originalism animate our discussion of property rights? Judge Reinhardt.

JUDGE REINHARDT

I don't have the benefit that Justice Scalia has of knowing what the original Founders thought about everything, so I'm not in a position, really, in to say what they thought about these problems. I had thought that the Constitution was a series of general principles that we were supposed to interpret over the years as we learn more and more about society and we learn more and more about human nature, that they were wise enough to give us this set of principles so that we could, with knowledge and the developments of life and science, the difference between the country as it was in the 1789 and the country as it is today, that we have more knowledge, more experience, and that we could take those principles and apply them to today's problems. I didn't think that they thought they could solve all those problems for us in that time.

But if I were to try to determine what the Founding Fathers thought about property, I would have some difficulty. You read some quotes before. Another quote about property from somebody I would think you would have some respect for would be Thomas Jefferson, who wrote

to James Madison, "The laws of property have been so far extended as to violate natural right. The Earth is given as a common stock for man to labor and live on." Now I don't know what that means about how the Founding Fathers would decide the kinds of cases we have today, how they'd decide *Penn Central* or *Loretto* or any of those cases.

I can get general concepts from some Founding Fathers. Thomas Jefferson disagreed with James Madison. How you find out—it's not a single person. It's not like reading one of President Bush's signing statements. The Founding Fathers have a lot of different views, particularly once you get beyond them saying yes, property is important. Well, everybody would say that.

When we get to the types of practical problems we have today, I don't think it's very easy to find out through original intent how the Founding Fathers would have addressed today's issues.

JUDGE KOZINSKI

Well, it's funny that you mention Justice Scalia because about 20 years ago at a Federalist Society event—it was right before Justice Scalia was nominated to the Supreme Court. I think it may have been the very weekend before. The following week he was nominated to the Supreme Court. He stood up and he gave a speech, and he said, I want to speak against original intent, and the room fell silent. But he actually spent the entire speech speaking out against original intent. I don't know if Gene Myers remembers that, but I'm not sure many people here would be old enough to remember or would have been present.

He said it's not intent; it's meaning. This is not an exercise in historical psychology. We don't ask the question, what did Madison have in mind? What did Jefferson imagine about the Internet? Not that he had the Internet. These would be meaningless questions. This is why we have the Constitution. We don't have to imagine what they thought; they wrote it down.

(Laughter.)

Now, it is true, as Judge Reinhardt point out, in *Tahoe Sierra*, and I didn't contradict him in my dissent, the statement that Jim quoted because I thought it was so self-evidently disproving. Yes, the Founding Fathers enumerated life, liberty, and property separately. Well, that's because we don't have an English word that means all three things.

(Laughter.)

And I don't know of any other way. Now today, you might have a hyperlink, you know, something to put them all in the same place or something. But in those days, you had to, you know, write them one after the other. Usually when you wrote them one after the other in a series and you have an "and" connecting them, they meant that they sort of go together. They are meant to be part of the same group, apply the same level of generality.

So, I'm not troubled by questions about, you know, what would Madison think in this area or what would—or gee, which order were these things listed? The question I ask is, does the constitutional text, you know, as illuminated by some of the papers that are available during the ratifying conventions, to some extent—you know, I'm not so much concerned, it seems to me with, with a drafters. What seems to me as important or perhaps more important is what was said about these provisions when the states ratified the Constitution? That seems to me a far more significant source of enlightenment.

But in the end, really all that ultimately matters is what they wrote down on paper and what they all agreed on. We cannot engage in psychology in interpreting the Constitution anymore than we can or should engage in psychology in interpreting statutes. I mean, God only knows what Congress thinks if it thinks at all.

(Laughter.)

So you know, it seems to me that the fact that the Constitution refers to life, liberty and property in one breath suggests to me that these are values that the Founding Fathers found to be both very important but also made of the same timbre. They are aspects of human existence. You can't have one—it's like love and marriage. You can't have one without the other.

JUDGE REINHARDT

Well, there are two things to say about Judge Kozinski's rather simplistic presentation. Number one, merely because words are in the same document does not mean they are of equal importance.

JUDGE KOZINSKI

I'll give you that.

JUDGE REINHARDT

I guess I understand what Judge Kozinski said. Yes, they're in the same line, and therefore the same timbre, he says. Well, the question is when they come in conflict, are they equally important? I already addressed whether I think, when they come in conflict, they're equally important. The answer is no. I think we've had a history of times that they've come into conflict. That's the question.

The other question is he reads the Constitution, he says, and there's the answer. Well, what does the Constitution say about life, liberty and property? You can't take them without due process of law. Well, do you read due process and you know what that means? What the Supreme Court said about 150 years later, they said, what is due process? They said it's a process that is due. Well, that is a wonderful explanation. It doesn't get us much farther than what reading the document does. Reading the document doesn't answer the question. It doesn't tell you what due process is, which is the key. That's what we've been interpreting ever since. What kind of process is due, and what is due process for life? What is due process for liberty? What is due process for property?

We've had a changing view. Previously, you didn't need a lawyer in a criminal case. We've said, now, that's not due process. People are entitled to lawyers. Our concepts have changed over the years, and fortunately, I think we've grown in our understanding. We didn't look at the Constitution and say, well, it was due process in 1789, so it's due process now. We didn't read it and say, well, everybody knows what due process means. That's a term that comes to have meaning as society changes, as society learns, as we have a greater right and respect for the individual in this country. That's why, despite what Judge Kozinski says, the Founders, if they had an intent, did not intend us to apply a document. They didn't try to spell out what due process meant. They didn't try to spell out what all of these basic rights meant because they understood that we would learn as the society grew, we would become better, we would improve ourselves, and we would have a better understanding of individual rights.

MR. BURLING

We see there's some dispute on these federal judges on the role of property. I want to go to a specific question dealing with the role of the judiciary, and that is our constitutionally-based property rights, issues

worthy of federal judicial involvement, or should such claims be heard only by state courts? Which one of you would like to start? Judge Reinhardt?

JUDGE REINHARDT

Well, I'm a great believer in the federal courts for a number of reasons. I believe in life tenure.

(Laughter.)

Fortunately now. But I believe in life tenure because it makes judges independent. It allows them to do what they think their duty requires them to do. I said a number of years ago in a speech to the Beverly Hills bar that I had talked to some southern judges in state court, Supreme Court justices, and they told me quite honestly that they didn't feel free to vote for a capital defendant because they would lose the next election. You don't have that in the federal judiciary. Federal judges do what they believe to be right and what they believe their obligation is. We may differ on what we think our obligation is. We may differ on what we think is right. But I haven't met any judge in the federal courts who disregards his duty for any reason.

I think everybody tries their best to do what their oath mandates them to do. In the state courts, some try, particularly in capital punishment cases. We have a Supreme Court justice in California who was an excellent justice and highly respected by all sides, and he said deciding a capital punishment case is like trying to ignore an alligator in the bathtub. You know, you try to put out of your mind the fact that you're going to come up for election and you try to do your best, but never are you really without the political pressure that lies in the background when you decide these cases and when you know the law and order people are there watching you. And then our courts say we're there for quite a while. It's not as much now, but even in the trial courts, they were there taking score on the individual judges on how well they enforced law and order in their view. That's a problem we don't have, and that's why I believe that the federal courts are better able to protect individual rights and property rights.

Now, whether property rights cases are so important that they're entitled to be in the federal courts when our Supreme Court and Congress sometimes don't believe that all cases should be in federal court and whether they're more important than criminal cases which are very limited in federal courts—I'm talking about states' cases where you [are] talking about state law. Now property law is basically state law, and for

that reason the Supreme Court has said when you're talking about takings by states and local entities you should first let the state court go through—states interpret those rulings, whether a taking occurred or whether there are exceptions, whether there are variations or variances. You should go through the entire process and then see if there is a state remedy, whether the state provides relief, and only then should you come and answer the federal question.

Well, what do they do in *habeas* cases? In *habeas* cases, they say it doesn't matter whether the state action is unconstitutional. Federal courts should give—should ignore the violation of constitutional rights unless, two things. One, the Supreme Court has previously held a very similar act unconstitutional. If they haven't held it unconstitutional before, then the fact that it is unconstitutional doesn't matter, and you recognize whatever the state has done. Secondly, they say, unless the state's unconstitutional action is unreasonable, if any rational state judge could come to that conclusion, then you still defer to the state courts. Well, I don't think those advocates of property rights feel the same way about property.

You know, as long as we have this kind of a view of people's constitutional rights, who are being held in jail or executed unconstitutionally, I'm not sure we should prefer property rights over those individual rights. Personally, if I had a choice, I'd like to see property rights as well as individual rights and human rights vindicated by the federal courts regardless of what the state courts have done, as long as it's truly unconstitutional. I'd like to see equality among those rights, as long as we don't consider the individual rights of people to be worthy of full federal court protection. I'm not sure whether I would prefer property rights over them.

MR. BURLING

Thank you.

JUDGE KOZINSKI

Well, the reality is there's only one kind of federal right that can no longer be litigated in federal court, and that's a takings claim. You can raise any other constitutional claim, but a takings claim you simply cannot now get in federal court at all, not for a minute, not for an hour, not subject to state preemption or anything else. It's very simple. In 1985, a

Supreme Court had the case by the name of *Williamson County*. What they said was, what Judge Reinhardt said, if you have a takings claim, you've got to go to state court and make sure that you don't get compensation from the state because if you get regulation of the property but the state will compensate you for it, of course there's no taking. The state hasn't taken your property if it has a remedy where you can go and get paid. Make sense?

Well, 20 years later in a case by *San Remo Hotel*, they said, well, but while you are in state court you've got to raise, you can raise a takings claim. State courts can consider federal claims as well as the state courts can and must consider federal takings claims as a federal court. And so while you are there, you can raise a takings claim, and in fact you must raise a taking claim because under the doctrine of collateral estoppel in most states, every state in the union in fact, if you could have raised a claim and failed to raise it, you can't then raise it in subsequent litigation. You can't then come to federal court and say, well, I litigated my state claims, the question of whether I get compensation, but I reserve my right to litigate the federal claim in federal court. The Supreme Court said you can't do that. So you either litigate the federal claim in state court, in which case you can never bring it in federal court, or you don't litigate it in state court, in which case you could never bring it all.

So there's one claim or one kind of federal right in the Constitution that you cannot in fact now bring in federal court as of 2005. It is a claim for the taking of property. It's a startling result, and much as Judge Reinhardt complains about *habeas* and exhaustion and all those things, I mean the fact is if you're a prisoner and you complain that you don't like the food in prison, you can bring a claim in federal court. If you think that your right to worship in prison wasn't properly observed or you claim that you were mistreated or anything of that sort—and I don't denigrate those claims; I think some of them are quite serious—you can definitely get into federal court. You complain about your conviction, you can get into federal court. You have to hurry about it. You have to exhaust your stated claims, but ultimately, you will get federal judges looking at those claims. One claim you cannot get, and that is a takings claim, after *San Remo*. At least that's the way I read the Supreme Court opinion.

JUDGE REINHARDT

Well, there are two things I would disagree with Judge Kozinski about. Number one, yes, you can get into federal court with a conviction

if you hurry about it, but as I said, even if your conviction is unconstitutional, you can't get relief in the federal courts if it wasn't unconstitutional according to a direct Supreme Court decision at the time the unconstitutional action was taken. And two, you can't get relief if the state court decision is unconstitutional, but a reasonable judge, whatever that means, could have made an unconstitutional decision, so you don't get relief for an unconstitutional conviction in federal court.

Secondly, I just don't read *San Remo* the way Judge Kozinski does. You know, this shows how lawyers differ and why we keep going on with cases that end up five to four. As I read *San Remo*, the Court said that the plaintiff didn't have to raise his federal claim in state court. It could have been preserved, but they went beyond where they had to go, and if they had limited their claim, they would have been able to go to federal court. Now you know we can take sentences out of *San Remo* which may appear to contradict, but that's just the run-of-the-mill Supreme Court decision. In any event, I don't give it the narrow preemptive reading that Judge Kozinski did, and I don't think that was the intent of the majority.

JUDGE KOZINSKI

That's how Brother Willie Fletcher raised it.

JUDGE REINHARDT

Well, I don't always agree with Brother Willie Fletcher, I can tell you.

MR. BURLING

At this point, I'm going to stop my questioning, although I had a number of others, and ask for questions of the audience because you only have a few minutes left. And in the interest of time, I encourage all the very brilliant lawyers and legal scholars out there to make these into questions. A question is not being a long speech followed by, will you comment on that please. Let's turn these into questions. Thank you. First.

AUDIENCE PARTICIPANT

Thanks. Ilya Shapiro from the Cato Institute. Judge Kozinski, a couple of weeks ago when you had another debate, Federalist Society debate on property rights, you essentially read the first part of the Takings Clause as prefatory as the first part of the Second Amendment, and the only operative clause, if I'm understanding your argument, is the Just Compensation Clause. How do you square that with what you just said about the importance of property rights and how they shouldn't be treated as distinct from life, liberty and the kind of bifurcation that *Carolene Products* created?

JUDGE KOZINSKI

Just the same way I read the Second Amendment. I think the Second Amendment has a prefatory clause talking about militia. But the operative language is the one that says, talks about restriction of the right to bear arms. Same thing in the Takings Clause. I think the part that says "for public use" is descriptive and not proscriptive. The real punch is you get paid. The government takes your property, but you get money for it, money that you can then use to buy other property, send your kids to college, take that long-awaited European vacation, whatever you want to do with it.

MR. BURLING

Next question.

AUDIENCE PARTICIPANT

Judge Reinhardt, I'd like to ask you what makes you, and judges more generally, what in the Constitution gives you the right to decide when society has changed rather than the people through the elected branches?

JUDGE REINHARDT

It's our duty to interpret the Constitution. It's unfortunate that the Constitution needs interpretation, but it was written that way. That's our system. It was not—and I think it was wise. If we want to look at the intent or the meaning of the Constitution and we want to go back and look at the original decisions of Justice Marshall. It's been apparent from the day we adopted the Constitution that it was not self-interpreting or self-executing, that it needed to be construed as time went by.

And you know, just as [with] any elective system, you can't put every public policy question to the public and take a vote on, should we raise this tax? Should we lower this tax? Should we have a date to withdraw troops? Should we raise the cap on Social Security? Why shouldn't the people decide all those questions? The country wouldn't function very well that way. We have the initiative in California, and I think it proves not to be a very good way to run the state. But if we try to go to direct initiatives nationally on every issue that had to be decided by Congress, we wouldn't function well, and the same thing with interpreting the Constitution. The system, from the beginning, has been that the courts have to interpret the Constitution, and that's the way it is.

There may be a better system. Maybe we ought to put every question that now goes to the Supreme Court to the public. But I don't think it would be very practical. I don't think that was what was intended, and I don't think it would be a good way to run a country.

MR. BURLING

Roger.

AUDIENCE PARTICIPANT

Yes, Judge Reinhardt, I'm Roger Pilon with the Cato Institute. You've spoken at the outset of your remarks about the conflict between human rights and property rights as though they were ubiquitous. But as we know from cases like *Lucas*, the only reason you have this conflict is because the legislatures are prone to give the public rights over what people previously thought were their rights, and you would have the court, as I understand it, bow out of this and essentially defer to the legislative

branch to extinguish willy-nilly these property rights. How do you justify that given that the Constitution gives you the authority to say no to the legislature when it does violate these pre-existing rights by creating these new rights out of whole cloth?

JUDGE REINHARDT

Well, you know, I don't really want to go into the details of what—

AUDIENCE PARTICIPANT

I've noticed that.

JUDGE REINHARDT

I don't really go into the details of when the courts can determine that a legislative action is arbitrary and capricious.

AUDIENCE PARTICIPANT

We're not talking about administrative law here.

JUDGE REINHARDT

No, no. I'm talking about these kinds of cases, property cases. As you know, the issue is now before the courts of whether, in addition to the takings, there is also a constitutional right to invalidate some of the property decisions and legislative acts on the grounds that they're arbitrary and capricious.

JUDGE KOZINSKI

Say it's substantive due process. Go ahead. Say it, Steve.

JUDGE REINHARDT

Well, I'm trying to avoid the issue because, as I said, Justice Kennedy in the—I don't remember which case it was recently—*Lingle*—said that there is a remedy in the courts when the legislative action is arbitrary and capricious. That case is now in front of our court, or that issue is now in front of our court. In fact, we just issued a decision which is not final, and we may all have to vote on it.

JUDGE KOZINSKI

That's right.

JUDGE REINHARDT

So I don't really want to get into the question of what the authority of the federal courts is to invalidate these legislative actions on the ground that they are, these takings may be arbitrary and capricious rather than simply a question of what Judge Kozinski says. You take it, and you pay for it.

AUDIENCE PARTICIPANT

There's an English word for that. It's called theft.

MR. BURLING

We're going to have one more question—oh, and I should quickly point out some of that case you're talking about, you don't have to vote on that. That's okay. It was a very hard case.

(Laughter.)

One more question, and then [there] won't be enough time for any further questions. And then we have 30 seconds left. We'll have some final remarks by our panelists. So, one more question.

AUDIENCE PARTICIPANT

Judge Reinhardt, you had suggested a connection between private property rights and the system of slavery, and it caused you to distinguish private property rights from individual rights of personal freedom. Isn't it the case that on certainly the Lockean theory, the classical liberal theory of private property rights, first and foremost, property right is in one's self, one's own property, one's own labor. And as a result, it might be suggested, I might suggest that in fact the classical liberal tradition of private property undermined slavery rather than supported it.

JUDGE REINHARDT

Well, that may be, but that was a debate among those drawing up the Constitution, and that was a debate up through the Civil War. The issue that was advanced by those who favored slavery was that they had property rights. They may have been wrong, but what I say is it has come up with some regularity in this country that when we have had rights of equality, individual liberty, all of those things, that the debate has been that, no, we have property rights has been the other side. Maybe they were wrong, but those are the debates we have had as we've tried to make progress in this country. Each time the issue has been raised that we're infringing on property rights.

MR. BURLING

I'd like to just have our panelists get some final thoughts. We have to clear out of the room because they need to clean up the lunch plates for the next session. I was told that we must get out promptly by one o'clock.

JUDGE KOZINSKI

I'm going to cede my time to the audience.

JUDGE REINHARDT

I just had one other quote that I would like to read from a 1922 Supreme Court decision, *Pennsylvania Coal*, which has been repeatedly reaffirmed, the last time in *Lingle*, which was [a] unanimous decision. It says, "Government hardly could go on if, to some extent, values incident to property could not be diminished without paying for every such change in the general law." That's an observation by all sides in the Supreme Court that we should keep in mind as we discuss these absolutist views of property.

I am not in any way opposed to property rights. I'm not sure I would agree with Judge Kozinski that the only thing you have to do is pay for them, but I don't think these issues can be resolved without the kind of normal balance we apply in the law to most of the issues that confront us these days. And more and more, I think what we find, more and more we have difficulty in resolving issues not only in the courts but in political life because they're not just, how do you vindicate her right? That's a very easy question. The issues more and more are how do you balance these rights, how do you reconcile them, how do you resolve them, and how do you try to preserve, to the extent possible, liberty and security? How do you try to preserve, to the extent possible, property rights and individual rights and the public interest?

I don't think we can resolve any of these questions by saying property trumps all or even—and certainly we can't resolve them by saying security trumps all. All of these issues get, it seems to me, to be getting more and more difficult, require more and more judgment, and more and more understanding of the need to try to accommodate conflicting interests and conflicting values.

MR. BURLING

Thank you very much. Let's give them a hand.

(Applause.)

(Panel concluded.)