

# The Right and US Trade Law: Invalidating the 20th Century

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### I. Beyond the Law

The case of *Methanex v. United States* originated in California in the mid-1990s, when people began to notice a foul taste in their drinking water, a smell like turpentine. Santa Monica had to shut down half its supply wells and purchase clean water from elsewhere. The contamination turned up in thirty public water systems, Lake Tahoe and Shasta Lake, plus 3,500 groundwater sites. The source was quickly identified as methyl tertiary butyl ether (MTBE), a methanol-based gasoline additive that creates cleaner-burning fuel, thus reducing air pollution. But even small amounts of MTBE leaking from storage tanks, pipeline breaks or car accidents made water unfit to drink -- and extremely difficult to clean up. A study team from the University of California, Davis, added that in lab tests on rats and mice, MTBE was also carcinogenic, raising the possibility of human risk.

The state government acted promptly. In 1997 the legislature authorized a ban on MTBE if further investigations confirmed the health risks. In March 1999, after more research and lengthy public hearings, Governor Gray Davis issued an executive order to begin the phaseout. Other states were acting too. The oxygenating additive is used in one-fourth of the US gasoline supply, especially in pollution-prone big cities, so New York, New Jersey and other places were also discovering MTBE's unintended consequences for clean water. Up to this point, the story sounded like an alarming but fairly conventional environmental problem.

Then, four months after Governor Davis's order, a Canadian company from Vancouver, British Columbia, filed a daring lawsuit against the US government, demanding \$970 million in compensation for the damage California was inflicting on its future profits. Methanex Corporation, which manufactures methanol, principal ingredient of MTBE, claimed that banning the additive in the largest US market violates the foreign-investment guarantees embodied in Chapter 11 of the North American Free Trade Agreement. Under Chapter 11, foreign investors from Canada, Mexico and the United States can sue a national government if their company's property assets, including the intangible property of expected profits, are damaged by laws or regulations of virtually any kind. Who knew?

The company did not take its case to US federal court. Instead, it hired a leading Washington law firm, Jones, Day, Reavis & Pogue, to argue the billion-dollar claim before a private three-judge arbitration tribunal, an "offshore" legal venue created by NAFTA. Each side -- the plaintiff company and defendant government -- gets to choose one of the three arbitrators who will hear the case, then they jointly select the third, who presides. The proceedings are in secret -- no public notice whatever -- unless both sides agree to disclose the case. Sacramento had difficulty finding out what was happening, though it was California's environmental law that was under attack.

Methanex and the other controversial corporate claims pending before NAFTA tribunals are like a slow-ticking time bomb in the politics of globalization. As nervous members of Congress inquire into what they unwittingly created back in 1993, environmentalists and other critics explain the implications: Multinational investors can randomly second-guess the legitimacy of environmental laws or any other public-welfare or economic regulation, including agency decisions, even jury verdicts. The open-ended test for winning damages is whether the regulation illegitimately injured a company's investments and can be construed as "tantamount to expropriation," though no assets were physically taken (as is the case when a government seizes an oil field or nationalizes banks).

NAFTA's arbitrators cannot overturn domestic laws, but their huge damage awards may be nearly as crippling -- chilling governments from acting once they realize they will be "paying to regulate," as William Ware, a fellow at Georgetown law school, puts it. On its face, this strange new legal system's ability to check democratically elected governments confirms a principal accusation of those much-disparaged protesters against corporate-dominated globalization. Elite power politics, they contend, is imposing rules on the global economy that effectively shut out competing voices and values, that slyly undermine the sovereign capacity of a nation to defend its own citizens' broader interests. Indeed, the US multinational community dreams of establishing Chapter 11's provisions as the worldwide standard, to be applied next in the proposed Free Trade Area of the Americas.

The most disturbing aspect of Chapter 11, however, is not its private arbitration system but its expansive new definition of property rights -- far beyond the established terms in US jurisprudence and with a potential to override established rights in domestic law. NAFTA's new investor protections actually mimic a radical revision of constitutional law that the American right has been aggressively pushing for years -- redefining public regulation as a government "taking" of private property that requires compensation to the owners, just as when government takes private land for a highway or park it has to pay its fair value. Because any new regulation is bound to have some economic impact on private assets, this doctrine is a formula to shrink the reach of modern government and cripple the regulatory state -- undermining long-established protections for social welfare and economic justice, environmental values and individual rights. Right-wing advocates frankly state that objective -- restoring the primacy of property against society's broader claims. A tentative majority on the Supreme Court agrees in theory -- the same five who selected George W. Bush as President.

"NAFTA checks the excesses of unilateral sovereignty," Washington lawyer Daniel Price told a scholarly forum in Cleveland. He ought to know, since he was the lead US negotiator on Chapter 11 a decade ago. As for anyone troubled by the intrusions on US sovereignty, he said, "My only advice is, get over it." Price, who heads international practice at Powell, Goldstein, Frazer & Murphy, a premiere Washington firm, says that contrary to the widely held assumption that suits like Methanex's represent an unintended consequence of NAFTA, the architects of NAFTA knew exactly what they were creating. "The parties did not stumble into this," he said. "This was a carefully crafted definition."

This account, instead of delving further into Chapter 11's legal complexities, turns to explore its murky political origins. How could all this have transpired so unobtrusively? And how did the right wing's novel concept of "regulatory takings" find its way into an international trade agreement? The story, in passing, is another devastating commentary on the decay of representative democracy. These now-controversial legal innovations were ostensibly adopted in broad daylight, yet the public never had a clue. Nor did the media, watchful policy experts or members of Congress. Yet the stakes are as fundamental to public life as the Constitution itself. The transmission of big ideas among elite interests is always a more supple and elusive process than backroom conspiracy -- not exactly secret, yet withheld from general understanding. To fully appreciate the momentous risks for law and justice, one starts by stepping back in history to see what exactly the right-wingers are trying to overthrow. The answer, in their own words, is the twentieth century.

## **II. Rolling Back the New Deal**

Political conflict over property rights has of course been central to American life since the first colonies, starting most obviously with human slavery and the brutal confiscation of Indian lands. But the property issue never really went away; it only became less visible. The conservative mind sees private ownership of property (correctly, in my view) as an essential element undergirding individual freedom. Yet conservatives typically have trouble accepting that property also regularly comes into collision with society's other values: claims for the common good, the rights of individual citizens who own little or nothing. The tension of deciding which comes first -- property or people -- has always generated the deepest conflicts, including the Civil War.

The last great confrontation over property rights occurred at the dawn of the twentieth century, when modern corporations emerged with national scope and scale and awesome new influence over society. A broad tide of reformers, led by labor, arose in opposition, demanding new social and economic laws to protect people and social values, but the federal judiciary blocked their way. The Supreme Court relentlessly defended business and the old order -- the "classical legal doctrine" of limited government and laissez-faire economics. It spoke most defiantly in the *Lochner* decision of 1905, in which the Justices threw out an early New York State labor-reform law that required a ten-hour day and safer conditions for bakery workers. The law, they ruled, unconstitutionally deprived bakery owners of their property rights.

Over the next three decades, the logic of *Lochner* was applied to invalidate more than 200 state and federal statutes -- the progressive income tax, minimum-wage laws, health and safety codes, workers' right to organize independent unions and other public measures that have since become common features of US governance.

The *Lochner* era did not actually end until deep into the New Deal. When a liberal majority was finally achieved at the Supreme Court in 1937, it promptly upheld the National Labor Relations Act and declared that social and economic regulatory laws are constitutional after all. Government, the court affirmed, has constitutional obligations to protect society's general health and welfare, and its so-called police powers justify intrusions into the private sphere -- these public necessities come before property rights. This decision opened the floodgates for expanding government and elaborating new regulatory powers in myriad ways.

In our era, conservatives think they have finally found a way to close the gates. This past March in Chicago, the Federalist Society organized a lawyers' forum with a provocative title -- "Rolling Back the New Deal" -- and its star attraction was Richard Epstein, law professor at the University of Chicago and intellectual lion of the right. Epstein's theory of "regulatory takings" galvanized the movement fifteen years ago when his book *Takings: Private Property and the Power of Eminent Domain* first appeared, describing an ingenious new constitutional interpretation designed to rein in modern government. Regulations, he argued, should be properly understood as "takings" under the Fifth Amendment (" . . . nor shall private property be taken for public purpose without just compensation"), so government must pay those businesses or individuals whose property value is in some way diminished by public actions.

Soon after, Ronald Reagan's Attorney General, Edwin Meese, sent a warning to every agency of the federal government, instructing civil servants to search for Epstein's "hidden takings" lurking in regulations. With financing from the usual list of conservative foundations, the Federalist Society and other groups began proselytizing lawyers and law students, even sitting federal judges, in behalf of Epstein's doctrinal counterattack on liberalism. The professor (outgoing dean at Chicago Law School) has appeared at many Federalist Society events, alternately pugnacious and ingratiating in style, with a meticulous intensity that might put less learned revolutionaries to sleep.

"It will be said that my position invalidates much of the 20th century legislation, and so it does," Epstein wrote in *Takings*. "But does that make the position wrong in principle? . . . The New Deal is inconsistent with the principles of limited government and with the constitutional provisions designed to secure that end." In telephone conversation, I asked the professor for examples and he obliged with gusto.

"Most of economic regulation is stupid. . . . What possible reason is there for regulating wages and hours?" Epstein said. "If my takings doctrine prevails, you have no minimum-wage laws. That's fine. You'd have an OSHA a tenth of the size. That's fine too. You'd have no antidiscrimination laws for privileged employees, which would be a godsend." Does Professor Epstein wish to restore the *Lochner* era of 1905? "Well, God bless, of course," he said. "But why do you think that's socially irresponsible?" In fact, he portrays his approach as moderate compromise because,

unlike the *Lochner* doctrine, it would not invalidate the regulatory laws that legislatures enact. He would merely make the public pay for them. "We will allow the majority to have its way so long as it's willing to buy off its dissenters at a fair valuation," Epstein told the libertarian magazine *Reason*.

A host of conservative litigation groups have sprung up to argue Epstein's doctrine in court and taken a series of cases to the Supreme Court. So far, the Court's pro-takings decisions have dealt only with subsidiary questions and stopped short of fully embracing Epstein's claim that government must compensate an owner even if property or a business has been only partially affected. It is this claim of partial injury that makes Epstein's theory so radical, because it would freeze government action, which inevitably has some partial impact on many people. It also would overturn twentieth-century precedent, even the Rehnquist Court's. The putative "pro-takings" majority on the Court has hesitated to go that far. Perhaps for good reason: To enshrine this radical new definition of property rights would provoke a grave governing crisis, from local zoning laws to the Court's own legitimacy.

Professor Epstein, in fact, is bitterly disappointed at the Supreme Court's hesitation and especially irked at his former law school colleague Justice Antonin Scalia. "Scalia is terribly worried, as I'm not, about what will happen to the federal judicial power if he adopts the kinds of cases I'm championing -- that local zoning cases would be subject to federal scrutiny," Epstein said. "So he's nervous about a sea change. He looks for ways to change the doctrine on the margins, but he doesn't want to go all the way. As a result, his decisions are incoherently decided. He knows 'takings' is right, but he can't bring himself to do it. . . . The only person who holds the 'takings' position in what I regard as a consistent fashion is Clarence Thomas, not Scalia, not Rehnquist and so forth. They're much more timid."

Many legal authorities, including conservatives who reject Epstein, have assumed the Rehnquist Court would not undertake such a radical leap in behalf of its ideology, but their confidence was deeply shaken by *Bush v. Gore*. "The Court is just on a knife edge," said Georgetown Law Professor John Echeverria, who studies the takings decisions. "If a liberal member resigned and was replaced by a Justice who is pro-takings, it is very likely the Court could swing wildly on that doctrine."

Epstein is perplexed by another matter. While his conservative brethren on the Supreme Court have so far declined to accept his radical redefinition of the Constitution, multinational business has already succeeded in planting his premise in NAFTA and promoting it for other trade agreements. The claims are being heard, some companies have already won huge awards for regulatory injury to investments. The professor's contribution didn't even get a footnote. "I am aware that what I have said has been very influential in the NAFTA debate and that, strangely enough, much of what I say seems to have more resonance in the international context than it did in the domestic context," Epstein said. "Nobody from any of those [business] organizations even thought to ask me to give an opinion, let alone hire me as a consultant. I think they should have asked me."

### **III. Think Locally, Act Globally**

How did the professor's ideas migrate from one realm to the other? "The takings stuff is a little like fluoride in the water," Echeverria said. "It's an advocacy agenda that's been floating around Washington for fifteen years with a large number of influential supporters." His colleague professor Robert Stumberg explained more concretely that NAFTA's investor protections "are based on a long-term strategy, carefully thought out by business, with many study groups and law firms involved in developing them. This is about limiting the authority of government -- that is its central importance."

The American multinational community initiated its first discussions on the investment problem in the mid-1980s, well before NAFTA negotiations began but at a time when overseas capital investment was beginning its great surge -- dispersing production worldwide. The first seminars were attended by both business and government experts, including Dan Price, who would negotiate NAFTA under the US Trade Representative; the discussions were organized by the US Council for International Business (USCIB), a less prestigious group than the Business Roundtable but with overlapping membership. Global economic integration, the companies recognized, would no longer be driven so much by further tariff reductions, already largely accomplished, but by foreign direct investment -- building and buying factories, banks and affiliated firms in other countries and markets.

The problem they foresaw, as US capital invested heavily abroad, was not the old-style expropriation of outright seizure, but a more subtle process in which foreign governments, by enacting progressively stiffer regulatory measures, could effectively take control of assets and profits. Economist Edward Graham, NAFTA expert at the Institute for International Economics (IIE), a think tank supported by international business and finance, thought the fears were legitimate. "There had been problems in Latin America, though not so much Mexico, I think, and some other developing countries, particularly in Southeast Asia, with what came to be known as creeping expropriation. Measures were taken by governments that were regulatory in nature but clearly expropriatory in intent. For example, taxes. You just keep pumping the taxes, you claim the company had used various tax-avoidance mechanisms in the past. So the government would present them with a big bill for back taxes and say, Look, if you don't pay up on this, we are taking 25 percent of equity for the government."

This was about the same time Attorney General Meese was alerting government agencies to Epstein's "regulatory takings," but many important CEOs had probably never heard of the man or his theory. "The investor-state was not on business's radar screen," an important corporate trade lawyer says. "The critical part for American business was getting Mexico to begin to dismantle its restrictions on investment, which were substantial. I do not recall any philosophical debate. This was a practical problem. We've got corrupt courts in a lot of these countries; companies should have the right of honest redress."

Washington lawyers, in and out of government, were the main transmission belt. Their role, often underappreciated, is to act as the keepers of the flame, nurturing long-term policy objectives over many years and beyond the transient influence of elected

politicians or corporate CEOs. They move in and out of government themselves, helping to write the official texts and laws they later use as tools in behalf of corporate clients when they return to private practice. "Businesses as a general matter do not understand the subtleties of these legal issues, and they are led by the lawyers," the corporate lawyer explained, adding, "A lot of them came out of the Legal Adviser's office at the State Department -- who are great believers in international law, and they are very enamored of this concept."

Edward Graham, the economist at IIE, thinks Chapter 11 grossly overreached its purpose, and this was not an accident. "There are those I've talked to who maintained that there was at least a subgroup of constituents who really saw this as a way to get compensation for regulatory actions," Graham said. "There was strong advocacy that thinks, whenever the government enacts a regulatory measure, it should compensate. They saw this, I am told, as a way of getting such a provision into international law that does not exist in US domestic law."

When NAFTA negotiations began in 1990, the multinationals' lawyers already had the investor protection scheme in hand, the arbitration feature borrowed from prior bilateral agreements. Then they expanded it vigorously during the negotiations. Dan Price, now the top trade lawyer at Powell, Goldstein, is widely credited (and admired among his peers) for the design of the "investor-state" provisions, whose ostensible purpose -- and the explanation given to Congress -- was that US investors needed an insurance policy in Mexico, whose courts were notoriously corrupt. Price had worked at the State Department's Legal Adviser's office before he became a key negotiator on Chapter 11 for the US Trade Representative (his views reinforced by what one diplomat called "investment groupies" from Treasury and State). "The breadth of coverage and the strength of the disciplines [in Chapter 11] exceed those found in any bilateral or multilateral instrument to which the United States is a party," Price has boasted. Price and other advocates claim that Chapter 11's "enormously broad" definition of property rights is in accord with US law -- though any diligent law student could demonstrate that the claim is fallacious.

Price is hailed among some younger lawyers as a negotiating genius for persuading Mexico to accept such dramatic concessions, but they misunderstand the lopsided dynamics of the negotiations. The corrupt regime of Carlos Salinas was so desperate to get the inflows of US capital that when the Americans kept pushing for tougher language, the Mexicans regularly agreed rather than risk losing the deal. Canada had previously refused to include similar rules in its own bilateral free-trade agreement with the United States, so Canadian negotiators may have been counting on Mexico to hold off the American demands. Instead, Mexico rolled over.

Price's arguments and language are a good fit with Epstein's. Though other lawyers say he is not a right-wing ideologue himself, he invokes a moral logic that is identical. Governments, Price has explained, "recognize that it would be unfair to force an investor to bear the entire cost of a change in social policy. These costs, at least under certain circumstances, should be borne by society as a whole. . . . Simply designating a government measure as a conservation measure, or a health and safety measure, does not answer the basic question about who should bear its costs and should not be

enough to remove that measure from international investment disciplines. The purpose of the regulation may be very noble, but it is necessary to examine how that purpose is effectuated and the impact on the affected investor."

Today, Price represents the USCIB as well as corporate clients. He also initiated one of the first Chapter 11 cases brought against Mexico -- the Azinian claim, filed by a Los Angeles trash-hauling firm that lost its contract in a Mexico City suburb. (Price dropped the case when he discovered the client had no money.) Another lawyer active in claims cases said, "Dan told me he has two claims against Canada that he was just waiting to file." Price declined numerous requests for an interview.

Another influential advocate is Edwin Williamson of Sullivan & Cromwell, who, by his own description, has always been more ideological on the subject than Price. His law firm is blue-chip establishment, with an awesome range of international clients spanning global finance and major multinationals (Sullivan & Cromwell recently counseled Citigroup on its \$12.5 billion purchase of Mexico's largest bank). Williamson took leave in 1990 to serve as legal adviser at the State Department under Bush I and monitored the developing terms for enforcing investor rights. "I was calling strikes from the bleachers," he told me, but others described him as a central influence. His office at State "scrubbed" NAFTA's final text to make sure the language conformed with negotiators' intentions, and although Williamson described the vetting as uncontroversial, a Canadian legal adviser said the lawyers at State deleted key words and phrases that effectively broadened NAFTA's terms even further. "What we're really trying to protect here are property rights," Williamson explained. "Property rights are included in the International Declaration of Human Rights, but they've always gotten short shrift from an international standpoint because the international legal community is very left wing and doesn't care about property rights."

Williamson, it happens, is also active in the Federalist Society and chairs the society's practice group for international lawyers. "Well, I'm a conservative, low-government, private-property kind of person by nature," he said. He returned to Sullivan & Cromwell after 1992 and became chair of the US industry expert group at USCIB, where he became a leading advocate for the Organization for Economic Cooperation and Development's ill-fated Multilateral Agreement on Investment, designed to spread this expanded property rights for investors worldwide. That project was set aside after citizen protesters, led by Canadians and joined by American activists like Global Trade Watch, raised a global storm of critical objections. By the late 1990s, Williamson was lobbying the Clinton Administration -- "very, very hard," one ex-official remembered -- on the same subject. He is still on the case for the upcoming FTAA negotiations.

Does he regard Epstein's doctrine as sound? "Oh, yeah. I basically believe we need to recognize that extensive environmental regulation may still involve a taking. From an international standpoint, this is an area where we haven't had any real problems of magnitude, but with increased cross-border investment I think it is incumbent on the international community to provide protection for property rights."

The first Bush Administration, Williamson pointed out, was populated with many like-minded advocates, such as White House counsel C. Boyden Gray, who is now



back at Wilmer, Cutler & Pickering and serves with Ed Meese on the Federalist Society's board of visitors, and Vice President Dan Quayle, whose White House staff scrutinized all new regulations for takings issues. "The ideology was pretty well spread around," Williamson said. The new Bush Cabinet, likewise, includes many "pro-takings" devotees, from Attorney General John Ashcroft to Interior Secretary Gale Norton.

Yet Williamson worries that the multinational corporations are insufficiently alert to the cause. "I have a lot of clients I think ought to be interested in this," he said, "but, you know, it's the old attitude -- this isn't going to happen to us." Likewise, he fears the proposed FTAA talks will not include investor protection if it doesn't get more aggressive business support. "If you're not going to include the investor-state in the FTAA, you're not serious about it," he said.

Among some trade lawyers and ex-diplomats, the conviction persists that both environmental critics and business advocates are hyping the implications of "regulatory takings" for their own different purposes. Charles "Chip" Roh, now retired as a career civil servant at USTR, was a deputy negotiator working alongside Dan Price on Chapter 11 ten years ago. Roh explained the unresolved legal ambiguities at great length and predicted that once more cases are decided, the terms will prove to be not very different from long-established practices. "If you got a trend line of bad cases where it seems as though the regulatory takings theory appears, I don't think the governments signed on to that," he said. "If that happens, they should step in and amend it, and I think they would. Because whether you're liberal or conservative, people are not going to accept that."

Then I read to Roh from the letter sent in April to US Trade Representative Robert Zoellick by twenty-nine major US multinationals and industry organizations, urging him to push for the same NAFTA investor provisions in the upcoming FTAA negotiations. The appeal was organized by USCIB and vetted by Dan Price. GE, Ford, GM, International Paper, Motorola, Dow, DuPont, Chevron, Procter & Gamble and 3M were among the signers (though not the Business Roundtable). The business letter sounds a lot like Professor Epstein. NAFTA, it asserts, includes "protection from regulations that diminish the value of investors' assets."

"Jesus, they can't mean that," Roh exclaimed. I read him the text again. "Jesus, if they do that, they're going to put Middle America on the barricades alongside the environmentalists."

#### **IV. A Shield Becomes a Sword**

The first Chapter 11 lawsuits against national governments were pioneered by entrepreneurial spirits from obscure law firms, starting with a Toronto lawyer named Barry Appleton, who won the first claims victory for the Ethyl Corporation in 1996, suing Canada for its ban on the US company's gasoline additive. Appleton has since opened offices in Washington (his man in DC is a Reaganite lawyer who held high posts at the White House, Treasury and Agriculture). Appleton regularly sues the

Canadian government and occasionally issues patriotic warnings that Canada will be flirting with Chapter 11 claims if it goes forward with various actions. Some of his public alerts sound quite fanciful. Canadian hockey and baseball teams, he suggested, can sue the United States because American cities subsidize rival teams with taxpayer-financed stadiums.

The problem is, Appleton might be right. Nobody knows for sure, including the three NAFTA governments. This twilight zone where aggressive lawyers search for big scores should endure for many years, because NAFTA specifies that no arbitration rulings will be regarded as binding precedent for future cases. Thus, even if Methanex and others lose, a troubled company willing to pay for smart lawyers can still take a shot at winning big bucks in NAFTA's legal lottery.

The pillars of the American bar have decided to play too. Huge and imaginative cases are being filed by some of America's premiere law firms, evidently persuaded that NAFTA's novel legal doctrines are perfectly sound or at least worth a shot. Jones, Day is handling the Methanex case and also a claim by Loewen for \$725 million that seeks to override a Mississippi jury verdict against its predatory business practices. Hogan & Hartson has UPS's claim against subsidy by the Canadian postal system. Baker & Botts represents Waste Management against Mexico. White & Case is working for Mondev, a Canadian developer that accuses the City of Boston of violating a contract for a shopping center project (Mondev first sued in state courts but lost and was turned away by the US Supreme Court, so, what the heck, it's trying NAFTA for \$50 million).

I asked Christopher Dugan, lead lawyer for Methanex, why the company did not pursue its complaint in US courts. One reason, of course, is that American judges would not accept many of its arguments, since they are derived from the looser criteria in NAFTA and international law, not US law. Dugan, however, gave a different explanation. "We wanted an impartial tribunal," he said. "If you look at it, foreign investors do have a substantial reason to avoid the US judicial process. NAFTA does clearly create some rights for foreign investors that local citizens and companies don't have. But that's the whole purpose of it." This sounds bizarre, considering the original pretext for creating Chapter 11 -- that US investors could not trust Mexican courts for fair treatment. Now, it seems, US courts cannot be trusted either.

But Dugan's remark also illustrates why NAFTA's investor protections pose a threat to US jurisprudence. Domestic businesses, not to mention mere citizens, will rightly complain that NAFTA effectively puts them in a subordinate legal position, since they cannot assert the same expanded definition of property rights to challenge US regulations. One obvious solution, which "regulatory takings" advocates will doubtless recommend, is that the Supreme Court reconcile these different legal standards by issuing a precedent-setting revision in constitutional law. Epstein might win through this backdoor what he has not achieved in straightforward argument.

Meanwhile, the Chapter 11 lawsuits may be more valuable to multinationals as political weapons used to intimidate governments with the mere threat that they might file for huge damage claims. Howard Mann, a Canadian lawyer who advises environmental groups on the subject, described the impact: "What you see now is the

big law firms talking about Chapter 11, not just as a shield but as a sword against government action."

The sword is already in use. Carla Hills, the US Trade Representative who oversaw the NAFTA negotiations for Bush I and now heads her own trade-consulting firm, was among the very first to play this game of bump-and-run intimidation. Her corporate clients include big tobacco -- R.J. Reynolds and Philip Morris. Sixteen months after leaving office, Hills dispatched Julius Katz, her former chief deputy at USTR, to warn Ottawa to back off its proposed law to require plain packaging for cigarettes. If it didn't, Katz said, Canada would have to compensate his clients under NAFTA and the new legal doctrine he and Hills had helped create. "No US multinational tobacco manufacturer or its lobbyists are going to dictate health policy in this country," the Canadian health minister vowed. Canada backed off, nevertheless.

A former government official in Ottawa told me: "I've seen the letters from the New York and DC law firms coming up to the Canadian government on virtually every new environmental regulation and proposition in the last five years. They involved dry-cleaning chemicals, pharmaceuticals, pesticides, patent law. Virtually all of the new initiatives were targeted and most of them never saw the light of day."

Maybe this leverage is what corporate lawyers had in mind all along. A major multinational might be reluctant to sue the host government in a country where it is heavily invested, since its relationship would be ruptured. But the company can invoke the threat of NAFTA litigation to intimidate bureaucrats and political leaders. "One or two cases and suddenly the business guys understand, Oh my God, look what we have here," said John Audley, a former EPA official for trade issues. "This thing either scores us a healthy compensation or gets changes in the regulation or both. This thing is a winner."

While the legal thicket surrounding Epstein and NAFTA's Chapter 11 seems fiendishly complicated, the core meaning is not fundamentally an argument over legal doctrine. It involves a profound assault on community and small-d democracy, as we know it. The point was made by Lois Schiffer, Clinton's assistant attorney general for environmental law and one of many who foresee grave damage if the revised version of property rights should prevail, at home or abroad. "We live as a community, not as individual, selfish people," Schiffer said. "Everybody benefits from good environmental regulation, but I can't clean up a river all by myself. I mean, it takes me and all the other people who live on the river to accomplish that. It's a real community enterprise. People who talk about it in other ways are trying to disaggregate those communities."

## **V. Property vs. People**

As the huge Chapter 11 claims accumulated (eighteen or more so far), Mexico City, Ottawa and Washington gradually awakened to their problem. Mexico lost the \$16 million Metalclad case, involving a notorious hazardous-waste site as bad as Love Canal, and saw its arguments for protecting health and safety brushed aside by

arbitrators as irrelevant. Mexico City, recognizing that it is a prime target, assembled an all-NAFTA team of lawyers who aggressively defend against every case. "Otherwise," one of them said, "we were going to become the insurer for every investment that goes awry in Mexico." Canada was stung and embarrassed by its own losses and began urging the other governments to join in issuing a binding "interpretative statement" that would reduce Chapter 11's scope and wall off legitimate regulatory powers from attack.

Washington wasn't interested at first and, indeed, assisted US companies in developing claims. The Clinton Administration got nervous, however, after Methanex and other provocative cases were filed. Would Americans accept such foreign assaults on US law as a necessary part of how "free trade" supposedly spreads "democracy" worldwide? Meanwhile, unknown to the public, an intense policy debate developed -- EPA, Interior and Justice's environmental lawyers versus Treasury, State and Commerce. "Inside the government, the divisions were clear and painful," said John Audley, who participated for EPA. "Some agencies were saying, 'We got it wrong in NAFTA and we have to change it.' The others were saying, 'No, we don't accept that interpretation. In fact, we like Chapter 11 so much, let's negotiate it again.' The substantive differences were pounded out through horrible meetings and fifty-, seventy-five-page documents. We simply couldn't work it out." On the last days of Clinton's presidency, the agencies were still at the table arguing, without resolution.

The interagency conflict has presumably subsided now that business-friendly Republicans are heading the regulatory agencies, but Trade Representative Zoellick has revealed his nervousness too -- worried that rising concerns in Congress might get in the way of fast-track approval for the FTAA negotiations. Zoellick recently worked out with Mexico and Canada an officially binding "clarification" that promises more procedural openness in arbitration panels, rules out one key legal premise and may deprive Methanex of its best argument. "I think they were scared to lose the case, so they changed the rules," said Professor Stumberg. But even if Methanex does lose, the basic problems are not fixed: Zoellick's corrections do not address the core issues of expanded property rights versus public regulation. If he gets the votes for FTAA fast-track negotiations, NAFTA's "regulatory takings" will be promoted to cover the entire Western Hemisphere.

The political ingredients are present -- at the Supreme Court, in Congress and the White House, and in trade diplomacy -- to work a reactionary transformation of American governance and rights. I do not say this will necessarily occur. I do not think it can if Americans at large become sufficiently alert and mobilized in opposition. But, as this account should make obvious, the danger exists, and no one can count on conservative self-restraint or vigilant media or the other self-correcting mechanisms in representative democracy to prevent it. The cause has gotten this far with very little recognition or understanding of what's at stake. Many right-wingers sense they are at the brink of an epic triumph over liberal government's long domination; their objective is aligned with influential multinationals that intend to keep what they have already won.

The opposition must purposefully raise the stakes too -- forcing these arcane matters

into wider public awareness and delivering a stark warning to political elites. If they persist in this objective, they will ignite a grave constitutional crisis that could destroy the legitimacy of law and representative government in public consciousness, that could send angry citizens into the streets to fight for their rights. Democrats, if they have the backbone, will draw a hard line of opposition, but Republicans should also consider whether they wish to advance this revolutionary upheaval in long-established rights at a time when the country is so embattled.

Senate Democrats, given what has already transpired, are fully justified in rejecting any nominee for the federal judiciary, especially the Supreme Court, who sympathizes even distantly with Epstein's radical reinterpretation of the Constitution. Likewise, it is quite wrong to confirm nominees for law-enforcement positions at Justice or the regulatory agencies who demonstrably do not accept the settled terms of property versus public rights.

On the global front, if the Bush Administration wishes to keep America united, it can promptly defuse this fight -- first by announcing that Chapter 11's peculiar privileges for investors will not be proposed for any future trade agreements and, second, by suspending NAFTA's "investor-state" enforcement mechanism in agreement with Canada and Mexico, at least until the subject is submitted to serious scrutiny and the full public debate it never received the first time around. Otherwise, Democrats, including free traders, should unite to block FTAA or any like-minded proposals. Opportunistic right-wingers in and out of government may be thinking they can fog the issue past Americans preoccupied with terrorism. Democrats might assume an accommodationist stance in the name of patriotism. If that occurs, both parties deserve contempt and attack. The antiglobalization movement, which suspended its protests in deference to the crisis, may have to remobilize quickly. This time deep throgs should surround not the IMF and World Bank but the White House, the Capitol and the Supreme Court as well.

The demonstrators should also target the lofty nameplates of America's multinational corporations and banks. If some sources are correct, US companies are more ambivalent about Chapter 11 than the lawyers who represent them. Perhaps they did not fully understand what they were promoting in NAFTA, any better than politicians or the public did. To test the proposition, these firms should be pressured directly to back off. If they refuse to concede, they will find that the controversy generated by their exclusive rights may well doom their other long-term objectives in globalization politics. In other words, the mighty are vulnerable on this issue, and some of them evidently know it. While the ranks of citizen protesters gather to confront titans of global commerce and finance, they may also wish to send marchers on some of those Washington law firms.

In the last quarter of the 20th century, legislative action concentrated on details and incremental change. Closer inspection reveals two overarching lines of development. The first indicates that the Aktiengesetz evolved into a regulation of what could be called two types of corporations: one being the "small Aktiengesellschaft", without access to public markets and not intended to be taken public (eg, family-owned corporations), the other the public corporation. One important aim of regulation, heavily influenced by European legislation, is to strengthen the supervisory board and equip it with better means to exercise control over the executive board. As a matter of general context of German corporate law, one should pay Indeed, the US multinational community dreams of establishing Chapter 11's provisions as the worldwide standard, to be applied next in the proposed Free Trade Area of the Americas. The most disturbing aspect of Chapter 11, however, is not its private arbitration system but its expansive new definition of property rights "far beyond the established terms in US jurisprudence and with a potential to override established rights in domestic law." "It will be said that my position invalidates much of the 20th century legislation, and so it does," Epstein wrote in Takings. "But does that make the position wrong in principle?" The New Deal is inconsistent with the principles of limited government and with the constitutional provisions designed to secure that end. Submitted\_ urlhttp://www.thenation.com/article/right-and-us-trade-law-invalidating-20th-century/. plus-circle Add Review. comment. Reviews. There are no reviews yet. Be the first one to write a review. 460 Views.

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