

Constitutional Law Committee Newsletter

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MESSAGE FROM THE CHAIR

Jamison Colburn

Greetings, fellow Constitutional Law Committee member. Since our last newsletter, we have transitioned to a place in Section of Environment, Energy, and Resources's regular committee roster. I think that reflects the timeliness of and interest in this group's work. As I write this, membership is up, plans are being laid for great programming, and an exploratory committee is being assembled to consider the creation of a book about our conjoined fields: constitutional and environmental law. I invite you to look inside and, better yet, get involved!

As Vice Chair Robin Craig's piece demonstrates, there have been quite a few significant cases in the field since our last newsletter, from standing, to preemption, to First, Fourth, Fifth, Eleventh and Fourteenth Amendments. Professor Craig explores the late focus of the Ninth Circuit on whether a procedural injury can support standing in an environmental case and a range of other issues.

As part of a two part series in this newsletter, Professor Dan Cole of the University of Indiana considers the consequences of *Kelo* two years later. Professor Cole is one of the nation's leading experts on the intersection of environmental and property law and this pair of pieces summarize one of his forthcoming articles on the subject. We are delighted to be able to bring them to you in this venue.

Lastly, in *City of Norwood v. Horney* (Ohio 2006), the Ohio Supreme Court announced in July that it depart from the federal Supreme Court's interpretation of "public use" where eminent domain is used for economic development by closely scrutinizing the municipality's justification for the taking and economic forecasts about the neighborhood(s) in question. I have taken the opportunity to write up a short assessment of that case as it fits into the wider conflict that is unfolding nationally surrounding eminent domain.

But I want to take this opportunity to invite you, the reader, to respond to anything you read here. We are looking for writers, and in particular student writers, who can summarize developments in this newsletter, whether from a particular region or developments nationwide in scope, or offer an opinion or perspective. We hope you'll join in making this newsletter a lively forum of exchange. Please contact either Professor Robin Craig (rcraig@law.fsu.edu), our vice chair in charge of the newsletter, or me (jcolburn@law.wnec.edu) to get involved.

Happy reading!

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**Constitutional Law
Committee Newsletter
Vol. 3, No. 1, October 2006
Robin Kundis Craig, Editor**

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KELO'S IMPACT (SO FAR)

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This article is adapted from and updates Daniel H. Cole, "Why Kelo Is Not Good News for Local Planners and Developers," forthcoming in the Georgia State University Law Review. Citations and other references have been kept to a minimum.

Introduction

In 2005, the U.S. Supreme Court decided the case of *Kelo v. New London Development Corporation*, 125 S. Ct. 2655, and all hell broke loose. The political controversy that erupted around *Kelo* took legal scholars by surprise. The decision did not significantly alter eminent domain doctrine—the Court simply followed well-established precedents—but Justice O'Connor's hyperbolic dissent inflamed property-rights advocates, media pundits, and state and federal legislators, who assailed *Kelo* as the death knell for private property rights.

In fact, the death of private property rights has been greatly exaggerated. State courts and legislatures have responded to *Kelo* by increasing protections for private property under state constitutions and statutes. For better or worse, those increased protections are likely to make it more difficult for local planners and developers to engage in large-scale urban redevelopment. From a more theoretical perspective, the political response to *Kelo* illustrates an important point that most American jurists under-appreciate: political institutions provide substantial protection for private property rights regardless of constitutional guarantees.

This article briefly reviews the *Kelo* ruling, highlights some of the important responses to *Kelo* in Congress, state legislatures and state courts, and briefly discusses some of the implications of *Kelo's* aftermath for protecting private property rights in democracies.

The Kelo Case

The city of New London, Connecticut, was founded in 1646. Before *Kelo*, it was most famous for being burned down by Benedict Arnold's troops during the Revolutionary War. Today, New London is a small city with a population of less than 24,000. Its average household income of \$33,809 is well below the state average; its unemployment rate of 7.6 percent is twice the state average. In 1990, the state of Connecticut officially designated New London a "distressed municipality," and that was before the Navy closed its Naval Undersea Warfare Center on the Fort Trumbull peninsula, putting another 1,500 people out of work.

In 1998, New London received some good news when Pfizer Pharmaceuticals announced plans to build a \$300 million research facility in the Fort Trumbull neighborhood. This announcement gave impetus to New London's decision to redevelop the adjacent area. The city authorized the New London Redevelopment Corporation (NLDC) to plan and oversee the redevelopment effort. After a number of public meetings, the NLDC issued its redevelopment plan for Fort Trumbull in August 1999. The plan included retail and commercial properties, a marina, conference center, museum and various other public amenities. The NLDC estimated that redevelopment would create up to 3,000 jobs and generate as much as \$1.25 million in tax revenues for New London. On Jan. 18, 2000, the city of New London approved the redevelopment plan.

Before redevelopment could begin, the NLDC had to "assemble" the entire 90-acre area of land into a single parcel, with itself as owner. To that end, the city of New London authorized the NLDC to acquire existing properties in Fort Trumbull, by eminent domain if necessary. The NLDC managed to acquire 98 percent of the land by voluntary agreement (albeit in the shadow of eminent domain), but 9 owners of a total of just 1.54 acres refused to sell. While the NLDC negotiated with them, the first-stage of redevelopment work commenced, including \$12 million in infrastructure improvements. Finally, in November 2000, the NLDC filed lawsuits to condemn the hold-outs' properties by eminent domain, and placed

\$1.6 million into escrow as compensation. The nine hold-outs, including Susette Kelo, sued to prevent the taking on grounds that economic redevelopment did not constitute a valid public use of their non-blighted lands.

The city prevailed both at trial and before the Connecticut Supreme Court. The U.S. Supreme Court granted *certiorari* on Sept. 28, 2004. Nine months later, the Court upheld the taking. Justice Stevens' majority opinion for the Court relied on several federal and state court precedents extending back to the nineteenth century. Those precedents established several propositions, including the following: (1) the government cannot take property from one specific private owner, *A*, and give it to another, *B*, for purely private use; and (2) it is well-settled that "economic development takings" can satisfy the Public Use Clause. In particular, the majority relied on three previous U.S. Supreme Court rulings in *Berman v. Parker*, 348 U.S. 26 (1954), *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984) and *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984). In *Berman*, the court upheld the taking of a non-blighted department store as part of a large-scale economic redevelopment plan for a "blighted" part of Washington, D.C.; in *Midkiff*, the Court approved the taking of land from a small group of oligopolists in order to create a functional, modern land market in Hawaii; and in *Monsanto*, it upheld federal pesticide legislation that permitted the federal government to "take" trade secrets upon payment of compensation in order to prevent barriers to entry in pesticide markets. The Court also pointed to other rulings that endorsed takings designed to promote mining and agriculture because of the perceived importance of those industries to the economic welfare of certain states. See *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527 (1906); *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112 (1896). Given those precedents, the majority was convinced that the Court was not breaking any new ground in upholding the taking of Susette Kelo's land for economic redevelopment. The Court found substantial evidence to support the city's determination that economic redevelopment was desirable; but it found no evidence that New London was preferring one group of identifiable private owners over another.

Justice Kennedy concurred in the judgment, but wrote separately to express his view that the Court ought to adopt a higher standard of review for redevelopment takings. Somewhat typically, he did not specify just what that higher standard of review might be. He concluded, however, that the Fort Trumbull redevelopment plan would have met whatever higher standard he had in mind.

The dissenters, led by Justice O'Connor, took a fundamentally different view of the case. Whereas the majority thought the law was well-settled by 150-years of precedents, Justice O'Connor referred to *Kelo* as a "case of first impression." What was new, in her view, was the absence of any finding that existing uses of land in Fort Trumbull were publicly harmful. Unlike in *Berman*, there was no finding of "blight," which would constitute a public nuisance; unlike in *Midkiff* (a case in which Justice O'Connor wrote the majority opinion), there was no finding that the preexisting system of land ownership was harmful. The dissenters felt that the Court should not permit redevelopment takings in the absence of an express finding, supported by substantial evidence, that the current uses of land were publicly harmful. Without such a finding, Justice O'Connor wrote, redevelopment takings only redistribute property from one group of private owners to another. This leaves all private property in the United States "vulnerable to being taken and transferred to another private owner, so long as it might be upgraded," and "effectively ... delete[s] the words 'for public use' from the *Takings Clause of the Fifth Amendment*" (*Kelo*, 125 S. Ct. at 2671-2673, O'Connor J., dissenting).

Finally, Justice Thomas, who signed onto Justice O'Connor's dissent, wrote separately to argue in favor of a literal reading of the Public Use Clause: the Constitution allows eminent domain takings when the government plans to keep the property in public ownership for the benefit of the public at large. Thus, Justice Thomas would have overruled *Midkiff*, *Berman* and all other cases allowing takings for economic development or redevelopment. Justice Thomas's separate dissent is principled (although given that principle, we might wonder why he also signed onto Justice O'Connor's dissent).

Which side had the better of the argument (leaving out Justice Kennedy's concurrence and Justice Thomas's separate dissent, neither of which attracted a second vote)? In my view, Justice O'Connor's dissent suffers from two glaring weaknesses. First and foremost, its effort to distinguish *Kelo* from *Berman* is weak. Perhaps the "urban blight" in *Berman* was more publicly harmful than the "distressed municipality" in *Kelo*. However, in *Berman* no one alleged that the department store itself was blighted. In that respect, the plaintiff in *Berman* was in precisely the same position as Susette Kelo. Meanwhile, the Court's holding and reasoning in *Kelo* do not appear to extend beyond its *Berman* decision. This is not to claim that either case necessarily was rightly decided. But it's difficult to see how Justice O'Connor and the other dissenters in *Kelo* believed they could rule against the city of New London without overruling *Berman* (as Justice Thomas would have done).

The second glaring weakness of the dissent is Justice O'Connor's hyperbolic, and frankly disingenuous, assertion that the majority's holding permits transfers from one group of private owners to another whenever property "might be upgraded." The majority took pains to stress that such transfers from one identifiable group of private owners to another ordinarily would not satisfy the Public Use Clause. In addition, the majority emphasized the history of economic deterioration in New London, the state of Connecticut's express finding that New London was a "distressed municipality," and the fact that the decision to redevelop the Fort Trumbull neighborhood was made without regard to who owned, or would come to own, the properties. In sum, contrary to Justice O'Connor's opinion, the Public Use Clause seems no more (or less) moribund after *Kelo* than it was before. Even those who would not approve of the use of eminent domain for economic redevelopment should recognize, at least, that existing precedents amply supported the Court's decision in *Kelo*.

***Kelo's* Aftermath**

The media was quick to criticize, and to mischaracterize, the Supreme Court's ruling in *Kelo*. The *Economist* (London) (Aug. 18, 2005) wrote that

Kelo “massively expanded the government’s power of eminent domain.” A *Boston Globe* reporter (June 26, 2005) claimed that *Kelo* “eviscerates ... the Public use clause.” Writing in the *Virginian-Pilot* (July 1, 2005), U.S. Rep. Thelma Drake asserted that *Kelo* authorizes “arbitrary land grabs.” All of these assertions (or many others published in other media outlets) were inaccurate, although they seemed justified by Justice O’Connor’s own mischaracterizations of the majority’s opinion in *Kelo*. Nevertheless, it is clear that *Kelo* was a deeply unpopular decision. It is not clear whether the media were leading or following public opinion, but numerous scientific and unscientific public opinion polls testified to the public’s outrage over city of New London’s treatment of poor Susette Kelo (though residents of New London overwhelmingly supported the redevelopment of Fort Trumbull), and the Supreme Court’s decision to uphold the takings. Indeed, some opinion polls suggested that Americans are opposed to any and every use of eminent domain; private property should be sacrosanct (www.cnn.com/POLLSERVER/results/18442.exclude.html).

Given the polls and the media coverage, it is unsurprising that *Kelo* quickly attracted the attention of state and federal legislators, who immediately began efforts to undo the ruling’s effect. At the federal level, Congress held hearings into the *Kelo* decision. During the Supreme Court nomination hearings for John Roberts and Samuel Alito, senators inquired about the nominees’ views on eminent domain. In 2005, Congress enacted appropriations legislation (H.R. 3058) for the 2006 fiscal year that, among other things, limited federal funding for federal, state, and local highway and housing projects that used eminent domain. The legislation specified that federal funds could not be used for economic development purposes that primarily benefit private entities. Also in 2005, the House of Representatives passed a more comprehensive “solution” to the eminent domain “problem.” The 2005 Private Property Rights Protection Act would prohibit the use of eminent domain for any economic development projects receiving federal funding, and impose penalties on states that use eminent domain in federal funded projects. Since most economic development and redevelopment projects involve some federal

funding—the federal government provided \$2 million for the Fort Trumbull redevelopment project in New London, Connecticut—the 2005 Private Property Rights Protection Act, if enacted, would significantly reduce the use of eminent domain for economic (re)development. As of this writing, the Private Property Rights Protection Act is still awaiting action in the Senate.

Meanwhile, according to the property-rights advocacy group the Castle Coalition (<http://eminentdomainabuse.org/legislation/passed/index.html>), 28 states already have enacted eminent domain reform laws in the wake of *Kelo*, and as of this writing 47 states are considering more than 450 separate legislative proposals to limit their own (and their cities’) powers of eminent domain. The vast majority of these legislative proposals will never make it to governors’ desks; but a few will, and at least some of those will impose real limitations on eminent domain.

Of the state laws enacted so far, some accomplish very little, while others are quite significant. An example of *faux* legislative change is Alabama’s 2005 Eminent Domain Code, which prevents the use of eminent domain “for the purpose of nongovernmental retail, office, commercial, residential, or industrial development or use,” *except* for blighted areas. This law would not prevent a case like *Berman* or *Kelo* from arising; it would simply force cities to make specific findings that an area was blighted.

The state of South Dakota, by contrast, adopted an eminent domain reform law that appears more stringent. That law prohibits the use of eminent domain to transfer land from one private person to any other “private person, nongovernmental entity, or other public-private business entity.” In addition, it prohibits the use of eminent domain “primarily for enhancement of tax revenue.” These are fairly significant limitations, or they would be if the practice of eminent domain in South Dakota actually required reform. The fact is that eminent domain is almost never used for economic (re)development in states like South Dakota.

Indiana’s 2006 Eminent Domain law (H.R. 1010) is both tough and relevant. It specifies that “public use ...

does not include ... economic development, including an increase in the tax base, tax revenues, employment, or general economic health.” And, in accordance with Justice O’Connor’s dissent in *Kelo*, it limits the use of eminent domain to “public nuisances,” “fire hazards,” “structures unfit for human habitation” and “unimproved or vacant” lands. The Indiana statute also raises the costs of eminent domain by requiring super-compensation: governments must pay 150 percent of fair market value when they take occupied residential properties and 125 percent of fair market value when they take agricultural lands. And landowners who fight eminent domain are entitled to recover “reasonable attorneys fees.” There is no question that this new statute has effectively curtailed the ability of state and municipal governments to exercise eminent domain for economic (re)development purposes.

***Kelo*’s Legacy**

When the Supreme Court decided *Kelo v. City of New London*, it seemed a clear victory for municipal governments, local planners and developers over lower- and middle-class property owners like Susette Kelo. If it was a victory, it was pyrrhic and short-lived. The ongoing backlash against *Kelo* may well make it far more difficult for local governments in many states to engage in economic (re)development takings than it ever was before *Kelo*. Even in states that have not yet enacted laws to counteract *Kelo*, municipal officials and local developers are feeling the sting of the backlash. Even the city of New London, which has a clear legal right to evict Susette Kelo and the other hold-outs from their properties, has grown wary of public disapproval, and negotiated a settlement instead. A thousand miles away, in St. Louis, Missouri, the same chilling effect has “killed” at least two redevelopment projects. According to the city manager of Maplewood City, a suburb of St. Louis, after *Kelo* it suddenly became harder to use eminent domain (*St. Louis Post-Dispatch*, Aug. 28, 2005 at B1). Developers and commercial lenders, too, are concerned about the adverse publicity. In January 2006, BB&T, the country’s ninth largest financial holdings company with \$109.2 billion in assets, announced that it no longer would finance development projects involving lands taken from private citizens by

eminent domain. And it is not just adverse public opinion that worries them, but also the threat of lawsuits from well-heeled property-rights advocacy groups like the Institute for Justice, which financed and argued the *Kelo* case all the way to the U.S. Supreme Court.

The ultimate legacy of *Kelo* may be as a reminder that constitutional rights are protected not only by the courts, but also by democratically elected bodies. At least occasionally, those political bodies may provide more and better protection than the courts for some constitutional rights. This finding would surprise many, if not most, jurists, especially with respect to private property rights. James Madison wrote the Takings Clause into the Fifth Amendment to the U.S. Constitution because he was concerned that property owners would become a “vulnerable minority,” subject to dispossession by the non-property-owning majority. JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 54 (1998). Justice Oliver Wendell Holmes, in the famous *Pennsylvania Coal* case, wrote that when the Constitution’s “seemingly absolute protection” of private property “is found to be qualified by the police power, the natural tendency of human nature is to extent the qualification more and more until at last private property disappears.” *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922). Seventy years later, Justice Antonin Scalia asserted, in the equally famous *Lucas* case, that legislative bodies would always seek to impose burdens on discrete private landowners and avoid paying compensation whenever they could get away with it. *Lucas v. South Carolina Coastal Council*, 505 US 1003, 1025 n.12 (1992). The aftermath of *Kelo* suggests that these three outstanding jurists were, to some extent at least, wrong. State legislatures (and even some cities) are in the process of doing exactly what Madison, Holmes and Scalia have suggested they never could or would do: imposing legal constraints on themselves to prevent (real or perceived) abuses of eminent domain.

In the next issue of this newsletter, I will provide further theoretical reasons for, and empirical evidence of, the political protection of private property rights.

REJECTING KELO: NORWOOD V. HORNEY

Jamison Colburn

In July, the Ohio Supreme Court announced *Norwood v. Horney*, ___ Ohio St.3d___ (Ohio 2006) (slip op.). In doing so, it became the most recent state high court to reject the Supreme Court’s interpretation of “public use” in eminent domain, most recently stated in *Kelo v. City of New London* 125 S. Ct. 2672 (2005). “Where the exercise of eminent domain is rationally related to a conceivable public purpose, the United States Supreme Court has never held a compensated taking to be prohibited by the public-use clause.” *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, ___ (1982) (O’Connor, J., for the Court). The story in state court has been somewhat different. See Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 96 (1986) (finding state courts are more likely than federal courts to invalidate takings as not being for a public use). Only now, the differences are reverberating in an echo chamber of ideological combat. The result seems to be calculated overreactions in an abstruse debate that threatens any real progress in land use law in the coming years.

In 2004, the Michigan Supreme Court decided *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004), a case interpreting the Michigan Constitution’s “public use” clause to invalidate a redevelopment taking where the land was to be transferred into private hands. *Hathcock* attracted so much attention—having reversed an opinion, *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981), that famously set the public use standard so low as to be virtually a dead letter—that many viewed it as the beginning of a revolution in eminent domain. See, e.g., Symposium, *The Death of Poletown: The Future of Eminent Domain and Urban Development After County of Wayne v. Hathcock*, 2004 MICH. ST. L. REV. 837. Thus, after the *Kelo* disappointment, the Ohio case was highly anticipated, having been the target of many amicus curiae briefs, the subject of chatter in the blogosphere, and, of course, of academic prognostication.

Whatever the opinion lacked in analysis, it more than made up for in rhetorical fireworks. What has under Fifth Amendment jurisprudence long been a very deferential analysis of the local government’s preferred use of the land being condemned, now seems an occasion—at least in several state courts—for searching judicial scrutiny. Some state high courts have long maintained that public use is a real element in any challenge to an exercise of eminent domain. See, e.g., *In re City of Seattle*, 638 P.2d 549 (Wash. 1981). And others have basically adopted the federal courts’ approach. See, e.g., *Yonkers Community Dev. Agency v. Morris*, 335 N.E.2d 327 (N.Y. 1975); see generally Corey J. Wilk, *The Struggle Over the Public Use Clause: Survey of Holdings and Trends, 1986-2003*, 39 REAL PROP. PROB. & TR. J. 251 (2004).

Since *Kelo*, though, we have seen a regular kulturkampf explode over the fairness of takings for economic redevelopment. Saying when it is fair to take property from present owners as part of some larger plan to move other landowners into town, of course, is no easy task. In fact, if *Norwood* is any indication of what is to come, it seems to have become the perfect storm of legal ambiguity, ideology, and cause-lawyering. Many state constitutions track the language of the Fifth Amendment closely, at least implying (as does the Fifth Amendment) that private property can never be taken for others’ “private” use. The provision the Ohio court was applying in *Norwood* says the following:




Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure, or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money, and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.

Ohio Const. Art. I, § 19.

Dicta and interpretive glosses on what constitutes a public use from around the country and across time do more work in the *Norwood* opinion than any textual analysis of that language, though. Indeed, vague allusions to god and natural law even adorned the opinion. See *Norwood*, slip op. at *13 (“Believed to be derived fundamentally from a higher authority and natural law, property rights were so sacred that they could not be entrusted lightly to “the uncertain virtue of those who govern.””). *Norwood*’s ordinance authorized its officials to condemn land within any areas they found were “deteriorating.” But with no concrete proof that the petitioners’ neighborhood was actually deteriorating (the court rejected it all as circumstantial), *id.* at * 41-44, the city was made to seem callow, unfeeling—kicking families out of homes for no other reason than profit.

The importance of property to personhood is something no one could say was lost on the Ohio court. Of course, property is very different from most other fundamental rights in our legal culture in that it has been so thoroughly commodified. Unlike other fundamental rights, property *is* alienable—the very thing that makes it a commodity. For all the searching scrutiny the court heaped on the city of *Norwood* and its economic plans for the neighborhood in question, the reader cannot help wondering where all the sanctimony surrounding property has come from lately. Not that this is a complaint. Environmental lawyers have long been the butt of jokes when they suggest that land isn’t *just* a commodity and that special care ought to be taken with its transfer from A to B just because B’s use of it might be more utilitarian. And if anyone’s property has a bulls-eye on it for economic development takings, after all, it is the land trusts and conservation organizations that own their real property for precisely anti-“development” reasons. But for all the Ohio court’s cynicism toward *Norwood*’s redevelopment plans (and there was a lot of it), it offered surprisingly little to back up its conclusion that what ails eminent domain today is too little judicial review based on concepts like “public use.” Indeed, underlying a lot of the recent sanctimony about property seem to be two essentially unproven premises: that local government is especially prone to abusing the power of eminent domain and that the

“public use” concept in constitutional takings provisions is the best check on that abuse. The procedural posture of *Norwood* saved the Ohio court from having to prove either of them in this opinion. But before too much of modern land use law is pulled into this kulturkampf, it would be a real public service if someone would either prove or refute those two propositions. There is little doubt that municipalities face horizontal competitive pressures today that are intensifying the need to pull in wealthy residents. But if that is so, more judicial scrutiny at this one juncture will only deflect their efforts to attract and keep those residents; it won’t deter them.



Constitutional Law
Committee Newsletter

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RECENT CASES OF NOTE

Robin Kundis Craig

Standing Litigation

The U.S. Court of Appeals for the Ninth Circuit has been focusing on the proper evaluation of whether a procedural injury can support standing in an environmental case. In *Earth Island Institute v. Ruthenbeck*, — F.3d —, 2006 WL 2291168 (9th Cir. Aug. 10, 2006), it held that Earth Island Institute had standing to challenge the Forest Service’s categorical exclusions established pursuant to the National Environmental Policy Act (NEPA), because the loss of an administrative right of appeal was a sufficient procedural injury to support standing. However, in *Nuclear Information & Resource Service v. Nuclear Regulatory Commission*, — F.3d —, 2006 WL 2042893 (9th Cir. July 24, 2006), the court held that while the procedural injury deriving from a federal agency’s failure to prepare an Environmental Impact Statement (EIS) under NEPA can support standing, no standing will exist when the plaintiff merely pleads a “free floating assertion” of a procedural violation that is not linked to a more concrete interest of the plaintiff.

International standing became an issue with respect to the All-American Canal. A Mexican and an American non-governmental organizations sued the Department of the Interior and the Bureau of Reclamation to challenge the agencies’ plan to line the All-American Canal to prevent seepage of water, on grounds that other people and legally protected species had been relying on the seeping water for survival. However, the U.S. District Court for the District of Nevada held that the Mexican organization lacked standing to bring any of its claims. *Consejo de Desarrollo Economico de Mexicali, A.C. v. United States*, — F. Supp. 2d —, 2006 WL 1788407 (D. Nev. June 26, 2006). First, the organization lacked standing to bring its Fifth Amendment takings claim because the Fifth Amendment does not protect foreign organizations. It lacked standing under the 1944 Water Treaty because the treaty did not extend rights to private parties, and it lacked standing under the Administrative Procedure Act because it had not alleged that act as a cause of

action. Finally, the organization lacked organizational standing under the Endangered Species Act, the Migratory Bird Treaty Act and the San Luis Rey Act because the environmental interests at stake in the litigation did not relate to the purposes of the organization.

Commerce Clause Litigation

The U.S. Army Corps of Engineers did not violate the Commerce Clause in interpreting Clean Water Act “navigable waters” to include tributaries of waters that are navigable-in-fact. *United States v. Hubenka*, 438 F.3d 1026, 1032 (10th Cir. 2006).

In contrast, Washington’s Cleanup Priority Act violated the dormant Commerce Clause by unconstitutionally discriminating against the import of low-level radioactive waste into the state. *United States v. Manning*, 434 F. Supp. 2d 988, 1009-14 (E.D. Wash. 2006). Even though the Washington statute was not facially discriminatory, a close reading of its provisions reveals that the act “effectively closes Washington’s border to low-level radioactive waste . . .” As a result, the act failed the strict scrutiny test.

Similarly, an Ohio solid waste disposal service successfully challenged the West Virginia Public Service Commission’s certificate of convenience and necessity requirement on dormant Commerce Clause grounds. *Harper v. Public Service Commission of West Virginia*, 427 F. Supp. 2d 707, 723-24 (S.D. W. Va. 2006). While the requirement was not facially discriminatory, it nevertheless violated the Commerce Clause because it imposed significant burdens on interstate commerce that were clearly excessive in light of the benefits that West Virginia received.

Supremacy Clause and Preemption Litigation

The Supremacy Clause can work as a source of immunity for officers implementing the Endangered Species Act. Specifically, federal officers monitoring the gray wolf population in Wyoming had Supremacy Clause-based immunity from state-law trespass actions. *Wyoming v. Livingston*, 443 F.3d 1211, 1226-27 (10th Cir. 2006).

With regard to federal preemption of state law, the U.S. District Court for the District of Massachusetts held that Title II of the Ports and Waterways Safety Act field preempted the provisions of the Massachusetts Oil Spill Prevention Act that purported to create manning requirements for tank barges. *United States v. Commonwealth of Massachusetts*, — F. Supp. 2d —, 2006 WL 2051649 (D. Mass. July 24, 2006). The U.S. District Court for the Eastern District of Washington held that the Atomic Energy Act preempted the provisions of Washington’s Cleanup Priority Act that would have allowed the state to abate uncontrolled releases or potential releases of radioactive substances, concluding that neither the Resource Conservation and Recovery Act (RCRA) nor the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) had given the state that authority. *United States v. Manning*, 434 F. Supp. 2d 988, 994-1009 (E.D. Wash. 2006).

In contrast, the U.S. District Court for the Western District of North Carolina held that the Clean Air Act does *not* preempt North Carolina’s nuisance action against the Tennessee Valley Authority’s coal-fired electric generating units in Tennessee, Alabama and Kentucky. *North Carolina ex rel. Cooper v. Tennessee Valley Authority*, — F. Supp. 2d —, 2006 WL 2042537 (W.D.N.C. July 21, 2006). Similarly, the U.S. District Court for the District of Oregon held that CERCLA does *not* preempt the Oregon statute of repose that applies to a purchaser’s negligence claim regarding mining waste discovered on the real property.

First Amendment Litigation

The Utah Constitution provides that voter-initiated legislation related to wildlife must receive a two-thirds majority vote in order to become law. When wildlife and animal advocacy groups challenged this supermajority provision on grounds that it unconstitutionally burdened core political speech in violation of the First Amendment of the U.S. Constitution, the U.S. Court of Appeals for the Tenth Circuit disagreed. *Initiative and Referendum Institute v. Walker*, 450 F.3d 1082 (10th Cir. 2006). “Although the First Amendment protects political

speech incident to an initiative campaign, it does not protect the right to make law, by initiative or otherwise.” *Id.* at 1099.

Similarly, environmental settlements are free of First Amendment strictures, at least according to the U.S. District Court for the Western District of Virginia. That court held that a sealed settlement in an environmental lawsuit over an explosion of a landfill did not violate the victim’s First Amendment rights. *Stephens v. County of Albermarle*, 422 F. Supp. 2d 640, 643-44 (W.D. Va. 2006).

Fourth Amendment Litigation

Searches at the Bureau of Land Management’s check point at the entrance to a federal recreation area did not violate the Fourth Amendment, the Ninth Circuit ruled, because “many of the BLM’s objectives—increasing fire safety, enhancing environmental protection, reducing litter, and eliminating drug sales and use—are important if not readily observable.” *United States v. Faulkner*, 450 F.3d 466, 473 (9th Cir. 2006). Similarly, there was no Fourth Amendment malicious prosecution violation for prosecution of a septic tank pumping business when several entities along the way had approved the prosecution. *Ayala v. KC Environmental Health*, 426 F. Supp. 2d 1070, 1093-94 (E.D. Cal. 2006).

Fifth Amendment Takings Litigation

The U.S. Court of Appeals for the Federal Circuit has twice dismissed takings claims on statute of limitations grounds, emphasizing that takings claims against the federal government accrue on the date when the relevant *federal actor* takes action, not when federally authorized private actors take action. Thus, in *Goodrich v. United States*, 434 F.3d 1329, 1333-34 (Fed. Cir. 2006), the court held that cattle ranchers’ cause of action against the United States for a taking of their water rights on federally owned grazing lands accrued when the Forest Service adopted its Record of Decision (ROD) in an Environmental Impact Statement allowing another rancher to use the water—not on the date when that rancher actually began to use the water—because the ROD was the final agency action on the matter.

Similarly, the Federal Circuit held that a lessee's physical takings claim brought in response to landfill remediation by the lessor was time-barred. *John R. Sand & Gravel Co. v. United States*, — F.3d —, 2006 WL 2267100 (Fed. Cir. Aug. 9, 2006).

According to the court, the takings claim accrued, and the six-year statute of limitations began to run, when *the government* first constructed a security fence around the site.

Wetlands restoration enforcement orders do not constitute a Fifth Amendment taking, according to the Federal Claims Court. Specifically, in *Brace v. United States*, — Fed. Cl. —, 2006 WL 2261332 (Aug. 4, 2006), the court held that the portions of a Clean Water Act consent decree requiring the defendant to restore 30 acres of filled wetlands did not constitute either a regulatory or a physical taking of the defendant's property, while the portions of the consent decree that required the defendant to flood his farm following the wetlands restoration was not a physical taking, either (regulatory taking was not argued).

Fifth Amendment Due Process Litigation

The U.S. Court of Appeals for the Eighth Circuit reaffirmed its decision in *United States v. Dico*, 266 F.3d 864, 878-80 (8th Cir. 2001), that retroactive application of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) does not violate due process. *United States v. Vertac Chemical Corp.*, 458 F.3d 1031, 1047-48 (8th Cir. 2006).

Eleventh Amendment Sovereign Immunity

The U.S. Court of Appeals for the Fifth Circuit held that removal to federal court of a state-law negligence action against, *inter alia*, the Louisiana Department of Environmental Quality for an environmental release of mercury did not automatically violate the Eleventh Amendment. *Frazier v. Pioneer Americas LLC*, 455 F.3d 542, 546-47 (5th Cir. 2006). According to the Court of Appeals, because the Louisiana Department of Environmental Quality did not join in the removal petition, its sovereign immunity defense remained intact. However, "[a] federal court may ignore sovereign immunity until a state asserts it." *Id.* at 547.

Fourteenth Amendment Equal Protection

The U.S. District Court for the District of Hawai'i upheld, against an equal protection challenge, a land use regulation that allowed single family residences in floodplains and coastal high hazard areas but not in other types of state-designated limited subzones. *Waimea Bay Associates One, LLC v. Young*, — F. Supp. 2d —, 2006 WL 1582433 (D. Haw. June 5, 2006). According to the court, the distinction survived a "rational basis" review because the state had a legitimate interest in protecting natural resources while balancing such protection against the needs of its citizens.

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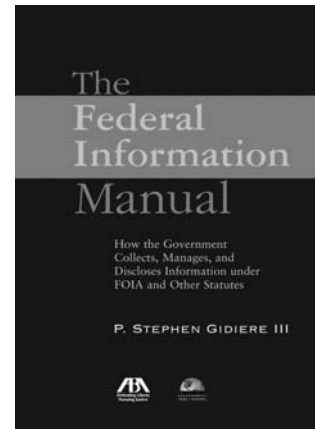
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