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PROPERTY LAW SYMPOSIUM

INTRODUCTION

JEANETTE BURRAGE*

As land use controls grow in number and degree the people and courts are questioning the conflict between these controls and property rights. The Northwest Legal Foundation was created in 1988 to represent a broad range of people being harmed by governmental misuse of power. The Foundation's primary mission is to promote civil rights associated with ownership and use of private property, through education and litigation. Education is achieved through newsletters to members, speaking to community groups, appearances on talk shows, and information given to elected officials considering new legislation. All litigation accepted by the Foundation must have broad public impact and must be approved by the Board of Directors.

The following articles are major revisions of presentations made by the authors at the Northwest Legal Foundation's Property Law Symposium-1992. The goal of Property Law Symposium-1992 is to focus on the very basic origins and reasons for private property rights. The first symposium speaker was Professor Richard Epstein from the University of Chicago School of Law. A panel of three commentators critiqued him, after which Professor Epstein responded to the panel's comments. The panel was moderated by Wallace Loh, Dean at the University of Washington School of Law. (Mr. Loh is the first Asian American Law School Dean in the United States.) Participants at the symposium asked questions of panel members and Professor Epstein.

In later symposium sessions, William H. Mellor, President and General Counsel at the Institute for Justice and Professor Lloyd Cohen of the Chicago-Kent School of Law each made one hour presentations.

PROFESSOR RICHARD EPSTEIN

Professor Epstein describes a system of property rights with enduring universality which, as he puts it, leaves no areas in which the legal system cannot reach a principled decision.

His presentation and writings advocate a legal system grounded in individual property rights. A tort system is essential to protect the property

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rights of the owner, or instability will lead to decreased investment. Rules of transfer for property, including contracts, are needed to move property to the hands of an owner who can obtain the most value from it.

Professor Epstein analyzes property systems for different types of property including oil and gas, water, and information. He distinguishes between property in the public domain (like mathematical theorems) and property controlled by government (for the benefit of the public). He also discusses labor markets, because one's labor is also a property interest.

In the land use area, Professor Epstein says that if the government has veto power on use, and the owner must obtain permission to use his own land, protracted negotiations occur. "Land use planning is a form of socialism in microcosm." The inefficiencies of central planning of course occur.

Epstein questions the duty of selected individuals to use their private land for wildlife breeding grounds. As an example of recent trends to expand government land use planning he uses the Washington State Growth Management Act, showing how the Act leaves landowners "unprotected against the pervasive risk of favoritism and faction."

PROFESSOR STEVEN EAGLE AND MR. WILLIAM MELLOR, III

Mr. William Mellor made the oral presentation at the symposium, on the type of scrutiny courts could use when evaluating cases involving property rights. He observed that while no one case will restore the economic liberties we have lost over the last 50 years, we can help shape the level and type of discourse on such legal issues. He spoke of looking for cases that would be incremental targets of opportunity.

In their article on *An Evolving Return to Property Rights*, Professor Steven J. Eagle and William H. Mellor, III discuss the history of regulatory taking cases at the United States Supreme Court. The authors explain that there are three levels of scrutiny the Court uses when reviewing legislative actions. Depending on the type of right alleged to be violated, the court uses either a rational basis test, an intermediate test, or a strict scrutiny of the law.

Throughout the article, Eagle and Mellor look at regulatory takings cases, and the type of scrutiny applied by the Court. Their focus is on an evolution of cases which, in their words, make it likely that the Court is in "an evolution back towards recognition of individual property rights under per se rules and increased judicial scrutiny."

PROFESSOR LLOYD COHEN

The article written by Professor Cohen, *The Public Trust Doctrine: An Economic Perspective*, reviews the historical (Roman and English) public doctrine trusts. He also discusses the modern American doctrine, or what

he calls the “jumbled and evolving body of case law and commentary that constitutes the current legal requirements and understanding of the doctrine.”

The optimal (for economic efficiency) public trust doctrine is neither the past nor current doctrines, but one that requires that just compensation be paid *to* the government when tidelands or shorelines are sold into private hands. Professor Cohen points out a difficulty, that of determining what compensation is just, for a publicly owned parcel.

Professor Cohen offers the easily understandable proposition that secure property rights encourage long term investment, which usually leads to a positive return, both for the individual and for a society as a whole. He questions whether a doctrine of invalidating sales of government owned property (or major portions of rights acquired) a hundred years after the sale, with no refund to the private party, will lead to security in property.

CONCLUSION

The staff, Board of Directors, and Advisory Board of the Northwest Legal Foundation hope you will find the following articles to be enlightening and useful. Whether you are a property owner, a seasoned attorney or a bold new advocate, we hope these articles offer a basis for a return to property rights, and the economic successes such rights produce.

