The John Marshall Law Review

Volume 40 | Issue 2 Article 1

Winter 2007

Foreword: Real Estate Law and Practice Symposium Issue of the John Marshall Law Review, 40 J. Marshall L. Rev. xix (2007)

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FOREWORD: REAL ESTATE LAW AND PRACTICE SYMPOSIUM ISSUE OF THE JOHN MARSHALL LAW REVIEW

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The Center for Real Estate Law at The John Marshall Law School presented two extraordinary conferences in fall 2006. The conferences respond to the importance of commercial real estate as an industry and to the significance of the law in shaping aspects of it that have an impact on individuals as well as on business players. The conferences brought together both academics and nationally known practitioners to reflect on significant issues that the real estate community has faced and will continue to consider.

In a unique effort, the Fair Housing Legal Support Center joined the Center for Real Estate Law in presenting "What King Wrought? The Impact of the Summer of 1966 on Housing Rights." It provided a look backwards in tribute to the march of Dr. Martin Luther King on Chicago, and a look forward to consider proposals for remedying the continuing problems of now illegal discrimination in housing and the continuing lack of decent rental housing. This conference brought together prominent scholars, practitioners, and activists. Some were involved in civil rights work forty years ago. Others lament that the deficiencies of the housing system identified in 1966 remain unresolved.

The Kratovil Conference on Real Estate Law and Practice has regularly produced articles for a symposium issue of *The John Marshall Law Review*. The 2006 Conference "The Takings Clause Clarified by the U.S. Supreme Court — *Lingle v. Chevron*: Regulations, Exactions and Eminent Domain" featured Professor David L. Callies as the keynote speaker. His presentation, "Legitimate State Interest Test and Unconstitutional Conditions after *Lingle v. Chevron*," provided the basis for discussion by both the academic panel and a panel of distinguished practitioners. This Symposium issue includes articles that flowed from that discourse.

The articles from these two conferences cover topics that initially appear to be distinct and unrelated. However, there are several commonalities they share that give sense to publishing

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them in this symposium issue devoted to real estate law and practice. First, the concept that it is necessary to look back in order to understand the present situation and predict or propose the future was a theme in both and is a unifying theme in the articles. Second, both conferences touch on the fundamental issue of governmental interference in the rights of owners to use and to develop their properties. The evolution of the applicable law, including governmental regulation and other actions, defines both our notion of property ownership and individual and societal rights in property. Thus the "Takings" doctrine and the law that developed about guaranteeing decent housing free of discrimination both generate strong public reactions, much controversy, and the need for the serious study that the reader will find here.

I. HOUSING RIGHTS ARTICLES

Professor Richard Chused with the detail characteristic of his other reporting of important Property cases[1] reminisces on his experience as recipient of a Law Students Civil Rights Research grant in the summer of 1966 between his first and second years as a student at the University of Chicago Law School. His story of a "quite elderly, thin, white woman" who was only allowed to answer one question that the judge in the Cook County, Illinois Eviction Court posed, "Have you paid the rent?" vividly portrays the limits of tenant protections in 1966. The political activism and litigation that gave rise to the implied warranty of habitability in rental housing[2] and protection of buyers of houses under land installment contracts[3] (that at the time provided none of the consumer protections of foreclosure procedures) were yet to come in Cook County, Illinois and other places, often through efforts of legal services attorneys funded by the Office of Economic Opportunity. His sharp recall of events forty years ago provides a rare glimpse of this period from the perspective of a new law student for whom this experience was a defining moment in Chused's scholarly focus in the field of Property Law. It provides inspiration to law students by demonstrating the importance of what substantive law applies and of lawyering for the individual at the lowest rung of ownership rights in housing the residential tenant.

Professor Mary Spector, identifies the "increasingly complex legal climate in an ever-changing social environment" as the basis for her stories of two residential tenants experiencing the

1. *See, e.g.*, RICHARD H. CHUSED, CASES MATERIALS AND PROBLEMS IN PROPERTY (1999); RICHARD H. CHUSED, A PROPERTY ANTHOLOGY (2d ed. 1997).

2. *See* Jack Spring v. Little, 280 N.E.2d 208 (Ill. 1972).

3. *See* Rosewood v. Fisher, 263 N.E. 2d 833 (1970).

limitations of summary eviction procedures on the exercise of their rights to decent housing. *Tenant Stories: Obstacles and Challenges Facing Tenants Today*, follows up on her earlier article[4] in illustrating the "serious collateral consequences that a tenant may suffer after the conclusion of the landlord-tenant relationship."

For example, for tenants receiving federal rent subsidies, like "Teresa," the summary nature of eviction proceedings and their limited scope may mean that the tenants will be ineligible for future subsidies. The Texas Supreme Court's refusal to consider an appeal of an eviction order because of mootness meant that Teresa and her family might be terminated from the subsidy program. In having been "evicted" with no right to appeal, she came within the provisions of federal regulations that penalize any tenant who is evicted for "serious violation of the lease" or where "any family member has been evicted from federally assisted housing in the previous five years."

Based upon her experience in the New York City courts, Professor Mary Marsh Zulack makes a very practical suggestion for guaranteeing the warranty of habitability in rental housing. *If You Prompt Them, They Will Rule: The Warranty of Habitability Meets New Court Information Systems* incorporates common prompting by computer technology to facilitate judges' ability to accelerate actual repair of rental housing from the bench.

Professor Zulack complains that the implied warranty of habitability and even a right of rent abatement do not "actually secure repairs" of the premises that are part of the public policy justification for the legal reform. She traces an argument for specific performance of the duty on the landlord to meet the warranty of habitability by looking to the *Restatement (Second) of Contracts* at Section 357(a). Still, she identifies systemic information problems in the Eviction Court that would make the remedy unworkable. Without information about the condition of the apartment, information about a landlord's other violations of the building code, information about the parties' settlement stipulations (especially when the tenant is often pro se), the specific performance approach will not be practical. The work of Professor Zulack and her students in Columbia Law School's Lawyering in the Digital Age Clinic, as so carefully described in her article, may help the New York City Housing Court develop the database and technology necessary to guarantee that the repairs get made in accordance with the standard of habitability.

Professor Robert G. Schwemm whose work is widely praised

4. Mary Spector, *Tenants Rights, Procedural Wrongs: Summary Evictions and the Need for Reform*, 46 WAYNE L. REV. 135 (2000).

in the area of discrimination in housing[5] provides an analysis of racial discrimination in rental housing to supplement existing work on discrimination in the residential sales and lending industries. As Alexander Polikoff[6] eloquently argued at the conference, the "fact that there is law making discrimination in housing illegal does not mean that such discrimination does not still exist years after enactment of the Fair Housing Act." In *Why Do Landlords Still Discriminate (and What Can Be Done About It)?* Professor Schwemm employs an analogy of a patient who endures years of considerable pain and impaired mobility caused by a growth on his back. When a treatment is discovered the patient faithfully uses a new drug, relying on doctor's advice that a cumulative effect over time will reduce the symptoms, though it will not be a cure. Professor Schwemm asks what the patient would do after twenty years without any improvement — "would you change doctors, get a second opinion, insist on some new approach . . . [o]r would you continue with the same course of action indefinitely?"

Professor Schwemm presents evidence that the disease of discrimination in rental housing continues and concludes that after twenty years the legal cure has not really remedied the problem. He reviews and analyzes lessons from economics and psychology to come up with something new that might improve compliance with the Fair Housing Act. Otherwise, "If we simply go on using the failed treatment, one has to wonder if we really want to get better — or deserve to."

Professor Lloyd T. Wilson, Jr. pulls together the housing part of this symposium issue by examining and describing the philosophy of personalism and its impact on Dr. Martin Luther King's social ethics. Professor Wilson focuses on the personal experiences of three conference speakers, including Kathleen Clarke, Executive Director of the Lawyers' Committee for Better Housing, and Michael E. Pensack, Executive Director of the Illinois Tenants Union, both of whom are alumni of The John Marshall Law School and who have taken King's "personalistic principles" as the basis for their life's work.[7]

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5. ROBERT SCHWEMM, HOUSING DISCRIMINATION AND LITIGATION (1990) is the recognized treatise.

6. Alexander Polikoff served as executive director of the Business and Professional People for the Public Interest in Chicago until 1999. He serves as senior staff counsel. His new book, WAITING FOR GAUTREAUX: A STORY OF SEGREGATION, HOUSING AND THE BLACK GHETTO (2006) provides more of the story of the problems and the litigation.

7. John Relman, who heads up a public interest law firm in Washington, D.C. is the third speaker in Wilson's analysis. Relman declared that the "unenforceable obligation to love" is the proper response to a question about the future of the Fair Housing Movement. Wilson views Relman's emphasizing the "ethical imperative of free moral agency" as a part of the

Wilson wonderfully explains that Dr. King's accomplishments are inextricable from "what King thought about the nature of reality and of persons." And, Wilson argues that King's legacy is both to show the inextricability between an individual's moral and ethical imperatives and their work, and also to place "personalism within the larger context of the relationship of ideas to general social progress." It is this legacy that helps lawyers especially to continue to work for fair and decent housing for all citizens.

II. KRATOVIL CONFERENCE ARTICLES

Publication of these articles written by participants in the 2006 Kratovil Conference on Real Estate Law and Practice, "The Takings Clause Clarified by the U.S. Supreme Court in *Lingle v. Chevron,*" continues the tradition of Kratovil presenters preparing articles published by *The John Marshall Law Review.* This tradition began with publication of "Solutions to the Affordable Housing Crisis: Perspectives on Privatization" by Professor Peter W. Salsich, Jr., McDonnell Professor of Justice in American Society, St. Louis University School of Law.[8] Professor Salsich gave the keynote address at the Inaugural Kratovil Conference presented in the fall of 1994.

The United States Supreme Court's decision in *Lingle v. Chevron U.S.A, Inc.* also decided in 2005 did not make front page headlines or result in feature articles. It did not even catch the attention of many practitioners. So why did the 2006 Kratovil Conference focus on this little known Supreme Court Decision with the Court's unanimous opinion written by Justice Sandra Day O'Connor which involved a regulation instead of an express exercise of eminent domain?

The decision in *Lingle* was significant because the Court overruled the test of when land-use law does not constitute a taking established in *Agins v. City of Tiburon.* The Conference speakers argued that the decision in the *Lingle* did not resolve or give clear direction as to when a regulatory taking gives rise to a right to compensation. In short the decision failed to provide a clear and more useful test. The Kratovil Conference articles consider *Lingle* from a variety of perspectives to reach this shared evaluation.

The article by Professor David L. Callies (the Kratovil keynote speaker) and Christopher T. Goodin, *The Status of* Nollan v. California Coastal Commission *and* Dolan v. City of Tigard After Lingle v. Chevron U.S.A., Inc., examines and reviews the Court's conclusion that the test announced in the *Nollan* and *Dolan* cases remain viable after the *Lingle* decision. Callies and

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legacy of Dr. King's personalism philosophy.

8. 28 J. MARSHALL L. REV. 263 (1995).

Goodin conclude that the *Nollan* and *Dolan* tests were not disturbed by the decision in *Lingle*.

Deconstructing Lingle*: Implications for Takings Doctrine* by Professor Dale Whitman begins by characterizing Justice O'Connor's opinion in *Lingle* as one of her most important opinions in the field of land use regulation by eliminating future reliance by landowners on the due process takings notions of *Agins*, thus "removing a significant litigation risk for local and state governments." Professor Whitman then moves on to discuss two implications of the *Lingle* decision the Court may not have recognized. First, he considers whether the *Lingle* decision destroyed the "character of governmental action" prong of *Penn Central*'s takings test. Whitman "grapples" with the explanation of the test "[s]ince the Supreme Court has never explained exactly what the [test is]." He concludes that the three possible approaches to understanding the test share a common thread, "depend[ing] on the government's reasons or motivations for taking the regulatory action" and are not "legitimate today" if Justice O'Connor's position in *Lingle* is taken seriously. He takes this as a "salutary development."

Nevertheless, Professor Whitman argues convincingly that notwithstanding *Lingle*'s denigration of legitimate public purposes as being a factor in takings cases, the governmental purposes and objectives remain highly relevant in assessing whether a taking is justified. Whitman's careful analysis of *Lucas* "background principles" shows that the character of government action considerations are alive and well, but still in a form that is unclear and debatable into the future.

Professor Richard A. Epstein, as author of an amicus brief submitted to the Supreme Court in the *Lingle* case, was the only Conference participant who had been involved in the case. His article *From* Penn Central *to* Lingle*: The Long Road Backwards* examines what he calls "the (negative) contribution that the Supreme Court's decision has made to a systematic understanding of the larger law governing the taking of private property." Blending economic analysis and property law concepts, Professor Epstein discusses why the standards from the *Penn Central* case which Justice O'Connor endorsed in *Lingle* are no more responsive to the underlying issues than the *Agins* test she overruled.

Professor Epstein exposes and criticizes the Supreme Court for leaving us with the "enduring disjunction between the massive sophistication that private lawyers use to wring every ounce of value out of private property and the primitive tools that constitutional lawyers use to drain private property of its value and utility by removing from it the key attributes of use, development, and distribution." Without the justices under-

standing and recognizing "private law conceptions of private property," they "will never get the [constitutional] analysis right." Accordingly, Epstein argues that this leaves not only scholars of both property and constitutional law confused but also private practitioners who must try to adjust their clients' expectations and projects for real estate development and investment subject to unknown and unknowable risks.

While not the focus of the 2006 Kratovil Conference, the United States Supreme Court's 2005 decision in *Kelo v. City of New London,* decision caught the attention of both the public and the media. The Court's decision upholding the taking of people's homes has generated concern among ordinary citizen homeowners. Thus, it is appropriate that the symposium issue include Professor Debra Pogrund Stark's article *How Do You Solve A Problem Like In* Kelo, since this is the decision that again made eminent domain cases newsworthy. Professor Stark considers whether the dissent's and general public's understanding of the opinion is accurate. She then proceeds to articulate and to propose "three different categories of takings and the appropriate level of judicial scrutiny and legislative burdens for each category" in order to restore "our constitutional system of checks and balances regarding the eminent domain power."

Professor Stark argues that the third category, a taking of a person's dwelling, deserves special scrutiny. For this specially defined category, the "dicta in the majority, concurring and even Justice O'Connor's dissenting opinion that judges should show extreme deference to legislative judgment of public use" is "troubling." Stark suggests a different analysis and a new standard of compensation to owners of such property.

It is always appropriate to acknowledge the financial support that the 2006 Kratovil Conference and resulting scholarship received from the real estate community. With this support the Center for Real Estate Law is able to distribute copies of this Symposium Issue of *The John Marshall Law Review* not only to attendees and participants but also to members of the academy.

Three Chicago law firms supported the 2006 Kratovil Program by contributing both money and the expertise of their partners who participated in the practitioner panel: Sanford Stein (Drinker Biddle Gardner Carton), John Lawlor (Sonnenschein, Nath & Rosenthal) and Paul Carroll and Virginia Harding (Gould & Ratner). The National Association of Realtors, the Illinois Association of Realtors, and Bank of America were among the 2006 real estate industry supporters.

Finally we must acknowledge the continued support that we have received over the years for the Kratovil Programs from Chicago Title Insurance Company and from its parent Fidelity National Title Insurance Company. This support underscores the

connections between The John Marshall Law School and the real estate industry. The Kratovil programs began as a memorial to Robert Kratovil who served both as Chicago Title's chief underwriter and as a member of The John Marshall Law School's faculty. The unique role that the study of real estate law and the education of future real estate lawyers has at this Law School is part of Robert Kratovil's legacy along with the Kratovil programs and symposium issues of the *Law Review*.