8-2015

Brigham-Kanner Property Rights Conference Journal, Volume 4

William & Mary Law School

Brigham-Kanner Property Rights Conference Journal

Volume 4

August 2015

DEFINING THE REACH OF PROPERTY
October 30–31, 2014

Conference Authors
Brigham-Kanner Property Rights Prize Winners

Michael M. Berger
James W. Ely, Jr.
Richard A. Epstein

Panelists

Dana Berliner
James S. Burling
David L. Callies & Ian Wesley-Smith
Steven J. Eagle
Janet Bush Handy

A Publication of the Property Rights Project of

William & Mary Law School

BRIGHAM-KANNER PROPERTY RIGHTS CONFERENCE JOURNAL

Volume 4
2015

Cite as:
4 BRIGHAM-KANNER PROPERTY RIGHTS CONF. J. ___ (2015)

A PUBLICATION OF THE PROPERTY RIGHTS PROJECT OF
WILLIAM & MARY LAW SCHOOL
COLLEGE OF WILLIAM & MARY
POST OFFICE BOX 8795
WILLIAMSBURG, VIRGINIA 23187-8795

The *Brigham-Kanner Property Rights Conference Journal* [ISSN Number: 2326-7437] is published by the Property Rights Project of William & Mary Law School. Our mailing address is *Brigham-Kanner Property Rights Conference Journal,* William & Mary Law School, College of William & Mary, Post Office Box 8795, Williamsburg, Virginia 23187-8795. E-mail address: mnwyatt @wm.edu. The views expressed in the *Journal* are those of the authors and do not necessarily reflect the policies or opinions of the *Brigham-Kanner Property Rights Conference Journal,* its editors and staff, or the College of William & Mary.

History of the William & Mary Law School

Chartered in 1693 by Queen Mary II and King William III of England, the College of William & Mary is the second oldest institution of higher learning in the United States. The Chair of Law at William & Mary was created in 1779 by the Board of Visitors at the request of Thomas Jefferson, and was the first established in the United States. The first occupant of the Chair was George Wythe, in whose offices studied Thomas Jefferson, John Marshall, James Monroe, and Henry Clay. The growth of the law school was halted by the beginning of the Civil War in 1861. Sixty years later, the study of law was revived in a modern program that attracts students from all regions of the nation.

Copyright Notice

Subscriptions

The *Brigham-Kanner Property Rights Conference Journal* is published once a year by the Property Rights Project of William & Mary Law School. Subscriptions to the *Journal* are considered to be continuous and, absent receipt of notice to the contrary, will be renewed automatically each year. The subscription price is $15.00 per issue. Correspondence related to subscriptions should be addressed to: Megan Wyatt, Assistant Editor, *Brigham-Kanner Property Rights Conference Journal,* William & Mary Law School, College of William & Mary, Post Office Box 8795, Williamsburg, Virginia 23187-8795.

BRIGHAM-KANNER PROPERTY RIGHTS CONFERENCE JOURNAL

VOLUME 4 AUGUST 2015

BRIGHAM-KANNER PROPERTY RIGHTS CONFERENCE JOURNAL

VOLUME 4 AUGUST 2015

DEFINING THE REACH OF PROPERTY
OCTOBER 30–31, 2014

PANEL 1: THE ROLE OF THE ADVOCATE IN DEFINING PROPERTY

PANEL 3: BALANCING PRIVATE PROPERTY AND COMMUNITY RIGHTS

PANEL 4: PROPERTY RIGHTS IN DEVELOPING AND TRANSITIONAL COUNTRIES

STRONG AND INFORMED ADVOCACY CAN SHAPE THE LAW: A PERSONAL JOURNEY

MICHAEL M. BERGER*

INTRODUCTION

Without advocacy, there are no rights. Nice words on paper, perhaps, but not rights. Rights need to be enforced to be meaningful. As the United States Supreme Court has said repeatedly, economic advantages do not become "rights" until "they have the law back of them" and when courts preclude others from interfering with those rights.[1] Enforcement of such rights is done by advocates, because courts are not self-starters. Someone has to bring cases to them—lawyers.

In the realm of protected rights, the rights of property owners were for many years strangely orphaned creatures—"poor relations," as the Supreme Court once noted.[2] Ensconced in the Bill of Rights alongside the rights to life and liberty, property rights found few defenders. Those who were interested in property at all seemed to come at it from the other side. The Sierra Club, for example, has been around since 1892, but its interest in property is restraining private use, not enhancing or protecting it. And don't get me started on the ACLU either. Organizations with a dedication toward protecting the rights of private property owners did not come into being until quite a bit later. The Institute for Justice, for example, was founded in 1991; the Cato Institute and the Washington Legal Foundation were both established in 1977; the Pacific Legal Foundation came into being in 1973. And I graduated from law school in 1967.

Thus, while it is not unusual today for us to see one or more of those recently formed organizations filing suit to protect the rights of private property owners, that occurrence is a current phenomenon.

---

* Partner and co-Chair of the Appellate Practice Group, Manatt, Phelps & Phillips (Los Angeles office).

1. *E.g.*, Kaiser Aetna v. United States, 444 U.S. 164, 178 (1979) (quoting with approval United States v. Willow River Power Co., 324 U.S. 499, 502 (1945)).

2. Dolan v. City of Tigard, 512 U.S. 374 (1994).

In 1967, there was just me and the small firm I practiced law with and a few other hardy individuals, including some academics who were prior honorees at this conference.

Specialized practice helps. It allows lawyers to become familiar with the ins and outs and complications of a particular field. Takings has always been a complicated area of the law and a difficult one to fathom. As Justice Stevens once put it, "even the wisest of lawyers would have to acknowledge great uncertainty about the scope of this Court's takings jurisprudence."[3]

When seeking to push and shape the contours of the law, it behooves one to actually have a firm grasp on the field. I have repeatedly urged that "friends don't let friends file takings claims." I was not kidding. My concern is that too many lawyers tend to view a takings claim as simply some sort of catchall to add as a tag line at the end of a multicount complaint (which may or may not have a valid claim at its core *ab initio*). Bad idea. It leads to cases in which lawyers make all sorts of wild claims, irritating judges (who may, in any event, be hearing their first takings cases[4]) and making bad law by continuing to make judges think that takings law is not a legitimate subject. Claims like these: that a phone call made by a police officer during an arrest was a taking;[5] that forcing "exotic" dancers to stay four feet away from customers was a taking of the bar owner's interest in the four-foot circle of property surrounding each dancer;[6] that precluding a murderer from collecting on a life insurance policy on his victim was

3. Nollan v. California Coastal Comm'n., 483 U.S. 825, 866 (1987) (Stevens, J., dissenting). That was actually putting it mildly. Professor Van Alstyne described takings law as "a mass of obtuse decisional law." Arvo Van Alstyne, *Modernizing Inverse Condemnation: A Legislative Prospectus*, 8 SANTA CLARA L. REV. 1, 4 (1967). Professor Sax found "a welter of confusing and apparently incompatible results." Joseph Sax, *Takings and Police Power*, 74 YALE L.J. 36, 37 (1964). Professor Dunham saw only "a crazy quilt pattern." Allison Dunham, Griggs v. Allegheny County *in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63. For a collection of similar conclusions, see Gideon Kanner, *When is "Property" Not "Property Itself": A Critical Examination of the Bases of Denial of Compensation for Loss of Goodwill in Eminent Domain*, 6 CAL. WEST. L. REV. 57, 58 (1969).

4. My experience has been that few judges came in contact with takings (or even more generic land use) cases when they were lawyers. And most of those with any experience represented states or municipalities.

5. Tower v. Leslie-Brown, 326 F.3d 290 (1st Cir. 2003) ($1.60 phone call on arrestee's phone is not a taking).

6. Sands North, Inc. v. City of Anchorage, 537 F. Supp. 2d 1032 (D. Alaska 2007). I am sure that counsel thought that was very clever. The court disagreed.

a taking;[7] that prohibiting nude dancing in bars is a taking;[8] or that castrating pet dogs is a taking.[9] Cases like these can only push the law in the wrong direction by convincing judges that the concept of takings is not to be taken seriously.

In this sense, I was blessed. I had spent a full year of graduate work researching the rights and obligations of airports and their neighbors, and had read and digested everything on the subject from across the country. I then joined a law firm that was engaged in virtually all of that kind of work in California (on the side of the neighboring property owners) and was able to spend the next ten years or so actually using all the material collected during my LL.M. studies.[10] Not many can say that. But that was not all our firm did. It did a lot of eminent domain work and related real estate litigation. So, when I was finished with the airport work (i.e., a specialized form of physical taking), I was able to transition seamlessly into regulatory takings, other kinds of physical takings (e.g., floods and landslides), and direct condemnation.

I. THE AIRPORT NOISE CASES—PHYSICAL TAKINGS

Since becoming a member of the California bar in 1967, I have handled every airport noise case in the California Supreme Court

7. United Investors Life Ins. Co. v. Severson, 151 P.3d 824 (Idaho 2007).

8. McCrothers Corp. v. City of Mandan, 728 N.W.2d 124 (N.D. 2007) (demonstrable drop in earnings after prohibition not sufficient to show taking).

9. Concerned Dog Owners of California v. City of Los Angeles, 194 Cal. App 4th 1219 (2011). Perhaps the outcome would (should?) have been different if the plaintiff had been the dog, rather than the owners. But would dogs have standing? *Compare id. with* Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights For Natural Objects*, 45 S. CAL. L. REV. 450 (1972).

10. The best part of the research was published as Michael M. Berger, *Nobody Loves An Airport*, 43 S. CAL. L. REV. 631 (1970). The remainder of it, augmented by materials and experience acquired in practice, eventually appeared as Jerrold A. Fadem & Michael M. Berger, *A Noisy Airport Is A Damned Nuisance*, 3 SW. U. L. REV. 39 (1971); Michael M. Berger, *You Know I Can't Hear You When the Planes Are Flying*, 4 URB. LAW 1 (1972); Michael M. Berger, *The California Supreme Court—A Shield Against Governmental Overreaching:* Nestle v. City of Santa Monica, 9 CAL. W. L. REV. 199 (1973); Michael M. Berger, *Airport Operator Liability: Continuing Liability for Continuous Tortfeasors*, 9 L.A. LAW. 27 (Dec. 1986); Michael M. Berger, *Airport Noise in the 1980s: It's Time for Airport Operators to Acknowledge the Injury They Inflict On Neighbors*, 1987 INST. ON PLAN. ZONING & EMINENT DOMAIN, ch. 10 (SW. Legal Foundation). This, along with the prolific output of my law partner Gideon Kanner, led one prominent Los Angeles land use lawyer to say of our firm, "You guys must have a 'publish or perish' requirement!"

except one.[11] The one exception was a case in which I had appeared as amicus curiae and later obtained rare permission from the Court to file a post-argument letter brief providing my suggested answers to questions that had been posed by members of the Court, but to which I believed had received insufficient answers.[12] There were also numerous matters handled in the various branches of the California Court of Appeal and other courts in other parts of the country.

The airport cases had two post-war[13] U.S. Supreme Court cases to provide a basis for analysis. In *United States v. Causby*,[14] the Court held the federal government liable for the destruction of a chicken farm beneath the landing pattern at a federally owned airport.[15] The Court had to deal only with the question of whether the government or the underlying landowner had to bear the burden of damage caused by multiple low flights. It was spared the need to go further, because the United States owned and operated both the airport and the military aircraft using it. The key holding, however, clearly placed responsibility on the government.

A few years later, the Court revisited the question and concluded that it was the airport operator that bore the responsibility. After all, said the Court, "it is the local authority which decides to build an airport *vel non*, and where it is to be located."[16]

But that was it. And, in fact, one might have thought that should be enough, as it plainly laid out the liability for damage to underlying

11. Nestle v. City of Santa Monica, 6 Cal. 3d 920 (1972) (government agencies are liable for nuisance); City of San Jose v. Superior Court, 12 Cal. 3d 447 (1974) (claim for airport noise damage may be filed on behalf of class, but class lawsuit is not appropriate because each parcel is unique); Britt v. Superior Court, 20 Cal. 3d 844 (1978) (statute of limitations must be liberally applied so as to permit trial); City of Los Angeles v. Decker, 18 Cal. 3d 860 (1977) (measure of compensation; ethical duties of government lawyers); Greater Westchester Homeowners Ass'n v. City of Los Angeles, 26 Cal. 3d 86 (1979) (victims of airport nuisance may recover damages for emotional disturbance). There had only been one such case before I started my practice (and it dealt only with noise liability as between airport owner/operator and airline owner/operator) an issue already decided by the U.S. Supreme Court, which left the field pretty open. *See* Loma Portal Civic Club v. Am. Airlines, Inc. 61 Cal. 2d 582 (1964).

12. Baker v. Burbank-Glendale-Pasadena Airport Auth., 39 Cal. 3d 862 (1985). The opinion generally accepted the analysis in my post-argument letter.

13. WWII, for our younger readers.

14. 328 U.S. 256 (1946).

15. Actually, the farm was not so much "destroyed" as rendered useless. The chickens were so frightened by the noise that they committed suicide by flying into the walls of their coop. See the trial court opinion in Causby v. United States, 60 F. Supp. 751 (Ct. Cl. 1945).

16. Griggs v. Allegheny Cnty., 369 U.S. 84, 89 (1962).

property caused by aircraft overflights, both as to general liability and as to the party to be charged.

But it was not to be that easy. The causes were several. First, each state jurisdiction believed that it was in charge of its own law. It was all well and good for the U.S. Supreme Court to make statements about the federal constitution, but these cases involved precepts of state property law, and that was the province of the state courts to decide.[17] Second, airport operators were reluctant to accept responsibility. Let me give you just two illustrations.

A full two decades after *Griggs* had plainly placed liability on the airport operator, opposing counsel made this argument in a Los Angeles Superior Court filing in one of my cases:

> Standing by itself, Los Angeles International Airport is basically a mass of concrete and steel. *Any* problems with respect to the Plaintiff only arise when jet aircraft land and take off from the Airport. Therefore, it is the jet aircraft's use of the airport that actually generates Plaintiff's cause of action for negligence, *not* the operation, management and control of the Airport by the Defendant.[18]

For sheer brass, such a statement may have been the high—or low—watermark since Cain shot a guilty glance Heavenward and asked, "Who, me?"

That attitude was epidemic. For example, after I convinced the California Supreme Court in 1972 to hold that airport operators could be liable to their neighbors under theories of nuisance, negligence, zoning violation, and inverse condemnation (in a case involving the Santa Monica Airport),[19] two things of note happened. First, a senior lawyer for Los Angeles International Airport told me that his client would never stop litigating until the Supreme Court reached a conclusion of liability in one of its own cases, not one involving some other facility. Second, while a petition for rehearing was pending in the Supreme Court in the Santa Monica case, the Los Angeles City Attorney

17. Remember the concept of "independent state grounds" as a basis for avoiding the U.S. Supreme Court.

18. Defendant's Memorandum of Points and Authorities in Support of Motion for Summary Judgment at 33–34, Malandrinos v. City of Los Angeles (1983) (No. 138136) (emphasis in original).

19. Nestle v. City of Santa Monica, 6 Cal. 3d 920 (1972).

"leaked" a "confidential, attorney-client" memo to the *Los Angeles Herald-Examiner*. In that memo, he purported to "advise" the City Council that if the Supreme Court did not reverse its decision on airport operator liability, the city would have no alternative but to close Los Angeles International Airport. The "leak" resulted in the issuance of an "EXTRA" edition of the newspaper (this was 1972, after all, and print newspapers were still important) bearing the following eight-column double-banner headline, in letters two inches high:

L.A. AIRPORT FACES
SHUTDOWN IN 30 DAYS

The whole sordid story is detailed elsewhere.[20] Suffice to say that the threat was a ploy to stampede the Supreme Court. It wasn't serious; it didn't work. I note it here only to show why much litigation was needed to bring civility to the relationship between airports and their neighbors.[21]

My first exposure to the reality of airport noise litigation involved the smallish airport in Santa Monica. That airport had been used by Douglas Aircraft as the jumping-off point for the many DC-3 aircraft that it built for the military, particularly during World War II.[22] After the war, it became a general civil aviation airport serving small, private aircraft and flight schools. Eventually, some of the private pilots using the airport acquired early generation jets (e.g., Lear Jets and Jet Commanders). That was when trouble with the neighbors erupted. The jets were loud. Very loud. In fact, they were similar to military fighter jets in that sense, because they had no sound mufflers. The noise problem was exacerbated at Santa Monica because the takeoff end of the runway was at the edge of a bluff high above a residential

20. *See* Michael M. Berger, *The California Supreme Court—A Shield Against Governmental Overreaching:* Nestle v. City of Santa Monica, 9 CAL. WEST. L. REV. 199, 244–52 (1973).

21. For other illustrations from other airports, see Michael M. Berger, *Airport Noise in the 1980s: It's Time for Airport Operators to Acknowledge the Injury They Inflict On Neighbors*, 1987 INST. ON PLAN. ZONING & EMINENT DOMAIN, ch. 10, pp. 10-60–10-62 (SW Legal Foundation).

22. An intriguing part of the litigation that is not specifically discussed in the Supreme Court's opinion is the basis for the zoning violation claim. The eastern 400 feet of the runway is located in the City of Los Angeles on land zoned for residential purposes. However, Douglas Aircraft obtained a variance from Los Angeles in 1942 to operate the runway on that land until the end of "the national emergency [i.e., WWII]." Thus, the trial record included copies of peace treaties with all the belligerents to demonstrate that World War II had indeed ended by the time the case went to trial in the late 1960s.

neighborhood. The jets would roll down the runway and then explode off the bluff over the homes below. The noise was shattering.[23]

That is when I got my start at shaping the law and using the massive amount of research I had just concluded in graduate law school. For better or worse, at that time the California Rules of Court specified *no limit* to either the pages or words one could include in a brief. Today, we have a word (and font) limit that is the rough equivalent of a fifty-page brief. I had a lot to say and, with no restriction, filed a 231-page brief. If you want to shape the law, it helps if they give you a lot of leeway to discuss it. It also helps if you have a court that is receptive enough to read it.[24]

The Santa Monica case was actually a wonderful starting point, as it contained four related, yet different, causes of action. Any one of them could have provided substantial recovery for the airport's neighbors: inverse condemnation (physical taking by aircraft overflight or noise intrusion), nuisance, negligence, and violation of zoning

23. We demonstrated this in the Superior Court and the Court of Appeal with acoustically calibrated tape recordings played by a sound engineer. On appeal (my introduction to the case), I decided that we needed to find a way to actually expose the Justices to the reality of the noise. As one of the bases of the appeal was that the judgment was not supported by the evidence, and the tapes were a crucial part of the evidence, I made a formal motion in the Court of Appeal for leave to have our engineer properly calibrate and play the tape for the court. (I did not want any Justice simply taking the tapes home and playing them on his domestic recorder (with the sound level incorrectly set), so I made up this otherwise unheard-of motion.) To the surprise of many (including my partners), the court granted the motion. We were allowed to set up speakers during a noon recess. There must have been at least a dozen speakers in each of the two banks that were set up to provide a stereophonic image. When I concluded my argument, I simply turned to the engineer and said "hit it." Which he did. A low rumble began in the back of the courtroom and increased in loudness as a Lear Jet literally "flew" through the courtroom and over the Justices' heads. The Justices (obviously knowing something was afoot) sat stone-faced. The court personnel were another story. The court reporter did not take stenographic notes but simply recorded the proceedings on a simple tape recorder. When the noise from the overflight began to build in intensity—and the jet "flew" overhead—the reporter dove under the table while the clerk leapt for the tape recorder in an effort to turn it off before its little brain exploded. With everyone's ears ringing, I turned to the airport's lawyer and said, "It's all yours." That was very early in my career, but it may have been the most fun I've had in a courtroom (other than the more generalized joy of arguing to the U.S. Supreme Court).

24. A demonstration of that receptivity came in a strange way at oral argument in the Court of Appeal. Between pages 195 and 196 in the brief, I had inserted a cartoon from a recent issue of the *New Yorker* that I thought aptly illustrated the testimony being discussed, i.e., about how the noise was driving ordinary people to do crazy things. The cartoon showed a man sitting in his back yard astride an anti-aircraft gun and his wife explaining, "Walter has decided to handle sonic booms his own way." At oral argument, the Justice who ended up writing the opinion castigated me for the humorous insertion—and said the space could have better been used for legal argumentation. One hundred ninety-five pages into a 231-page brief and he wanted more legal argument. We later became good friends and were able to laugh about the incident.

ordinance. We had gone to trial on the merits on the inverse claim and lost. The other claims had been dismissed as a matter of law. So, I briefed the heck out of each of them. My opening brief discussed 165 cases and 22 texts and law review articles (in addition to various constitutional provisions, statutes, and rules). To the greatest extent possible, it was a primer on both the substance of the underlying legal theories and their application to the facts in the airport v. neighbor context. I firmly believed that the courts needed such a primer on the inverse condemnation claims[25] and that they were not well educated on the law of nuisance either.[26]

When the opinion came down, we got a 50/50 split: the court affirmed the dismissal of our inverse condemnation and nuisance counts (acknowledging that such an inverse condemnation claim could be made but that the evidence supported the trial court's ruling against us) but reversing the dismissal of the negligence and zoning counts.

So, we carried on, seeking review from the State Supreme Court. The court granted review, and the case was again heavily briefed. The fundamental substantive change is that I convinced them that nuisance was a viable claim against a government agency. The issues were hard fought, but the law gained a lot of substance from this Supreme Court opinion, explaining that airport operators are no different than ordinary tortfeasors and have the same constitutional obligations as other government organizations.

Class action issues also became important due to the sheer number of people living around major airports.[27] Several such cases were litigated, advancing the law in various ways. The most interesting may have been a federal case in which we had been hired by the City of Inglewood (which lies just east of Los Angeles International Airport) to file a class action on behalf of all its property owners and residents.[28] In addition to alleging inverse condemnation and nuisance

25. *See supra* note 3 and accompanying text for comments about the general state of takings law.

26. Prosser once denigrated the nuisance concept as this: "There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.' It has meant all things to all people. . . ." WILLIAM PROSSER & W. PAGE KEETON, THE LAW OF TORTS ch. 15 at 616 (5th ed. 1984).

27. My firm preferred large group actions in which we individually represented each plaintiff. Some of these had nearly 1000 named plaintiffs. However, we became involved in class actions either because a client insisted on it or because we became involved in cases after someone else had already filed them that way.

28. City of Inglewood v. City of Los Angeles, 451 F.2d 948 (9th Cir. 1972).

claims, this case raised the question whether airport neighbors are third-party beneficiaries of the grant contracts entered into between airport operators and the federal government. Under these contracts, the federal government supplies massive funding to construct airport improvements.

The federal grant contracts contain provisions by which the airport recipient of funds promises, in essence, to be kind to its neighbors, as required by statute: "No airport development project may be approved by the Secretary unless he is satisfied that fair consideration has been given to the interest of communities in or near which the project may be located."[29]

In upholding the right of Inglewood to sue as third-party beneficiary (or at least as representative of the class of such beneficiaries), the court concluded:

> If Los Angeles made the assurances required by sec. 1716(c) (3) and sec. 1718(4) in applying for various grant agreements, then Inglewood must certainly be included within the category of intended beneficiaries of those assurances. Congress had some purpose in enacting these two sections of Title 49. It is not to Los Angeles' benefit to be required to give the Secretary those assurances; nor are the assurances of any independent benefit to the Secretary. The Secretary merely receives them for the benefit of, and in the place of, the surrounding communities and residents of the area. Any other interpretation of sec. 1716(c) (3) and sec. 1718(4) deprives them of any meaning or effect.[30]

An intriguing bit of good law was made in the losing cause of *City of San Jose v. Superior Court*.[31] That class action had been filed by another law firm, which brought me in to handle the city's appeal to the Supreme Court. The case presented two issues: (1) may a claim under the California Tort Claims Act be filed on behalf of a class, and, if so, (2) may a class action be filed in an airport noise case? The California Supreme Court answered these questions (1) yes, and (2) no. What was intriguing and what became the most important part of the decision was the reason for denying the class action: because the plaintiffs sought only property damages in their claim for nuisance, they

29. 49 U.S.C. § 1716(c)(3).
30. *City of Inglewood*, 451 F.2d at 956.
31. 12 Cal. 3d 447 (1974).

failed to adequately represent the class, because plaintiffs in nuisance cases may recover damages for personal injury and annoyance as well.[32] The case then became authority in lower courts for the proposition that plaintiffs in nuisance cases may recover damages for personal injury and annoyance, a proposition that had not firmly been established before. The reasoning was that if these class plaintiffs were inadequate for not pursuing such claims, then the claims must be valid.

By the time the Supreme Court considered the *Greater Westchester* case, the lower courts had repeatedly applied the *Nestle* conclusion that inverse condemnation was a viable claim for airport neighbors.[33] The major contribution of *Greater Westchester* was to solidify the application of nuisance law. *Nestle* only dealt with nuisance law in the abstract as a legal issue of whether such a claim could be made at all. *Greater Westchester* had gone to trial on the merits and resulted in a judgment for the airport's neighbors, who recovered a substantial amount for personal injuries and annoyance, in addition to property damage.[34] Thus, by the time the case was concluded, the Supreme Court had raised the dictum of *San Jose v. Superior Court* to a firm holding: In addition to damages for property impacts, airport neighbors could also recover under an expanded nuisance theory for personal suffering and annoyance.

The other interesting thing about this field was that there had been little published scholarly work at the time, leaving the area open for all my graduate research to fill the void. I still remember one day when Gideon came running into my office waving the latest appellate court advance sheet and proclaiming: "You've got to see this. This guy has taken your law review articles and stitched them together into a binding court opinion!" And indeed he had. The case was *Aaron v. City of Los Angeles*.[35] Only people like Gideon and me who were familiar with the contents of my articles would have realized the

32. *Id.*

33. For citations to both California and non-California cases see, for example, Aaron v. City of Los Angeles, 40 Cal. App. 3d 471 (1974).

34. The trial record was large and solid. The trial judge had insisted that anyone who claimed such personal damages had to testify individually. Many of the neighbors were children. A large number of the adults and children in this 900-odd plaintiff case had taken the stand and testified as to the devastating impact the noise, dust, and fumes from the airport had on their, his, or her life.

35. 40 Cal. App. 3d 471 (1974).

extent to which the opinion relied on them. Of course, the opinion cited the articles, as well as a couple of others that had been published by that time. But the flattering reality was that either the judicial author of the opinion or his research attorney had actually lifted a substantial amount of the text and, in Gideon's words, "stitched" the pieces together to create the bulk of the opinion. For someone writing advocacy pieces in academic journals, it doesn't get much more satisfying than that.

By then, airport litigation was slowing down. Major liability holdings had been affirmed at the highest state court level. It was time to move on to something else. Fortunately, activist governments and their agents were moving in other directions, sparking the regulatory taking litigation that continues apace to this day.

II. REGULATORY TAKINGS—THE MORE COMPLEX BRANCH

Regulatory takings will doubtless receive more attention from the panel. The topic is tougher and sexier than airports, and it is still very much in flux. Two aspects are critical: (1) can there be a regulatory taking, and (2) what does it take to ripen a regulatory taking case?[36]

I was involved in many of the early (which is to say post-1978, when the Supreme Court got interested in takings cases after its fifty-year layoff[37]) regulatory taking/ripeness cases as the law developed. In the takings course that I have taught for years, mostly at the University of Miami Law School, I have insisted that my students study the cases in chronological order—the way those of us in the field actually lived them—so they can see how the law developed and how the judicial lineups changed as we progressed from *Agins* in 1980 through *First English* in 1987. I continue to believe that you cannot truly understand how, and possibly why, the law developed as it did if you merely try to extrapolate black letter rules.[38] Suffice to say that, that period

36. I have been litigating regulatory taking cases for decades in state and federal courts. I will confine this discussion to the U.S. Supreme Court work.

37. Little of consequence appeared between *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) and *Penn. Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

38. For one, you would have missed the years during which *Agins* was said to set the rule for regulatory takings with its two alternatives for liability, i.e., failure to substantially advance a legitimate state interest or denying economically viable use. Twenty-five years later, the Court admitted the error that most of us had seen at the outset, i.e., that the first alternative was a due process test, not a takings test. *See* Lingle v. Chevron USA, Inc., 544 U.S. 528 (2005).

was excruciating. If you look at the *dramatis personae* in that batch of cases, you will largely find the same people, on both sides, fighting the same fight on behalf of different clients every year or so, while the Supreme Court struggled to find five Justices who could agree on an answer.

Being involved at the U.S. Supreme Court level often means filing amicus curiae briefs. There are not a lot of slots available to actually argue cases, and many of those are filled by lawyers at a few prominent D.C. law firms. Wise or not, many clients believe that they are better off with one of the "pros" rather than with someone who may be more specialized substantively. So, I participated through the amicus process in *Agins*[39] and *MacDonald*[40] while waiting for cert to be granted in *First English*.[41] By the time I briefed *First English*, we had a pretty good idea what all of the arguments were on all sides of the issue, and I felt confident that I could put together both a good petition and sterling briefs on the merits.[42]

In a sense, I was fortunate to be practicing in California and the Ninth Circuit. You may not have noticed, but California is really on a different planet. In much the same way as the Federal Circuit that includes California, the courts of that state tend to go their own way, regardless of guidance from a higher authority.[43] So, the theme of my Cert Petition was twofold: (1) the country needed an end to the legal confusion about regulatory takings that had begun with *Agins*, and (2) California was openly defiant of U.S. Supreme Court authority and needed to be reined in. The arguments were easy to construct

---

39. Agins v. City of Tiburon, 447 U.S. 255 (1980).

40. MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986).

41. First English Evangelical Lutheran Church v. Los Angeles Cnty., 482 U.S. 304 (1987).

42. I also spent some of my downtime writing articles about how the law of regulatory takings ought to work. In addition to the ripeness articles, *infra* note 48, see, for example, Michael M. Berger, *To Regulate or Not to Regulate—Is That the Question? Reflections on the Supposed Dilemma Between Environmental Protection and Private Property Rights*, 8 LOY. L.A. L. REV. 253 (1975); Michael M. Berger, *The State's Police Power Is Not (Yet) the Power of a Police State,* 35 LAND USE LAW & ZONING DIGEST, No. 5, p. 4 (May 1983); Michael M. Berger & Gideon Kanner, *Thoughts on the White River Junction Manifesto: A Reply to the "Gang of Five's" Views on Just Compensation for Regulatory Taking of Property*, 19 LOY. L.A. L. REV. 685 (1986); Michael M. Berger, *Happy Birthday, Constitution: The Supreme Court Establishes New Ground Rules for Land Use Planning*, 20 URB. LAW. 735 (1988); Michael M. Berger, *Vindicating the Rights of Private Land Development in the Courts*, 32 URB. LAW. 941 (2000).

43. The odds of having the U.S. Supreme Court review any decision are extremely low, so one suspects that few judges lose sleep over that prospect.

once it was decided that those were the keys to the case). The first was demonstrated by the growing conflict and confusion in courts around the country on what it took to establish a regulatory taking (and whether there really was such a legal animal), and the second was the subject of a growing pile of critical commentary, all of which was collected and quoted in the petition.

After a years-long wait for the Supreme Court to actually decide the merits of the regulatory taking issue, *First English* provided the key the Court had sought. The opinion begins with what appears to be an embarrassed apologia for having ducked the issue before, but concludes that this is the proper case. We had, I confess, what I always thought was significant help from the Court of Appeal. Although the opinion was unpublished,[44] the author, Justice Robert Thompson, plainly stated that "because the United States Supreme Court has not yet ruled on the question of whether a state may constitutionally limit the remedy for a taking to nonmonetary relief, this court is obligated to follow *Agins*['s]"[45] rule of noncompensability. The rule, when it finally came down, was simplicity itself: a taking is a taking, regardless of how accomplished and how long it lasts, and the 5th Amendment mandates compensation for all takings. A lot of us wondered why it took so long for the Court to say that, or, indeed, for government agencies to acknowledge it.

In the meantime, the Supreme Court's evasion of the general rule of regulatory takings had led it to develop—quite unintentionally—the rule of "ripeness" that continues to vex the legal system. I say it was unintentional because it was not announced as such until the Court had proceeded some way through the process. It simply began by refusing to decide regulatory taking issues because the specific case was not ripe. And it continued to do so. Eventually, I concluded that the Supreme Court had created a ripeness rule for regulatory takings—and for regulatory takings alone—that contained two prongs and seven branches.[46]

---

44. After all, it decided nothing of substance as California law since *Agins* had held that there could be no claim for damages in California because of regulatory action.

45. First English Evangelical Lutheran Church v. Los Angeles County, No. B003702 (June 25, 1985).

46. Michael M. Berger, *The "Ripeness" Mess in Federal Land Use Cases or How the Supreme Court Converted Federal Judges into Fruit Peddlers*, 1991 INST. ON PLAN. ZONING & EMINENT DOMAIN.

My participation in the ripeness mess was largely as an amicus[47] and as a contributor to the scholarly journals.[48] I was one of the first to criticize *Williamson County*,[49] and I continued to do so from that day in 1985 to the present.[50] One of my critiques was as a co-author with my old law school mentor, Professor Daniel Mandelker of Washington University Law School. Although we respected each other, Dan and I disagreed on most aspects of regulatory taking law.[51] Except in the area of ripeness. Finding that we both agreed that issues of federal constitutional law ought to be subject to litigation in federal courts, we joined forces to express that view.[52] It was not that I failed

47. I handled one case as a test case. A developer felt so strongly about the inanity of the ripeness rules that he offered his case as a possible way to reach the Supreme Court. Thus, we filed suit with the expectation of losing quickly in the district court and having that dismissal affirmed quickly, thus setting the stage for our petition to the Supreme Court. The first two stages went according to plan: the case was dismissed, and the dismissal was affirmed. Kottschade v. City of Rochester, 319 F.3d 1038 (8th Cir. 2003). But notwithstanding substantial amicus support, including support from leaders of Congress who urged the Court to straighten out the mess because Congress seemed unable to do so, the Supreme Court denied certiorari.

48. Michael M. Berger, *Anarchy Reigns Supreme*, 29 WASH. U. J. URB. & CONTEMP. L. 39 (1985); Michael M. Berger, *"Ripeness" Test for Land Use Cases Needs Reform: Reconciling Leading Ninth Circuit Decisions is an Exercise in Futility*, 11 ZONING & PLAN. L. REP. 57 (1988); Michael M. Berger, *Happy Birthday, Constitution: The Supreme Court Establishes New Ground Rules for Land-Use Planning*, 20 URB. LAW. 735, 786–95 (1988); Michael M. Berger, *The Civil Rights Act: An Alternative for Property Owners Which Avoids Some of the Procedural Traps and Pitfalls in Traditional 'Takings' Litigation*, 12 ZONING & PLAN. L. REP. 121 (May 1989); Michael M. Berger & Daniel R. Mandelker, *A Plea to Allow the Federal Courts to Clarify the Law of Regulatory Takings*, 42 LAND USE L. & ZONING DIG. 3 (Jan. 1990); Michael M. Berger, *The "Ripeness" Mess in Federal Land Use Cases or How the Supreme Court Converted Federal Judges into Fruit Peddlers*, 1991 INST. ON PLAN. ZONING & EMINENT DOMAIN; Michael M. Berger, *Regulatory Takings Under the Fifth Amendment: A Constitutional Primer*, WASH. LEGAL FOUND. 13–19 (1994); Michael M. Berger & Gideon Kanner, *The Need for Takings Law Reform: A View From the Trenches—A Response to Taking Stock of the Takings Debate*, 38 SANTA CLARA L. REV. 837 (1998); Michael M. Berger, *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*, 3 WASH. U. J.L. & POL'Y 99 (2000); Michael M. Berger, *Property Rights and Takings Law: Y2K and Beyond*, 2002 INST. ON PLAN. ZONING & EMINENT DOMAIN [hereinafter Property Rights & Takings]; Michael M. Berger & Gideon Kanner, *Shell Game! You Can't Get There from Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-Parody Stage*, 36 URB. LAW. 671 (2004); Michael M. Berger, *What Has San Remo Done to the Ripeness Doctrine?*, 2006 INST. ON PLAN. ZONING & EMINENT DOMAIN.

49. Michael M. Berger, *Anarchy Reigns Supreme*, 29 WASH. U. J. URB. & CONTEMP. L. 39 (1985).

50. Michael M. Berger, *The Ripeness Game: Why Are We Still Forced to Play?*, 30 TOURO L. REV. 297 (2014).

51. He had once described himself as a "police power hawk," indicating general sympathy for the position of regulating entities. *See* DANIEL R. MANDELKER, LAND USE LAW, at v (5th ed. LexisNexis 2003). I, of course, have always been on the property owners' side.

52. Berger & Mandelker, *supra* note 48.

to try to attract the Supreme Court's attention to this issue. I simply failed to get the four necessary votes to have certiorari granted. So I bided my time writing and supporting other people's petitions. We seem to have made a breakthrough in 2005 when four Justices signed an opinion saying that *Williamson County* may have been wrongly decided and ought to be reconsidered.[53] I had filed an amicus brief in that case, strongly attacking *Williamson County* in as many ways as I could. I could do no more than sit mute at oral argument when Justice O'Connor asked the lawyer I had supported whether he had challenged *Williamson County*. When he replied that he had not, her rejoinder was "[p]erhaps you should have." The Court has yet to do so, although many of us have tried to get it to follow through.

During this time, I also got involved in the fascinating real property issues raised by the Federal Rails-to-Trails statute.[54] In a nutshell, when railroads were being laid across the country in the nineteenth century, right-of-way agents fanned out and acquired property interests on which to lay the tracks. While they sometimes acquired fee simple interests, most of the rights-of-way were acquired as easements. More than that, they were acquired as restricted easements that were to remain in existence so long as the property was used for railroad purposes. Fast forward to the twentieth century. The railroads that had tied the country together were now yielding to other forms of transportation and seeking to divest themselves of tracks and rights-of-way that were becoming costly to maintain. At the same time, people had developed an interest in recreational hiking and biking and needed trails on which to do so. Acquiring linear rights-of-way is neither cheap nor easy. Especially in the twentieth century. Trail proponents sought to acquire rights-of-way that the railroads were already eagerly abandoning. They ran into one problem: settled state real property law. In virtually all states, when a restricted easement ceases to be used for its intended purpose and the owner of the dominant tenement abandons it, full use and enjoyment returns to the underlying property owner. Thus, the railroads had nothing to sell, and state courts repeatedly struck down attempted transfers at the urging of the underlying fee owners.[55]

---

53. San Remo Hotel v. San Francisco, 545 U.S. 323, 351 (2005) (Rehnquist, C.J., concurring, joined by O'Connor, Kennedy, and Thomas, JJ.).

54. 16 U.S.C. § 1247(d).

55. For discussion and case citations, see Michael M. Berger, *Is the 'Rails-to-Trails' Statute a Taking? Only the Claims Court Knows*, 13 ZONING AND PLANNING LAW REPORT 33 (May 1990);

Enter Congress. Responding to the pleas of trail organizations, local government agencies, and recreational users, Congress decided to deal with the property law issue by defining it out of existence. Congress declared that as long as a railroad intends that it might one day decide to re-lay the tracks and ties it had torn up and resume railroad use, then its cessation of use will not be considered "abandonment."

"There," thought Congress, "that ought to do it and make a lot of constituents happy to boot." But most courts would not stay fooled long.

I became involved in two such cases in the late 1980s. My introduction came in a plea from a group of property owners in Missouri who owned land over which the M-K-T Railroad had long run a line. When they approached me, I told them that my small California firm would not be capable of handling such a large trial in Missouri, but I urged them to come back to me when the case went up on appeal, as I was certain that it would. Indeed, as I examined this piece of Congressional handiwork, I told my partners that we needed to maintain contact with this group of people because the issue had Supreme Court written all over it. The idea that Congress could—with the stroke of a pen—upset settled property law from coast to coast would have to be addressed at the highest judicial level. When that group of clients lost at trial, they remembered me and returned. Where handling a trial in Missouri would have been difficult, handling an appeal in the Eighth Circuit would be no different than any other appeal anywhere. I was convinced that the statute was invalid, but I ultimately lost that appeal.[56]

While working on the Eighth Circuit case, I was in contact with other lawyers and property owners fighting similar cases in other parts of the country. One was a couple in Vermont whose case was proceeding through the Second Circuit. They also lost. Their lawyers asked for assistance in drafting the Cert Petition, promising that if we could get certiorari granted they would step aside and substitute me into the case. Essentially, I was drafting two petitions dealing with virtually the same issue at the same time. They were so close in time

---

Michael M. Berger, *Rails-to-Trails Conversions: Has Congress Effected a Definitional Taking?*, 1990 INST. ON PLAN. ZONING & EMINENT DOMAIN, ch. 8 (SW. Legal Foundation); Michael M. Berger, *Not So Fast: 'Rail-to-Trail' Conversions Could be More Costly than they Appear*, 37 RIGHT OF WAY, no. 5, at 4 (Oct. 1990).

56. Glosemeyer v. Missouri-Kansas-Texas R.R., 879 F.2d 316 (8th Cir. 1989).

that each petition referred to the other, urging the Court to grant at least one of the petitions while perhaps holding the other in reserve. Whatever went on inside the Court, we got the Justices' attention. Although they denied certiorari in the *Glosemeyer* case from Missouri, they granted the petition in the *Preseault* case from Vermont.[57]

Preseault was a fascinating case—as much for its procedural nuances as for its substance. On a technical level, I lost that case 9–0. But that doesn't really tell the story. When the Second Circuit decided the case, its opinion was as unfriendly to the underlying fee owners as it was possible to be. Paraphrasing, the court said that nothing in the Rails-to-Trails Act is now of will ever be a taking of private property in any way shape or manner. Period. Case closed. However, although the word at the end of the Supreme Court's opinion is "affirmed," that general ruling was gone. In its place was another "ripeness" ruling: the underlying fee owners could not seek to invalidate the statute until they had first sought compensation from the federal government (because of the impact of that statute) in the Court of Federal Claims. Not much about takings at all until you get to the concurring opinion. Three Justices, led by Justice O'Connor, took the opportunity to reconfirm the enduring validity of *First English*, holding that all takings require compensation. It may be noteworthy that Justice O'Connor was one of the dissenters in *First English* but took this opportunity to confirm the priority of stare decisis and the controlling nature of an earlier opinion that she did not join.

The upshot of *Preseault* was that many people have asked (and continue to ask) whether I won or lost. It is hard to say. I know that if you read the transcript or listen to the tape of oral argument you will find three places in which the Justices asked opposing counsel questions that caused those who were in attendance to break out in laughter. I also know that the general holding of the Second Circuit disappeared, and the matter was essentially sent to the Court of Federal Claims for a determination of the takings claim. And I know that after much litigation, the matter settled with the Preseaults being awarded $1.5 million for the quarter-mile of trail that traversed their land.[58]

---

57. Preseault v. ICC, 494 U.S. 1 (1990).

58. The total includes compensation for the property, interest for the sixteen years during which the Feds strongly denied liability, and reimbursement of the substantial attorneys' fees the Preseaults had to pay lawyers to defend their rights.

A final thought about Rails-to-Trails. Remember what I said earlier about airport operators refusing to face facts and deal with the legal realities they faced? That same disease appears to have stricken the federal defenders of trail rights. Even after *Preseault* should have made the liability issue clear, the Feds continued to fight claims by the owners of fee interests underlying rights-of-way. Lately, reported cases have seemed to swell.[59] The Supreme Court needed to take one more case last year to finally slap down the federal claims and, in the process, castigate the Solicitor General for arguing contrary to arguments his office had made years before:

> More than 70 years ago, the Government argued before this Court that a right of way granted under the 1875 Act was a simple easement. The Court was persuaded, and so ruled. Now the Government argues that such a right of way is tantamount to a limited fee with an implied reversionary interest. We decline to endorse such a stark change in position, especially given "the special need for certainty and predictability where land titles are concerned."[60]

I handled two other Supreme Court cases that had been referred by other counsel. I have always respected counsel who had strong enough egos to be able to say that someone with more background and experience ought to step in. In addition to *Preseault*, that happened in *Del Monte Dunes*[61] and *Tahoe Sierra*,[62] each of which provided different ways to help shape the law.

Del Monte Dunes was both exhilarating and terrifying. It was exhilarating because it was an excellent case with a strong factual record after trial, yet it was terrifying because the Ninth Circuit had ruled in favor of my client—twice, once procedurally and once on the merits. As you surely know, that is a virtual kiss of death from a court that is widely known as the most reversed court in the country. So I focused on the positive. The case had a fascinating ripeness aspect. It arose in California before the U.S. Supreme Court decided *First*

---

59. *E.g.*, Farmers Cooperative Co. v. United States, 98 Fed. Cl. 797 (2011); Biery v. U.S., 99 Fed. Cl. 565 (2011); Brandt v. U.S., 2011 WL 6076190 (Fed. Cl. 2011); Capreal, Inc. v. U.S., 99 Fed. Cl. 133 (2011).

60. Marvin M. Brandt Revocable Trust v. U.S., 134 S. Ct. 1257 (2014) (citing Leo Sheep Co. v. United States, 99 S. Ct. 1403 (1979)).

61. City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999).

62. Tahoe-Sierra Preservation Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002).

English. Thus, there was no compensatory remedy available under California law for the regulatory taking at the heart of the case. That allowed plaintiff's counsel to avoid the California courts and file suit in U.S. District Court.[63] Initially, that did not help, as the District Court dismissed the case as unripe. On appeal, the Ninth Circuit reversed. It examined the procedural history of the case, including the five separate development applications made by my client, accompanied by nineteen different site plans, all of which were denied by the city, and concluded that the only thing this case was ripe for was litigation.

The case went to trial in a procedurally strange way. The takings claim was submitted to the jury, along with an equal protection claim. The substantive due process claim was tried to the court alone. The jury ruled in favor of the property owner. The judge ruled for the city, noting that the city's burden in defending against a substantive due process claim was significantly lighter than defending against the others. On appeal, the Ninth Circuit affirmed, and then the Supreme Court granted the city's cert petition.

This turned out to be a first impression case, and an unusual opportunity to shape the law, but not in the way we initially supposed. The constitutional claim was brought under the Civil Rights Act.[64] What nobody realized until we began researching the brief on the merits was that there was no Supreme Court precedent dealing with the right of a civil rights plaintiff to have a jury decide liability. Thus, although retaining overtones of takings law, the case turned into a Seventh Amendment case.

As a regulatory taking case, it caused quite a buzz between the time of oral argument and the release of the opinion. The reason was that one of the Justices asked the city's lawyer, in a seemingly innocent voice: if we apply the three-factor *Penn Central* test, what if the "character of the government action" is bad faith? So, for a period of months, the takings bar waited to see how bad faith would factor in with the *Penn Central* analysis. It turned out to be a dud, as there was no mention of bad faith as part of the analysis.

---

63. Even *Williamson County* made clear that suit in state court was required only if state law provided a remedy. Here, the California Supreme Court had made clear that there was no remedy.

64. 42 U.S.C. § 1983 (2012).

But the thought was picked up in *Tahoe-Sierra*. No way to whitewash that case; it was a clear loss all around. It was a "moratorium" that lasted for decades. I don't know how the government was able to spin that into anything other than a massive admission that the planning process had failed, so everything had to stop—indefinitely. It always seemed to me that, that was a taking of some sort. The Supreme Court phase of the case began with a game by the Supreme Court: it changed, indeed reversed, the question I had presented to the Court. Where my question was whether a "temporary" moratorium can *never* require compensation, the Court told us to brief and argue whether a temporary moratorium *always* requires compensation. A very uphill question, even though I still believe that it could be answered in our favor. The issue would be whether there was any compensation due if the "temporary" part were so short that it did no damage.[65]

The most maddening part of the opinion (from my perspective, at least) is that, after concluding that this "temporary moratorium" could not be a taking, the opinion (drafted by Justice Stevens) included a section in which the theme was that "considerations of fairness and justice" might call for a different result. The opinion then discusses *seven* other ways in which the analysis might have been made so that it produced a different result. I say it was maddening because the first alternative was that the Court might have considered the series of moratoria as a singular "rolling moratorium" that had lasted for decades. That was *precisely* the question that I had drafted and presented in the petition. But the Court declined to grant review on that issue and then said that *if* review had been so granted it might have altered the result. I was, and remain, at a loss for words.

For the future, the opinion contains these intriguing items. First, it says that any moratorium in existence for more than one year is automatically suspect. Second, it dropped the other shoe from *Del Monte Dunes* and said that bad faith by the government may have

65. Another sidelight to the Supreme Court phase of the case was that the agency hired John Roberts to represent it. Yes, *that* John Roberts. I have lost track of the clipping, but I recall reading in the Washington Post that the White House had arranged that assignment because Roberts' nomination to the D.C. Circuit was being held up in the Judiciary Committee by a Senator who doubted his environmental creds. So they got him an environmental case. All I know is that shortly after the argument (which was also supported by Solicitor General Ted Olson), the nomination cleared the Committee, and the rest is history.

resulted in a taking (except there was none demonstrated here). The authority for that citation? *Del Monte Dunes*, which had tantalized the bar with the concept and is now remembered by the Court as the source of that rule.

CONCLUSION

When I graduated from law school, I never dreamed that I would spend most of my career dealing with cutting-edge constitutional law. But that is what it has been. It has been one heck of a ride, and it is not over yet. I am not ready to hang 'em up yet. I plan to continue writing, teaching, lecturing, and writing appellate briefs. There are still too many ripe targets that need to be dealt with, and I would like to be there when the Court finally deals with some of the issues that have plagued us for years.

MICHAEL M. BERGER—A CAREER DEVOTED TO PROPERTY RIGHTS

DANA BERLINER*

2014 marks the first time a practitioner has won this award, and it is fitting that it goes to Mike Berger.

Advocates do much to shape the law of property. Good advocates carefully select their cases to present issues directly and sympathetically. They identify the questions presented on appeal and, of course, at the Supreme Court. They formulate the theories and identify the lines of cases that they suggest the Court follow or reject. They introduce the evidence that either is or is not sufficient to prove their client's side of the story. All of these decisions then have a direct role in shaping the outcomes of cases.

The goal of the Brigham-Kanner prize is to identify those who have made a difference in property law. It is therefore fitting that it go to a practitioner, particularly one who has had the impact that Mike Berger has had.

What has made Mike such a powerful force in shaping takings law? He combines everything you need—strategic judgment in case selection, a well-developed theory of the law, and excellent advocacy skills. And Mike has been part of every major debate taking place in takings law today.

Mike has been able to make such a difference for many reasons. These include adherence to principle, perseverance, and a deep knowledge of the law.

- Principle. Mike has a firm belief that people whose property is taken, either by physical taking, by noise, or by regulation, deserve to be compensated. This principle has infused all of his litigation and all of his writings.
- Perseverance. Mike has been litigating and writing about these issues for more than forty years. He has litigated repeatedly in the Ninth Circuit and the California courts, probably the most unfriendly venues for property rights litigation in the entire country. He has also litigated in other parts of the country—I'm sure that was a relief for him—and at the

* Litigation Director, Institute for Justice.

U.S. Supreme Court. And takings cases last forever—fifteen to twenty years is not an unusual amount of time—so perseverance is of course critical in seeing one's view of the law realized.

- A comprehensive knowledge of the state of the law. Mike understands every aspect of takings law—eminent domain, regulatory takings, inverse takings, physical occupation, the many permutations of compensation questions, ripeness, and mootness.

But Mike has other qualities that make him uniquely effective. He is able both to work within the system and to criticize it from without. And he brings incisive wit to his presentations in court and in academia. In an area that often does not get the attention it deserves, humor is important.

Mike excels at working within a maze of illogical precedent while arguing for a little more sanity in the law. There are many aspects of takings law with which Mike disagrees, but when he litigates a case, he argues within the case law as it is. I witnessed this when I watched Mike's argument of *Tahoe-Sierra*.[1] Virtually everything that was going on made no sense at all. It made no sense that we were talking about a tiny segment of an endless moratorium. It made no sense that there was no way to challenge the total destruction of the plaintiffs' property values. It made no sense that their neighbors could build, yet they couldn't. Yet Mike betrayed no irritation with this state of affairs. He argued against it, but with respect and even humor, and worked from the Court's own precedents.

When he is outside the confines of the courtroom, however, Mike offers clear-eyed academic criticism. Mike has written at least two dozen articles about takings law. Unlike his arguments before courts, his articles pull no punches, containing such lines as "the ripeness rule was nonsense when first articulated and it remains nonsense today."[2]

Indeed, Mike is able to combine a sense of humor with a summary that cuts to the heart of things. From his early article *Nobody Loves an Airport*[3] to his most recent, *The Ripeness Game: Why Are We Still*

1. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002).

2. Michael M. Berger, *The Ripeness Game: Why Are We Still Forced to Play?*, 30 TOURO L. REV. 297, 298 (2014) (footnote omitted).

3. Michael M. Berger, *Nobody Loves an Airport*, 43 S. CAL. L. REV. 631 (1970).

Forced to Play?,[4] he is able to capture everything you need to know simply in the title.

Anyone who has ever listened to Mike's presentations at ALI-CLE (formerly ALI-ABA) has probably found himself or herself laughing out loud. Mike is able to encapsulate the absurdity of so many property law decisions while teaching at the same time. That's a real gift. For example, in his 2014 materials, Mike quoted from the *Horne* case and then commented: "'Accordingly, whether an alternative remedy exists does not affect the jurisdiction of the federal court.'[5] Although that has been said before, it does no harm to repeat it now and then. Perhaps someone will listen."[6]

Mike is even able to use incisive humor under pressure—a difficult feat. My favorite moment in *Tahoe-Sierra* was when the high court asked Mike about a state appellate case that conflicted with a position he was asserting. Mike replied, "I would submit that that court erred. It happens. Lower courts do that sometimes."[7] It was a perfect response, and I have used variations of it in many legal briefs since.

Mike has argued four takings cases at the U.S. Supreme Court, and he has won two. In any other area, this would sound like a mixed record. In takings, winning two cases at the Supreme Court is a near miracle.

The two wins established key precedents that changed the direction of takings litigation and continue to shape it today. In *First English*, the Court held there was actually a remedy for a temporary taking, and that remedy was compensation.[8] Then, in *Del Monte Dunes*, the Court held that takings cases brought under Section 1983 get a jury trial.[9]

Mike's two losses, *Preseault*[10] and *Tahoe-Sierra*,[11] were really victims of the Court's determination to force every takings case to be heard on the specific facts of the particular case. No one is allowed

4. Berger, *supra* note 2.

5. Horne v. Dep't of Agric., 133 S. Ct. 2053, 2062 n.6 (2013).

6. Michael M. Berger, *Update on Takings Cases—2014*, ALI-CLE PROGRAM: EMINENT DOMAIN AND LAND VALUATION LITIGATION 737 (2014).

7. Transcript of Oral Argument at 6, *Tahoe-Sierra*, 535 U.S. at 302 (No. 00-1167), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/00-1167.pdf.

8. First English Evangelical Lutheran Church of Glendale v. L.A. Cnty., 482 U.S. 304, 318–19 (1987).

9. City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 709–11 (1999).

10. Preseault v. Interstate Commerce Comm'n, 494 U.S. 1 (1990).

11. 535 U.S. at 302.

to challenge laws on their face; no one can get a ruling that a law or policy is a taking. This is one of the bizarre but unfortunately consistent features of regulatory takings law. It may be plain as day that a law affects hundreds or thousands of people in exactly the same way. It should therefore be perfectly possible to rule that there has been a compensable taking on the face of the law or as a general matter. The quantity of compensation may well differ for each individual, but the rule of law should be identical. However, this would make it too easy for owners. Courts want to require each one of them to litigate every single issue of right to compensation and then every single issue of compensation.

That's what happened in *Preseault*, in which the Court admitted that a Rails-to-Trails conversion could be a compensable taking, but then sent the owners back for another ten or fifteen years of litigation to finally get redress. They did finally get compensation.[12] And that's what happened in *Tahoe-Sierra*, in which the court told all the owners around Lake Tahoe that they would just have to litigate individually.[13] Unfortunately, so many of them had passed away or grown tired that few, if any, ever secured redress.

Mike's other litigation has been similarly impressive. As I read the decisions in Mike's cases about whether airport noise was a taking, I realized something. Mike had taken a position at the beginning—that the operators of airports needed to pay people who lived nearby for the damage to their homes and peaceful living. And over the course of years of litigation, he won. Indeed, he won so completely that this isn't even an issue any more. It's actually a settled legal question. In any area that involves takings, that in itself is pretty amazing, because when you get to regulatory takings, of course, no question ever appears to be finally settled. It always comes back.

Certainly, things are going well on Mike's issues these days. The 2012/2013 Supreme Court term heard three major takings cases that *all* saw a ruling in favor of the owner. In *Arkansas Game & Fish*, which involved repeated flooding by a state agency, the Court relied on the decision that Mike won in *First English* and held that when the government takes land even temporarily, as by flooding, it can

12. *See* Preseault v. United States, 52 Fed. Cl. 667, 670 (Fed. Cl. 2002) (documenting the aftermath including judgment on the takings claim issued in May 2001).

13. *See Tahoe-Sierra*, 535 U.S. at 342.

indeed be a taking.[14] Although *First English* held that temporary takings could still be takings, courts had not always followed it, and there was a line of cases that seemed to exempt floodings from the general rule. That loophole has been closed, at least for now.

In *Koontz v. St. Johns River District*, the Court resolved an issue that had generated massive splits in the circuits—whether exactions of cash from people in exchange for permits was subject to *Nollan/Dolan* analysis.[15] Courts were all over the map on that. Mike filed an amicus, as did my organization. The case was litigated by Pacific Legal Foundation. As usual in such cases, it was a 5–4 decision. But it held unequivocally that cash exactions also had to be examined for whether they made sense.[16] Of course, there are many more issues that will come up in this arena, but it is heartening that the court actually occasionally subjects government action to judicial scrutiny and then requires it to make some sense.

Mike is one of the leading critics of the *Williamson County* doctrine,[17] cogently explaining why finality and ripeness do not require someone to actually litigate an issue in the state court system to be able to bring a federal claim. This is of course a continuing and vital issue. Many cases raise it every year. And the decision last year in *Horne v. U.S. Department of Agriculture* hinted that it might be rolling back the *Williamson County* doctrine. It clarified that it was a prudential doctrine, and it actually allowed someone to raise his or her takings claim as a defense to an enforcement action without requiring administrative exhaustion first.[18]

That was promising. But *Williamson County* remains a major barrier to takings litigation, and no lawyer can litigate a case about it without first reading Mike Berger's and Gideon Kanner's excellent

14. Ark. Game & Fish Comm'n v. United States, 133 S. Ct. 511, 519 (2012).

15. Koontz v. St. John's River Water Mgmt. Dist., 133 S. Ct. 2586 (2013); *see also* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987) (prohibiting the government from taking land by imposing conditions on land use permits that do not advance the legitimate purpose of the land use permitting scheme); Dolan v. City of Tigard, 512 U.S. 374 (1994) (holding that an otherwise legitimate condition on a land use permit must be roughly proportional to the impact of the proposed development).

16. *Koontz*, 133 S. Ct. at 2598–99.

17. *See* Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 192–95 (1985) (holding a regulatory takings claim premature where the plaintiff, according to the Court, had neither obtained a "final decision" about the applicability of the ordinance nor exhausted state procedures for obtaining just compensation).

18. Horne v. Dep't of Agric., 133 S. Ct. 2053, 2061–64 (2013).

article *You Can't Get There from Here*[19] explaining the utter folly of the *Williamson County* doctrine, or Mike's latest article, *The Ripeness Game*.[20]

For those who haven't succumbed to the pleasure of reading articles about ripeness, I particularly enjoyed the analysis of comparing the ripeness rules for property to the ripeness rules for other rights. Of course, Mike was right. We have ripeness questions arise in many cases—not just property. And we rely on all sorts of evidence to establish ripeness, including cease and desist letters, enforcement actions, responses to correspondence, refusals to allow application for licenses, agency advisory opinions, and even filing notices of claim that are then rejected. Each of these can be sufficient to show that the agency in question has taken a definite stand. Often, something must be done to obtain ripeness, but that something is never going through an entire litigation in another court.

Mike has litigated and commented on this issue for decades. When the Supreme Court finally changes this ridiculous rule, I know that Mike and every other property litigator will breathe a huge sigh of relief—if it doesn't provoke dancing in the streets.

Even *Tahoe-Sierra*, which was Mike's only real loss at the Supreme Court, is not the end of its story. The Supreme Court and other courts continue to struggle with the mess that the Court has created on facial and as-applied claims. This is an enormous problem in all litigation, but it is particularly problematic in takings. But the *Koontz* decision creates a new opportunity in this regard. If you can challenge an exaction of cash, perhaps you can challenge a law that exacts cash from everyone who is subject to it—thus allowing a facial challenge. That's exactly what happened in the district court in the recent *Levin* case.[21] There may still be a chance though to correct some of what happened in *Tahoe-Sierra* if we are all as persistent as Mike.

Because I agree with so much that Mike has said in his articles and his briefs, I found it a little challenging to identify a point of disagreement or discussion. But I do have one. In what he and Gideon called their response to the *White River Junction Manifesto*, they discuss

19. Michael M. Berger & Gideon Kanner, *Shell Game! You Can't Get There from Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-Parody Stage*, 36 URB. LAW. 671 (2004).

20. Berger, *supra* note 2.

21. Levin v. City & Cnty. of S.F., 2014 WL 5355088 (N.D. Cal. Oct. 21, 2014).

the issue of the appropriate remedy for a taking.[22] The *White River Junction Manifesto* asserted that the remedy should be invalidation of the law,[23] while Mike and Gideon say that it should be compensation. As a practical matter, I guess that Mike is right—courts seem to prefer compensation, so perhaps we're stuck with that. Yet I find that in some ways I agree that the proper remedy ought to be invalidation or at least invalidation most of the time. And I was surprised that Mike argued against it. It is one thing to admit that compensation is, in practical terms, more likely to work and another thing to say that it is actually a more appropriate remedy.

So let me make a pitch for invalidation, albeit one that is totally unsupported by Supreme Court precedent.

The Takings Clause requires that takings be for a public use. If courts were to actually evaluate the claimed purposes, which they virtually never do and have done even less after *Kelo*, they would find that few takings or land regulations are for a public use. They are for pie in the sky theories of how land use works that are untrue. They are to benefit existing owners who have developed their lands at the expense of those who want to develop. They are to keep out middle or lower-income people that current residents don't like. All of those laws should be invalidated. And even when there is a public use, they should all be subject to a nexus and proportionality requirement like *Nollan* and *Dolan*. That would result in invalidation of even more laws. We would then have land use policies that were not punitive and that made sense, and that would be enormously beneficial to owners and to the public. And certainly to law.

I want to conclude on a personal note. I've known Mike for more than a decade—less, I know, than many who litigate property cases, but still a significant period of time. I've called Mike many times to discuss all kinds of takings issues, from California procedure to public use to exactions. Never once, in all that time, has Mike been too busy to talk to me. His knowledge, his kindness, and his practical good sense make him a joy to deal with and to work with. I'm delighted that he is the first practitioner to win the award, and I'm honored to be speaking on this panel.

---

22. Michael M. Berger & Gideon Kanner, *Thoughts on the* White River Junction Manifesto*: A Reply to the Gang fo Five's Views on Just Compensation for Regulatory Taking of Property*, 19 LOY. L.A. L. REV. 685 (1986).

23. Norman Williams, Jr. et al., *The White River Manifesto*, 9 VT. L. REV. 193 (1984).

MICHAEL M. BERGER—A PATH TO FAIRNESS

JANET BUSH HANDY*

The awarding of the 2014 Brigham-Kanner Property Rights Prize during the Eleventh Annual Brigham-Kanner Property Rights Conference at William & Mary Law School to Michael Berger provided the opportunity to recognize that the path which he followed to reshape our country's property rights jurisprudence was set in his seminal law review article, *To Regulate, or Not to Regulate—Is That the Question? Reflections on the Supposed Dilemma between Environmental Protection and Private Property Rights*.[1] After writing this article Mr. Berger spent the next forty years working on the cases that would provide the path to an understanding that the only valid understanding of constitutional property rights must recognize the concept of fairness. The themes that he would repeat to the Supreme Court in both winning and losing cases were well established and explained in the 1975 Reflections. Those themes continue to resonate in constantly evolving jurisprudence of property rights.

Mr. Berger explained that his thoughts on property rights issues needed to be understood as coming in a time when even the newly appointed Attorney General recognized that there was "an enormous amount of cynicism about the administration of justice in the United States."[2] This cynicism had grown, growing to the point when even judges commented on the "growing number of people losing faith in Government and questioning the quality of justice dispensed in the courts,"[3] while other judges took "judicial notice of the fact that a

* Deputy Counsel to State Highway Administration, Assistant Attorney General, Maryland Office of the Attorney General, Baltimore, Maryland. I am grateful to the Brigham-Kanner Property Rights Conference for the invitation to present a condemnor litigator's perspective. I would like to thank my husband, Robert A. Handy, Ed. D., for his encouragement and editing suggestions.

1. 8 LOY. L.A. L. REV. 253 (1975) [hereinafter *1975 Reflections*].

2. *Id.* at 300 (citing Ostrow, *Levi Calls Broad Distrust of Law System a Problem*, L.A. TIMES, Feb. 4, 1975, pt 1, at 4, col. 1 (quoting Attorney General Edward H. Levi)).

3. *Id.* (citing Thompson, *Appellate Court Reform—The Near Term,* 6 BEVERLY HILLS B.J., Sept., 1972, at 9, 13, 18; Tobriner, *Can Young Lawyers Reform Society Through the Courts?,* 47 CAL. ST. B.J. 294 *passim* (1972); Wright, *The Role of the Judiciary: From* Marbury *to* Anderson, 60 CALIF. L. REV. 1262, 1268 (1972)).

large cross-section of the citizenry entertained an opinion that the Government is no longer representative of the people."[4]

Despite this atmosphere of cynicism, Michael Berger fearlessly called for action, explaining,

> [i]n the old days we had such abundant land and the land was so rich that waste didn't seem to matter. But millions of acres of our prime agricultural land has fallen to the tract builders and much more is doomed. Litter, endless billboards, honkytonk commercialism, and banal slurb construction line the highways. Poisons and sewage pollute our bays, lakes and rivers. Smog chokes Los Angeles, but what the San Francisco Bay Area and the Central Valley can anticipate will make Los Angeles seem desirable. And this is but part of the story.
>
> Despite the awesome political power of those who make money in the process of polluting and destroying the resources of California, we have it within our power to halt the spread of blight and to return this bright land to the splendor it once was. Right now, today, we have the constitutional right, the technology and the money. The problem is how to muster them.[5]

The author recognized there were problems with reaching this estimable goal, and, seeing there was no easy path to solutions, he explained that anyone who was interested in rational problem-solving must borrow a phrase from Justice Cardozo and "make [his] knowledge as deep as the science and as broad and universal as the culture of [his] day."[6]

It is clear from the beginning that Mr. Berger understood that the government, whether federal, state, or local, had the responsibility to respond to the needs of the public. He did not advocate that private property should be free from all government regulation or that the government should be given free rein to regulate that property until its value was negated. The theme of his 1975 article and the core of his notable career was set forth concisely and elegantly:

> What *is* urged is that "the public" take a long, hard look at what its needs are, assess *all* the costs involved, and proceed accordingly.

---

4. *Id.* at 301 (citing Gayle v. Hamm, 25 Cal. App. 3d 250, 257–58, 101 Cal. Rptr. 628, 634 (1972)).

5. *Id.* at 253.

6. *Id.* at 263 (citing Cardozo, *Our Lady of the Common Law,* 13 ST. JOHN'S L. REV. 231, 232 (1939)).

> If "the public" wants land uses (or non-uses) which benefit "the public" generally, then "the public" should buy the property, or an appropriate interest in the property, rather than attempt to force individual property owners to devote their property to public use without compensation.[7]

How extraordinary is it that he was able to write a thesis for his entire professional life that can be reviewed forty years later and confirms that this thesis provided a map, not only for his own personal career trajectory but a map for the major property rights Supreme Court jurisprudence of that forty-year period? The thesis not only remains an accurate summary of his professional mission but continues to be important to all who care about the constitutional protection of our fundamental right to own property.

Many discussions of property rights start with the proposition that property rights are fundamental, but the young Michael Berger began by explaining *why* they are fundamental. Long before the Bill of Rights, man had these "primordial" instincts, and the bottom line was that we needed property rights so that we were not forced to protect our space by killing each other.[8]

When Mr. Berger first argued in the Supreme Court, he may have looked up at the Ten Commandments represented in the courtroom and remembered the connection that he made between the Bill of Rights protection of property and his 1975 explanation of why the Bible endures as a present day social guide:

> Thus, we find the Tenth Commandment: "Thou shalt not covet thy neighbor's house, thou shalt not covet thy neighbor's wife, nor his manservant, nor his maidservant, nor his ox, nor his ass, nor anything that is thy neighbor's."[9] *As* Justice Holmes expressed it, "Property is protected because such protection answers a demand of human nature, and therefore takes the place of a fight."[10]
>
> Thus, we have developed systems of title recording and title insurance (not to mention statutes of limitation) in order to provide security of land ownership to allay these otherwise deep-seated universal anxieties and, intertwined with personal ownership, satisfy the need for social stability. The United States Supreme Court has repeatedly so recognized: No class of laws is more

7. *Id.* at 257.
8. *Id.* at 266.
9. *Id.* at 267 (citing *Deuteronomy* 5:12–17).
10. *Id.* (citing Davis v. Mills, 194 U.S. 451, 457 (1904)).

> universally sanctioned by the practice of nations and the consent of mankind, than laws which give peace and confidence to the actual possession and tiller of the soil.[11]

Later in 2001, when he and Gideon Kanner rephrased the Supreme Court's question in the Petitioner's Brief in the *Tahoe-Sierra Pres. Council v. TRPA* to "whether the Court of Appeals properly determined that government action freezing all productive use of private land does not constitute a taking,"[12] he must have wondered why this question was still being debated, because in 1975, he understood that it was "uniformly settled law that zoning which deprives the landowner of all reasonable use of his property is deemed confiscatory and hence constitutes a taking, such zoning gives rise to relief by inverse condemnation."[13]

Reading the many cases that were and continue to be fought to establish the applicability of the Fifth Amendment, it is striking how many obtuse parties were able to convince equally obtuse judges as to the invalidity of the fundamental conclusion that was so obvious to Michael Berger in 1975: *if the government wants your property, it should pay for it*. This is so fundamental that every attorney representing any government agency in land use or acquisition matters whose client disputes this conclusion should consider themselves obligated to remind their client that the Constitution of the United States establishes that the government cannot take private property without the payment of just compensation.

There is no valid constitutional argument that there is no compensable taking if the government does not have enough money, if the government has a better use for it, if the government decides the environment needs to be protected, or if the taking is for a limited period of time.

These are just a few of the exceptions which Mr. Berger was required to rebut in courts across the country and, ultimately, in his briefs and amicus briefs filed with the Supreme Court.[14] He did not

---

11. *Id.* at 267 (citing Hawkins v. Barney's Lessee, 30 U.S. 457, 466 (1831)).

12. Brief for Petitioners at 11, Tahoe-Sierra Preservation Council v. Tahoe Reg. Planning, 535 U.S. 302 (2002) (No. 00-1167).

13. *1975 Reflections*, *supra* note 1, at 279.

14. Mr. Berger represented property owners before the U.S. Supreme Court in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), *Preseault v. ICC*, 494 U.S. 1 (1990), *First English Evangelical Lutheran Church v. Cnty. of Los Angeles*, 482 U.S. 304

argue that the government should avoid all regulations or that it was always acting with an evil intent. Instead he recognized that the need to plan for our future would require limitations on development. He did not argue for no government but reasonable government. He did not argue that there was no public use which could justify an eminent domain taking, only that there really is a limit to what a public use can mean.[15]

While many government lawyers have struggled with the concept that temporary takings must be compensable, government attorneys who acquire property for roads have long understood the concept. Mr. Berger's argument before the Supreme Court in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*[16] addressed the fundamentals that every highway lawyer knows well.

> JUSTICE. A major bridge or a freeway construction or something could deprive a property owner of access for a good while.
> MR. BERGER. Yes, they can. And under—
> JUSTICE. And in your view that would require compensation.
> MR. BERGER. —Under settled law, Your Honor, if access is totally deprived to property, that is the taking of the property interest and requires compensation.
> UNKNOWN SPEAKER. Even though it is admittedly for a temporary duration?
> MR. BERGER. Yes, ma'am. The highway people routinely condemn temporary easements so that they can perform just that kind of construction without having to litigate with people over inverse compensation cases.
>
> They acknowledge that they are taking their access and interfering with their use, and they directly go ahead and buy that interest.[17]

(1987), and *Agins v. City of Tiburon*, 447 U.S. 255 (1980). Mr. Berger's amicus briefs in defense of property rights included *Kelo v. City of New London*, 545 U.S. 469 (2005), *Lingle v. Chevron USA, Inc.*, 544 U.S. 528 (2005), *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992), and *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).

15. Berger asked the Supreme Court to recognize "the Fifth Amendment's limitation that the 'awesome' power of eminent domain be used only to acquire property for *public* use, not for *private* economic development." Brief Amici Curiae of the Am. Farm Bureau Fed'n & the Farm Bureau Fed'ns of the Following States: Cal., Conn., Fla., Ind., Iowa, Kan., La., Mich., New Haven Cnty., N.J., N.Y., N.C., Ohio, Okla., Penn., R.I., Tex., Utah, and Va. in Support of Petitioners, Kelo v. City of New London, 545 U.S. 469 (2005).

16. 482 U.S. 304 (1987).

17. Oral Argument of Michael M. Berger, First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles, 482 U.S. 304 (1987), *available at* http://www.oyez.org/cases/1980-1989/1986/1986_85_1199.

Perhaps there would be fewer obtuse litigants if the government attorneys who advocate that there should be no compensable temporary takings should take Mr. Berger's suggestion and talk to the government's road department who well understand that even if the entry onto the property is only for a period of construction, a temporary easement must be acquired and compensation paid for that interest.

Having the opportunity to write briefs on behalf of petitioners as well as amici for submission to the Supreme Court, Mr. Berger has been steadfast in his efforts to make the Fifth Amendment protections of real property more than mere words. To make his point, one quote which Mr. Berger has repeated in his briefs before the Supreme Court is "[a]s Justice Brennan aptly put it: 'After all, if a policeman must know the Constitution, then why not a planner?'" (San Diego Gas & Elec. Co. v. City of San Diego, 450 U. S. 621, 661 (1981) (Brennan, J., dissenting on behalf of four Justices)).[18]

This question is not broad enough. A police officer must know the Constitution because it defines the officer's job. In keeping the peace, she may only make arrests or conduct searches within constitutional limits. While Americans are not renowned for their constitutional knowledge, the majority can recite their rights if they are arrested. They may not know the basis for the Supreme Court's decision in *Miranda v. Arizona*,[19] but most Americans can recite that before being questioned they have the right to remain silent, that anything that they say can and will be used against them in a court of law, that they have a right to an attorney, and if they cannot afford an attorney one will be appointed for them.[20] Despite this general knowledge, the police officer must still advise every suspect of his or her rights, or the state will suffer the constitutionally mandated consequences.

Fewer citizens can also recite the limits on government taking of property without just compensation, and even fewer can explain their rights in a temporary takings situation as established by the Supreme Court. Since these rights are so fundamental, should not only the

---

18. Brief for Petitioners at 24, Tahoe-Sierra Preservation Council v. Tahoe Reg. Planning, 535 U.S. 302 (2002) (No. 00-1167); Brief for Respondents at 30 n.39, City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999) (No. 97-1235); Brief of Amici Curiae at 11 n.5, Kelo v. City of New London, 545 U.S. 469 (2005) (No. 04-108).

19. 384 U.S. 436 (1966).

20. "Miranda has become embedded in routine police practice to the point where the warnings have become part of our national culture." Dickerson v. United States, 530 U.S. 428 (2000).

planner but every government representative who deals with land use regulations or acquisitions of real property be familiar with these basis constitutional fundamentals? And should they not also be able to explain those concepts to the individuals whose property is subject to a taking, either regulatory or direct?

The litigation about whether a criminal defendant's Miranda rights have been granted did not end with the decision of the Supreme Court. Instead numerous cases have been brought since 1966, as defendants have challenged their convictions because of deficiencies in the application of those rights.[21] So too will the challenges to the government's regulatory and direct takings continue. But those arguments will forever be framed by Mr. Berger's hard-fought victories. Today, as in 1975, our citizens are cynical, and environmental problems are pressing. Today, as in 1975, Michael Berger's conclusion identifying what needs to be done to face those challenges will provide a path to be followed to a fair application of the constitutionally protected property rights. As he explained:

> There is room for regulation. More than that, there is a need for regulation. But if it is truly to serve our best interests as a people, it must be a balanced regulation; a type which is fair to all. In a way, those calling for a change are right: we do need new, flexible tools to deal with the modern world. The problem is that they really propose nothing new. Their "new" regulation is really no more than old-hat Euclidean zoning without any safeguards. That just will not wash. What will work is a realistic look at the governmental powers involved, an abandonment of fascination with labels and an effort at purchasing the hard-earned property which society wants to preserve. That may not be the most sugar-coated message to deliver, but, in the late Chief Justice's words, "it's fair."[22]

21. The 1966 Miranda decision has been reviewed throughout the years. The most recent Supreme Court discussion of this case is *White v. Woodall*, 134 S. Ct. 1697 (2013).

22. *1975 Reflections*, *supra* note 1, at 301.

NOVEL TAKINGS THEORIES: TESTING THE BOUNDARIES OF PROPERTY RIGHTS CLAIMS

JAMES S. BURLING*

INTRODUCTION

In the past seventy-five years, property rights litigation has transformed from a constitutional afterthought to a major force in the defense of a fundamental right. It did not happen overnight, and it did not happen without some very heavy lifting, fortuitous circumstances, and an intellectual revival in the Academy. For the first third of the past seventy-five years, arguments suggesting limits on government action based on property were routinely unsuccessful despite vague suggestions from the Supreme Court in the 1920s. For the middle twenty-five years, the courts were largely silent, with property rights litigation barely registering on the Supreme Court's radar. But for the past quarter century or so, arguments that would once have been considered novel and concomitantly futile have gained substantial traction in the courts, especially the Supreme Court.

So, what accounts for the transformation of novelty into doctrine? And how does one avoid appearing too novel, such that courts will avoid a favorable ruling at all costs? This article will explore the elusive boundary between novelty and viability in property rights cases. The thesis is simple: some novelty is good, but too much is doomed to failure. And it is only when a novel idea is accompanied by compelling facts and intellectual heft that the law is likely to be advanced.

The underlying premise of this essay is that the protection of property rights is overall a benefit to both societal needs and individual liberty. Property rights are a fundamental attribute of the liberty that the Federal Constitution is designed to protect. In arguing for cases that advance the cause of property rights, one must never forget that neither the Constitution nor the courts will care about property

* Director of Litigation, Pacific Legal Foundation, Sacramento, California. An earlier unpublished version of this paper was presented at an ALI-CLE course on Eminent Domain on February 7, 2015.

for its own sake; rather the defense of property must be consistent with the defense of larger societal concerns. As the Supreme Court put it over a decade before the dawn of the property rights revolution:

> [T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a "personal" right, whether the "property" in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other.[1]

This sentiment was not new. It was an essential ingredient of intellectual thought from John Locke's *Second Treatise on Government*[2] to James Madison's *A Property in Our Rights*.[3] But the Court's recitation of this principle after a long dormancy during the heyday of progressivism signaled a new respect and new opportunities for a long-ignored principle—a principle that was not novel in the larger sweep of history, but somewhat novel in recent history: that property rights deserved vigorous protection by the courts from infringements by government agencies.

---

1. Lynch v. Household Fin., 405 U.S. 538, 552 (1972).

2. JOHN LOCKE, TWO TREATISES ON GOVERNMENT §§ 124, 201, 222 ("Whenever the legislators endeavor to take away, and destroy the Property of the People . . . they put themselves into a state of War with the People, who are there upon absolved from any further obedience."). Locke is cited in *Lynch* for support of the Court's thesis.

3. James Madison, *A Property in our Rights*, THE NATIONAL GAZETTE, Mar. 27, 1792, *reprinted in* 1 PHILIP B. KURLAND & RALPH LERNER, THE FOUNDERS' CONSTITUTION Ch. 16, Doc. 23 (Univ. of Chicago Press 1987), Madison wrote:

> Government is instituted to protect property of every sort; as well that which lies in various rights of individuals, as that which the term particularly expresses.
>
> This being the end of government, that alone is a just government, which impartially secures to every man, whatever is his. According to this standard of merit, the praise of affording a just security to property, should be sparingly bestowed on a government which, however scrupulously guarding the possessions of individuals, does not protect them in the enjoyment and communication of their opinions, in which they have an equal, and in the estimation of some, a more valuable property.

Id. For more on the role of property thought during the founding of the republic, see JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (2d ed. 1998).

I. THE ORIGINS OF MODERN PROPERTY RIGHTS JURISPRUDENCE—*PENNSYLVANIA COAL V. MAHON* TO THE MODERN ERA[4]

The first Supreme Court recognition of the potential of regulatory takings, the foundation of modern property rights jurisprudence, came in 1922 with *Pennsylvania Coal v. Mahon*.[5] In that case, the landowners had sold their mineral rights to various coal mining companies. Included in those sales were the "support estate." In other words, the coal companies bought not only the coal but the right to allow the surface to collapse after mining withdrew the coal. Being that there were far more surface landowners than coal companies, the Pennsylvania legislature adopted a statute forbidding companies from removing coal that might cause a surface collapse. The coal companies objected. Justice Holmes, the great progressive, *Lochner* dissenter, and not a great friend to business, ruled in favor of the coal companies, saying, "[t]he general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[6] That's it. There was no in-depth analysis

---

4. For a more complete summary of modern takings law, see James S. Burling, *Private Property Rights and the Environment After* Palazzolo, 30 B.C. ENVTL. AFF. L. REV. 1 (2002). For a complete treatment of regulatory takings law, see STEVEN J. EAGLE, REGULATORY TAKINGS (25th ed., 2012).

5. 260 U.S. 393 (1922). Despite the common assertion that the doctrine of regulatory takings began with *Pennsylvania Coal*, it is much more accurate to say that the doctrine was revived with that case, and that it was developed a century earlier in state courts and then forgotten. *See, e.g.*, Kris W. Kobach, *The Origins of Regulatory Takings: Setting the Record Straight*, 1996 UTAH L. REV. 1211 (1996). As a dissenting Montana Supreme Court justice recently explained:

> Contrary to the Court's assertion in ¶ 67, the notion of a regulatory taking—where the government regulates private property rights, as opposed to condemning or directly appropriating private property—was recognized in this country long before 1922. Indeed, recognition of this sort of taking may be found in the 19th century decisions of numerous state courts and even the Supreme Court. *See generally* Kris W. Kobach, *The Origins of Regulatory Takings: Setting the Record Straight*, 1996 UTAH L. REV. 1211; Andrew S. Gold, *Regulatory Takings and Original Intent: The Direct, Physical Takings Thesis "Goes Too Far,"* 49 AM. U. L. REV. 181, 228–38 (1999); Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549 (2003); David A. Thomas, *Finding More Pieces for the Takings Puzzle: How Correcting History Can Clarify Doctrine*, 75 U. COLO. L. REV. 497, 519–33 (2004).

Kafka v. Montana Dep't of Fish, Wildlife & Parks, 201 P.3d 8, 43 (2008) (Nelson, J., dissenting).

6. *Pennsylvania Coal*, 260 U.S. at 415.

of the Takings Clause, or the Due Process Clause for that matter.[7] Nor was there much in the way of guidance beyond the test of "too far." But this sentence stands out from the other rhetorical flourishes of the opinion and has come to stand for the beginning of modern era of takings jurisprudence. Justice Brandeis dissented from the holding, saying that "the defendant has failed to adduce any evidence from which it appears that to restrict its mining operations was an unreasonable exercise of the police power."[8] This was a reflection of the belief that any valid exercise of the police power could absolve any takings liability.[9] In addition, Brandeis surmised that there might be "an average reciprocity of advantage,"[10] negating any liability for an uncompensated taking. For a dissent, this formulation has been given great weight and is often trotted out to deny takings liability for land use regulations—in other words, "reciprocity of advantage" has been a thorn in the side of regulatory takings cases and has coexisted uneasily with the evolution of regulatory takings doctrine.

In looking at the Pennsylvania Supreme Court's opinion in *Mahon v. Pennsylvania Coal Co.*,[11] there is no indication that the parties actually raised a "regulatory taking" or even a Takings Clause violation. So this is not a case in which it is apparent that the parties brought a "novel" takings claim or any sort of regulatory takings claim at all. But it does illustrate the two key elements that any novel takings claim must have to succeed: it must have compelling facts, and it must be a fairly logical extension of existing doctrine. On the former point, the facts might not seem terribly compelling today—with coal companies causing the collapse of the surface under buildings. But the early part of the last century, environmental consciousness was not at the forefront of priorities—economic survival was.[12] Moreover, the Court would have been reminded that the companies actually bought and paid for the right to do this and that the surface owners had essentially convinced the legislature to renege on the deal. On the

7. Which is significant because a number of the property rights cases from this era do not separate out these two constitutional clauses.

8. 260 U.S. at 419–20 (Brandeis, J., dissenting).

9. Most famously articulated in *Mugler v. Kansas*, 123 U.S. 623 (1887) (no government takings liability from the prohibition of the manufacture of alcohol).

10. *Pennsylvania Coal*, 260 U.S. at 422 (Brandeis, J., dissenting).

11. Mahon v. Pennsylvania Coal Co. 118 A. 491 (Pa. 1922).

12. By the time of *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987), however, the public consciousness had changed enough for the Court to reach a different result in a case of almost identical facts.

doctrinal front, the Court had already ruled that state judicial action can result in a taking or due process violation (the two concepts were used interchangeably during this period).[13] So it was not a huge stretch to say that an action of a state legislature could result in a takings claim as well.

From *Pennsylvania Coal* to the 1980s, the idea that a regulation could result in takings liability was more of an academic curiosity than a useable doctrine in the hands of landowners and their attorneys. It was not for want of trying.

In 1926, the Court in *Village of Euclid v. Ambler Realty* upheld a scheme of land use zoning against a claim that it violated the Fourteenth Amendment.[14] The Court held that zoning plan lawful because it was not "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[15] As to the facts, the Court was not convinced that the unproven financial impact to the landowners outweighed the negative effects of not zoning. The Court was particularly concerned about the blight of parasitic apartment buildings on residential districts and felt no compulsion to extend property protections in this circumstance.[16] A couple of years later, the Court did strike down a zoning regulation—this time because on the facts there was no "practical use" for the property and not an "adequate return on the amount of any investment for the development of the property."[17] However, this seems to have been a one-off decision not to be repeated by the Court (outside the context of non-property rights and related civil rights violations).[18]

A few years after *Pennsylvania Coal*, in 1928, the Court found no problem when the owner of cedar trees was forced to destroy his trees, without compensation, to prevent the spread of blight from the cedar trees to the more valuable apple trees.[19] Again, the facts in favor of

---

13. *See, e.g.*, Chicago, Burlington & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226, 235 (1897) ("If compensation for private property taken for public use is an essential element of due process of law as ordained by the Fourteenth Amendment, then the final judgment of a state court, under the authority of which the property is in fact taken, is to be deemed the act of the State within the meaning of that amendment.").

14. 272 U.S. 365 (1926).

15. *Id.* at 395.

16. *Id.* at 394.

17. Nectow v. City of Cambridge, 277 U.S. 183, 187 (1928).

18. *See, e.g.*, Vill. of Belle Terre v. Boras, 416 U.S. 1 (1974); Moore v. City of East Cleveland, Ohio, 431 U.S. 494 (1977).

19. Miller v. Schoene, 276 U.S. 272 (1928).

the landowners were not compelling to the Court: either the cedar trees would have to be removed (and the timber sold), or the more valuable apple trees would die. The Court found no need to apply or extend a Takings or Due Process theory to these circumstances.[20]

Following this relative flurry of activity, nothing much of any significance happened in regulatory takings for the next half century.[21] What happened next, beginning in the late 1970s to mid-1980s, has been written about extensively elsewhere.[22] In short, through a series of cases, the Court managed to evade finding the existence of a regulatory taking, although it established a number of tests, some of which have withstood the test of time, others of which have not.[23] With the exception of *Loretto*, each one of these attempts to establish a regulatory taking failed.[24] But they certainly represented what had to be considered *novel* or at least bold attempts to claim a taking in light of over fifty years of silence from the Supreme Court.

II. THE 1987 TRIFECTA

What happened next in 1987 was the culmination of good facts, good theories, and a change in the intellectual currents. With the cases

---

20. For more on the background of the dispute between the competing owners of these two types of trees and why the claim may have failed, see William A. Fischel, *The Law and Economics of Cedar-Apple Rust: State Action and Just Compensation in* Miller v. Schoene, 3 REV. L. & ECON. 133 (2007).

21. One possible exception could be *United States v. Causby*, 328 U.S. 256 (1946), a case in which airplane overflights made property unusable and lead to government takings liability. But that case was more akin to a physical invasion, like flooding or commandeering the use of the property, rather than a taking caused only by the regulation of the property.

22. *See* Eagle, *supra* note 4.

23. *See, e.g.*, Penn. Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978) (the beginning of the amorphous regulatory takings tests of "economic impact," "investment backed expectations" and "character of the regulation"); Kaiser Aetna v. United States, 444 U.S. 164, 179–80 (1979) (physical invasion taking of private waterway); Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (establishing the "substantially advances a legitimate state interest" and "economically viable use" tests for regulatory takings, the former of which was rejected later in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005) (explaining that the "substantially advances" test of *Agins* is a Due Process test)); San Diego Gas & Electric Co. v. San Diego, 450 U.S. 621 (1981); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (physical invasions are always takings); Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985) (setting in motion a jurisdictional bar to bringing federal constitutional takings claims in federal courts unless there is final agency action and state compensation remedies have been utilized); MacDonald, Sommer & Frates v. Cnty. of Yolo, 477 U.S. 340 (1986) (takings claim not ripe because alternatives not pursued).

24. Of course, to be precise, *Loretto* was not actually a *regulatory* takings case but rather a *physical* invasion taking more along the lines of *Causby* than *Pennsylvania Coal*'s "too far" test.

through the late 1970s and 1980s that got close to finding a regulatory taking—but not close enough for property owners—the Academy had begun to stir. There were law review articles across the ideological spectrum with most giving some degree of credence to the idea of a regulatory taking, albeit often in limited terms.[25]

Most significantly, in 1985 Richard Epstein's *The Takings: Private Property Rights and the Power of Eminent Domain* was published, and Epstein's libertarian view of regulatory takings reached a more general audience. Thus, by 1987, the academic foundations had been built that made it possible for the Court to recognize and articulate the doctrine of regulatory takings.

The first case of 1987, *Keystone Bituminous*,[26] was an inauspicious beginning to the 1987 takings cases. There, Pennsylvania passed a regulation requiring that coal miners leave some coal in the ground in order to prevent the collapse of the surface. This was, of course, quite similar to the facts that animated Justice Holmes's decision in *Pennsylvania Coal*. Nevertheless, the Court distinguished *Pennsylvania Coal* and rejected a facial regulatory taking claim. The coal operators making the takings argument thought they had some controlling authority in *Pennsylvania Coal*, yet their claim could hardly be called "novel" in such circumstances. If anything, the government's argument could be considered "novel" in light of that precedent. Nevertheless, the passage of time and the public's embrace of environmental values led the Court to reach a different conclusion. When it came to the argument that the regulation would require twenty-seven million tons of coal to be left in the ground, the Court essentially reasoned that the overall economic impact was not that great.[27]

But, with *First English Evangelical Church v. Cnty. of Los Angeles*,[28] the Justices changed course. With Justice Scalia writing the opinion,[29]

---

25. *See, e.g.*, Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971), William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553 (1972); F. BOSSELMAN, D. CALLIES & J. BANTA, THE TAKING ISSUE: AN ANALYSIS OF THE CONSTITUTIONAL LIMITS ON LAND USE CONTROL (Council on Envtl. Quality) (1973).

26. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987). The opinion was written by Justice Stevens, joined by Justices Brennan, White, Marshal, and Blackmun. Justice Rehnquist wrote the dissent, joined by Justices Powell, O'Connor, and Scalia.

27. *Id.* at 499.

28. 482 U.S. 304 (1987).

29. He was joined by Justices Rehnquist, Brennan, White, Marshall, Powell, and Scalia. Justice Stevens wrote the dissent, joined by Justices Blackmun and O'Connor. The point of

the Court held that *if* a regulation takes property, even for a short period of time, compensation is due for the period of the taking.[30] This was a shot in the arm for property owners who had been enduring an endless sue-and-start-over scenario for decades in California and elsewhere.[31] In other words, after *First English*, landowners could seek compensation, rather than just invalidation, as a remedy for a regulatory taking, giving landowners and their attorneys an incentive to sue and governments an incentive not to take.[32]

The most telling victory for property owners in 1987 came with *Nollan v. California Coastal Commission.*[33] With that case, the Court required that government permitting agencies must show a nexus or relationship between impacts caused by a development project and the mitigating demands imposed on the developer. This too was not much of a novelty in the law; most states required such a relationship. Indeed, so too did California in a number of published decisions. But what had happened in California was that this relationship test was

---

listing out the names of the justices is simply to note that there was no change in personnel that explains the shift towards more favorable property rights opinions; it was more the combined weight of the various justices' reactions to the particular facts and doctrines being advocated in each case.

30. *Id.* Ultimately, on remand to the lower courts, no taking was found. But the principal of compensation for a temporary taking remains intact.

31. *See, e.g.*, San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621, 655–57 n.28 (1980). Justice Brennan seemed particularly peeved with the following advice given by a California city attorney to his fellow city attorneys at a 1974 annual conference of the National Institute of Municipal Law Officers in California:

> IF ALL ELSE FAILS, MERELY AMEND THE REGULATION AND START OVER AGAIN.
>
> If legal preventative maintenance does not work, and you still receive a claim attacking the land use regulation, or if you try the case and lose, don't worry about it. All is not lost. One of the extra goodies contained in the recent [California] Supreme Court case of *Selby v. City of San Buenaventura* appears to allow the City to change the regulation in question, even after trial and judgment, make it more reasonable, more restrictive, or whatever, and everybody starts over again. . . .
>
> See how easy it is to be a City Attorney. Sometimes you can lose the battle and still win the war. Good luck.

Id. (citing Longtin, *Avoiding and Defending Constitutional Attacks on Land Use Regulations*, 38B NIMLO MUN. L. REV. 192–93 (1975) (emphasis in original)).

32. Of course, California, being California, devised a rule wherein invalidation of a regulation might only be part of the normal permitting process, during which no compensation is due. *See, e.g.*, Landgate v. California Coastal Comm'n, 936 P.2d 472 (1997), *cert. denied*, 575 U.S. 876 (1998).

33. 483 U.S. 825 (1987). This time Justice Scalia wrote the opinion, joined by Justices Rehnquist, White, Powell, and O'Connor. The dissenters included Justices Brennan, Marshall, Blackmun, and Stevens.

being justified by increasingly tenuous or imaginative relationships at the behest of increasingly aggressive agencies, such as the California Coastal Commission. In *Nollan* for example, the state argued that its demand of some thirty percent of the Nollans' property in exchange for a permit to replace one home with a somewhat larger home was justified because of general policies in favor of public access and because building the home would create a "psychological barrier" between people and their coastline. Even taking these arguments as true, however, the Court found that there was no relationship between these harms and the particular land that the Nollans had to surrender.

While none of the successful takings arguments before the Supreme Court could be characterized as particularly novel, they did wake up lawyers across the country to the possibility that (1) money could be made in regulatory takings cases, (2) there was another cause of action in the lawyer's quiver, and (3) the arrow could be pulled out when nothing else would seem to work. These factors, combined with the adage that a little knowledge is a dangerous thing, have led to a plethora of "interesting" takings arguments since 1987. While many regulatory takings claims filed since 1987 have had a solid basis in the law and fact, and while some have even been successful, the remainder of this article will focus on some novel claims—claims that could be characterized as ranging from creative to bizarre. Much has been written on the more normal run of the mill regulatory takings claims, but not as much on those that are truly novel and idiosyncratic.

To a property rights advocate, there is a problem with claims that seek not to push the boundaries of the law, but rather to shatter those boundaries. Claims with bad facts or bad law lead to bad decisions that affect cases with good facts or good law behind them. Advocates for government authority and judges sympathetic to government arguments will use these cases to develop precedents that make it easier for the government to win future cases.

III. COMPENDIUM OF SELECTED NOVEL TAKINGS CLAIMS

This section is written from the perspective of an attorney who seeks to advance the cause of property rights by carefully litigating the best facts available in cases that may push the boundaries of the law but never push the boundaries beyond the realm of reasonableness. From the perspective of a property rights advocate, the best cases are

those that highlight the adverse consequences of bad government behavior—cases that will make the judiciary take notice that there is something wrong that must be fixed. Cases with unsympathetic clients or clients with bizarre grievances do not advance the cause of property rights.

A. Satellites and Takings

One pervasive theme that lawyers should take away from the study of regulatory takings is that the first step in any property rights analysis, whether the asserted claim being considered sounds in regulatory takings or due process, is to understand and define the property right at issue. Most importantly, there has to be a property right at issue. In *United States v. Willow River Power Co.*,[34] the government raised the water level downstream from a hydroelectric plant and thereby reduced the distance the water could fall through the turbines and, therefore, the efficiency and profits from the plant. The Court held this was not a taking because "not all economic interests are 'property rights'; only those economic advantages are 'rights' which have the law *back of them*,"[35] and they must be "legally protected interests."[36] Because there was no property right in any particular downstream water level, there was nothing to be taken and no due process to be denied. The lesson here is that a property owner contemplating a constitutional claim over the regulation of property must first understand what property interest is actually implicated before proceeding to court.

This same theme was repeated nearly a half century later in *Lucas v. South Carolina Coastal Council*[37] in which the Court reiterated this point from the opposite perspective. It found that when government asserts a "nuisance defense" to a takings claim, the government must demonstrate the existence of the common law nuisance limitation: "Any limitation [on the use of property] so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."[38]

34. 324 U.S. 499 (1945).
35. *Id.* at 502.
36. *Id.* at 503.
37. 505 U.S. 1003 (1992).
38. *Id.* at 1029.

With these principles in mind, we turn to *Howard v. United States*.[39] In that case the plaintiff alleged that satellite surveillance of Howard's property as well as the government's failure to accept a late contract bid were takings. Think about it—if the government were to find some kind of property right not to have a satellite go whizzing by a few hundred miles overhead every couple of hours, and then to find that the violation of that right implicated a takings claim, the results would portend astronomical levels of government liability. While it is true that property rights were once defined to extend from the center of the earth skyward to the heavens, that doctrine existed before air flight. Thus, while *Causby* found that aircraft overflights at eighty-three feet could cause a physical invasion-style taking, the Court there did so on the basis of the impact of the flights on the ground, not on an anachronistic reliance on property definitions originating in the middle ages.[40] Now, to be fair, in addition to more traditional *Causby*-like claims,[41] Howard wasn't only claiming a strict physical invasion or a claim based on an anachronistic definition of property, but rather a taking of the "plaintiff's privacy, peace of mind, and ability to secure gainful employment."[42] Clearly, a new age claim for a cadet of the space age. However, the court suggested that if these allegations were true, they might implicate criminal acts or torts—claims that were not cognizable in the court.[43] As for the contract-based claims, the claimant failed to assert a valid offer, so there was no contract claim or taking of any such contract.[44]

---

39. 21 Cl. Ct. 475 (1990).

40. United States v. Causby, 328 U.S. 256 (1946).

41. Well, sort of. "Plaintiff also claims a taking of his personal 'property' by agents of NASA 'who flagrantly, maliciously and loudly fly commercial and smaller aircraft at low altitudes constituting a nuisance, and cause aircraft contrails that resemble rocket launches.'" 21 Cl. Ct. at 477.

42. *Id.* at 479. Moreover, "NASA harassed him, watched his person, and listened to his private conversations continuously over the past seventeen years and, by unexplained actions, was to blame for his lack of gainful employment." *Id.* I suppose I should point out that this claim was brought *pro se*, and that no attorney was responsible for its contents. Surprisingly, Howard did not live in California where such claims might be considered more credible: "All of this activity allegedly occurred from 1973 to present in Washington, D.C.; Cambridge, Massachusetts; Chicago, Illinois; and Gary, Indiana." *Id.*

43. The intersection between torts and takings, it should be noted, can be somewhat murky. *See, e.g.*, ALI-ABA COURSE OF STUDY, TAKINGS AND TORTS: THE ROLE OF INTENTION AND FORESEEABILITY IN ASSESSING TAKINGS DAMAGES SS036 ALI-ABA 437 (Feb. 17–19, 2011).

44. 21 Cl. Ct. at 478.

B. Dancing and Takings I: Lap Dancing the Takings Claim Away

Attorneys are always hoping the next big damages case will put them into the lap of luxury. Connoisseurs of dance may wish to be up close and personal to the dancers, especially dancers engaged in the constitutionally protected art of lap dancing.[45] And the dancers of this aesthetic understand that proximity breeds tips. So when a municipality imposes proximity restrictions on the exercise of this art form, separating dancers from their customers, the dancers' income, among other things, may shrink. But does this rise to a taking of the foregone tips?

After all, we know that money is property, the taking of which can give rise to a valid takings claim.[46] But what if it is not money itself that is taken but the hope to earn more in the future from satisfied customers? In *Gammoh v. City of La Habra*,[47] the Ninth Circuit found that the dancers had not shown they had any sort of "property interest" in that alleged loss of income. Thus the takings claim was properly dismissed.[48] This claim was clearly an act of desperation—a quick Westlaw perusal of the fate of proximity restrictions on lap dancing makes it plain that while the Supreme Court, in all of its wisdom, has deemed that the Constitution protects certain sexually oriented artistic endeavors, that protection is not absolute, and various proximity regulations are permissible.

C. Dancing and Takings II: Raisins Back in the High Court

One of the truly great contributions to late twentieth-century American culture was the mash-up between pop music, claymation, and commercial television. We are talking, of course, about the triumphant dancing raisin commercials brought to us by the California Raisin Commission that featured *Heard It Through the Grapevine*.[49]

Raisins may be cute when they dance, but government control of the raisin market is not, and it has engendered much litigation.

---

45. According to plaintiffs in one case, "so-called 'lap dancing,' [is] arguably another unique form of expressive conduct." Colacurcio v. City of Kent, 163 F.3d 545, 556 (9th Cir. 1998).

46. *See, e.g.*, Webb's Fabulous Pharmacies v. Beckwith, 449 U.S. 155, 164 (1980).

47. 395 F.3d 1114 (9th Cir. 2005).

48. *Id.* at 1122.

49. *See* Video, *Heard It Through the Grapevine*, https://www.youtube.com/watch?v=pM2OK_JaJ9I (last visited June 10, 2015) (original version); https://www.youtube.com/watch?v=sDkA1pCQFOo (last visited June 10, 2015) (Michael Jackson version); https://www.youtube.com/watch?v=nhIvBZmQUWY (June 10, 2015) (Ray Charles version).

First, there was a First Amendment challenge to the fee assessed raisin growers to finance marketing programs, such as the *Grapevine* commercials.[50] It lost. Then there was an unsuccessful antitrust challenge.[51] Neither of these challenges made it to the Supreme Court. But now a takings claim has made it there twice.

The underlying question is whether a requirement to give a portion of a farmer's raisin crop in exchange for permission to sell the remainder is a taking of those raisins. In the case's first trip to the Supreme Court, the government and the raisin growers argued whether the takings case should have been brought in the Court of Federal Claims or federal district court.[52] The Ninth Circuit had tried to get rid of the case, but the Supreme Court said the district court was just fine. But along the way, members of the Court had some scathing characterizations of the statute. Notably, Justice Kagan remarked at oral argument that perhaps the best course would be for "the Ninth Circuit . . . [to] try to figure out whether this marketing order is a taking or it's just the world's most outdated law."[53]

But a return to the district court, and eventually the Ninth Circuit, was no guarantee of relief. After dealing with some preliminary standing issues, the Ninth Circuit proceeded to find that a *Penn Central* claim was not before the Court and that there was no physical invasion of the raisins.[54] The court reasoned that physical invasion cases like *Loretto* involved only real property, and since the Court in *Lucas* suggested that Takings Clause protections for personal property were less robust than for real property, there was no physical invasion

50. *See, e.g.*, Delano Farms v. Cal. Table Grape Comm'n, 586 F.3d 1219 (9th Cir. 2009), *cert. denied*, 131 S. Ct. 159 (2010) (holding that mandatory assessments under state law do not violate the First Amendment), *as discussed in* Jeremiah Paul, *Is a Grape Just a Grape? California Table Grape Commission's Mandatory Assessment Funded Generic Advertising Scheme vs. Grower's First Amendment Rights*, 21 SAN JOAQUIN AGRIC. L. REV. 207, 212 (2012). Such schemes had been previously upheld in *Glickman v. Wileman Brothers & Elliott*, 521 U.S. 457 (1997) (nut tree assessments), but later were called into question in United Foods v. United Foods, 533 U.S. 405 (2001) (mushroom marketing orders violated First Amendment because the advertising was the principal object of the regulatory scheme).

51. Delano Farms v. California Table Grape Comm'n, 655 F.3d 1337 (Fed. Cir. 2011), *cert. denied*, 133 S. Ct. 644 (2012).

52. *See* Horne v. United States Dep't of Agric., 133 S. Ct. 2053 (2013).

53. Oral Arg. in Horne v. Dep't of Agric., 2013 WL 3132218, at *49 (2013).

54. "The Hornes, however, have intentionally declined to pursue a *Penn Central* claim. Instead, they argue the Marketing Order, though a regulation, works a categorical taking." Horne v. U.S. Dep't of Agric., 750 F.3d 1128, 1138 (9th Cir. 2014), *cert. granted*, Horne v. Dep't of Agric., No. 14-275, 2015 WL 213643 (U.S. Jan. 16, 2015).

taking of the portion of raisin crop (or cash in lieu) confiscated by the government.[55]

Quite disingenuously, the Ninth Circuit also suggested that the Supreme Court itself had eschewed finding a physical invasion could apply to personal property when it justified its holding with this citation:

> *See also Wash. Legal Found. v. Legal Found. of Wash.*, 271 F.3d 835, 854 (9th Cir.2001) (en banc), *aff'd sub nom.*, *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 123 S. Ct. 1406, 155 L. Ed.2d 376 (2003) ("The per se analysis has not typically been employed outside the context of real property. It is a particularly inapt analysis when the property in question is money.").[56]

What makes this disingenuous was that the parenthetical following the citation to *Brown* above was not from the Supreme Court's opinion but from the Ninth Circuit's and that the Supreme Court had *expressly rejected* the Ninth Circuit's assertion:

> We agree that a per se approach is more consistent with the reasoning in our *Phillips* opinion than *Penn Central*'s ad hoc analysis. As was made clear in *Phillips*, the interest earned in the IOLTA accounts "is the 'private property' of the owner of the principal." If this is so, the transfer of the interest to the Foundation here seems more akin to the occupation of a small amount of rooftop space in *Loretto*.[57]

Having dispensed with the physical invasion claim, the Ninth Circuit turned to considering whether the expropriation of raisins was an exaction proscribed by the Supreme Court's unconstitutional conditions doctrine. Here, the Ninth Circuit also found no taking, finding that the tests of *Nollan* and *Dolan* were both met.

While *Nollan* itself asked whether the exactions served the public interest of alleviating a harm caused by the home building project, the Ninth Circuit here asked simply whether the exaction served the government end of stabilizing the market. But *Nollan* held that

---

55. 750 F.3d at 1139–40 ("[W]e see no reason to extend *Loretto* to govern controversies involving personal property.").

56. *Id.* at 1140.

57. Brown v. Legal Found. of Washington, 538 U.S. 216, 235 (2003) (citation omitted.).

the condition must do more than advance a government's purpose; it must advance a government regulation designed to ameliorate a harm caused by the project itself. Thus in *Nollan*, the Court wrote, "here, the lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation."[58] In contrast, the Ninth Circuit concluded in *Horne* that "the Marketing Order program furthers the end advanced: obtaining orderly market conditions."[59] One could add that "obtaining orderly market conditions" without tying them to any *disorderly* market conditions caused by Horne's raisin crop is akin to merely "some valid government purpose." Therefore it is no surprise that the raisin seizure passed the Ninth Circuit's bowdlerized *Nollan* test.

Turning to *Dolan*'s rough proportionality requirement, the Ninth Circuit surmised that because all raisin producers are treated equally[60] and because the percentage of raisins expropriated is adjusted annually, the *Dolan* standard had been met. But the "equal treatment" and "annual adjustment" rationales are non sequiturs: neither has anything to do with finding proportionality between the adverse impacts caused by selling raisins and the demand to fork raisins over to the federal government. The Supreme Court is expected to issue its ruling by the end of its 2014 term in June of 2015.

Most importantly, all this botched analysis of *Nollan* and *Dolan* begs the question: What does the demand for a portion of a raisin crop really have to do with context of *Nollan* and *Dolan*? Is it the regulation via conditions of the use of real property? This is the sort of confusion that the Supreme Court will need to sort out.

D. Takings by Lawyers in Black Robes

We know it is possible for the Executive and Legislative Branches of government to take property. It happens all the time. A Department of Transportation may condemn property for a road, or a local municipality may zone a parcel into inutility, giving rise to liability

58. *Nollan*, 483 U.S. at 837.
59. *Horne*, 750 F.3d at 1143.
60. *Id.* at 1144 ("[T]he use restriction is imposed evenly across the industry.").

under an inverse condemnation claim. But what about the Judicial Branch? Can it take property?[61]

The idea that a court can be responsible for a taking is not new or novel. It has been kicking around at least since 1897 in *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*.[62] In that case, the Court obliquely referred to a state court being involved in the taking of private property:

> [A] judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the fourteenth amendment of the constitution of the United States, and the affirmance of such judgment by the highest court of the state is a denial by that state of a right secured to the owner by that instrument.[63]

But since then, the doctrine of judicial takings has not had much traction—until perhaps now. It did get a major boost seventy years later in *Hughes v. State of Washington*,[64] in which Justice Stewart, in a concurring opinion wrote that "a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all."[65]

Hughes dealt with questions about how the State of Washington viewed accretions of riparian property. Justice Stewart continued that

> to the extent that the decision of the Supreme Court of Washington on that issue arguably conforms to reasonable expectations, we must of course accept it as conclusive. But to the extent that it constitutes a sudden change in state law, unpredictable in

61. For a more extended discussion on the arguments leading up to *Stop the Beach Renourishment v. Florida*, see James Burling, *Bacchanalian Beach Parties, Property Rights, and Judicial Takings: Argument in* Stop the Beach Renourishment v. Florida Department of Environmental Protection, ALI-CLE PROGRAM: EMINENT DOMAIN AND LAND VALUATION LITIGATION (2010), *available at* http://www.ali-cle.org/index.cfm?fuseaction=online.chapter_detail&paperid=266347&source=2.

62. 166 U.S. 226 (1897).

63. *Id.* at 241.

64. 389 U.S. 290 (1967).

65. *Id.*

> terms of the relevant precedents, no such deference would be appropriate.[66]
>
> Although the State in this case made no attempt to take the accreted lands by eminent domain, it achieved the same result by effecting a retroactive transformation of private into public property—without paying for the privilege of doing so. Because the Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its legislature, and no less when a taking is unintended than when it is deliberate, I join in reversing the judgment.[67]

Finally, in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*,[68] the Court actually took up a case premised solely on a judicial takings theory. In this case landowners claimed that the state's assertion of title over beachfront property—created in part by the addition of sand to the beach—was a taking. But the unique and novel twist here was that the landowners asserted that the Florida Supreme Court's rejection of the takings claim, and its assertion that the property belonged to the state, effected a judicial taking. The United States Supreme Court ultimately rejected this claim based on its reading of Florida land use law. But in doing so, a plurality of the justices opined that in the right set of circumstances, there could be a judicial taking:

> In sum, the Takings Clause bars the State from taking private property without paying for it, no matter which branch is the instrument of the taking. To be sure, the manner of state action may matter: Condemnation by eminent domain, for example, is always a taking, while a legislative, executive, or judicial restriction of property use may or may not be, depending on its nature and extent. But the particular state actor is irrelevant. If a legislature or a court declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation. [A] State, by ipse dixit, may not transform private property into public property without compensation.[69]

---

66. *Id.* at 296.
67. *Id.* at 298.
68. 560 U.S. 702 (2010).
69. *Id.* at 715.

This formulation doesn't exactly give a practitioner a whole lot of guidance. Moreover, the possibility of a judicial taking gives rise to a host of questions such as: What court gets to decide that another court took property? Who pays the compensation? From what budget? Indeed, because no judicial takings claim has actually succeeded, any attempt to bring one could be considered novel, if not daring. So, to the extent that the Court had referred to the possibility of a judicial taking, is that something a practitioner should actually bring? Only hindsight can answer that question.

E. Gambling on Government Contracts and Licenses

As noted above, having a definable property right is essential to a viable claim that property has been taken. While it is easy to understand that real property is covered, other less tangible assets can be problematic. Government contracts and licenses are a case in point. While one may take a broad Madisonian view of property—that a person has a property right in many things[70]—one must be cautious in equating the same degree of "right" to a government contract or a government-issued license, because the rights in that contract or license can be limited by the very terms of the instrument itself. Thus, if the terms of the contract or license allow for future interference or restriction by the government, then there may be no "property right" to complain about when that interference or restriction occurs.[71] Moreover, the contract or license may be limited not only by its express terms but also by the implicit understanding that the terms may be altered by future legislative or administrative acts.[72]

For these reasons, disputes based on the regulation of licenses do not make for the best vehicle for developing new precedents supporting property rights. Because of the inherent malleability in license rights, judicial decisions on license cases might yield negative

---

70. *See supra* note 3.

71. It is also important to note that if one has a viable contract remedy for an alleged government breach, that remedy must be pursued before any takings claim. *See, e.g.*, Allegre Villa v. United States, 60 Fed. Cl. 11 (2004).

72. *See, e.g.*, Transohio Sav. Bank v. Director, Office of Thrift Supervision, 967 F.2d 598, 621 (D.C. Cir. 1992) (noting that the "unmistakeability" doctrine means that a contract may be implicitly altered by later legislative acts—unless the contract in unmistakable terms says otherwise and that the contracting parties had the authority to so limit the government's ability to make future alterations).

understandings in other cases—that is, broad and imprecise language in license cases may well bleed over into the realm of more traditional property rights, making the latter more vulnerable to government manipulation.

In *Hawkeye Commodity Promotions, Inc. v. Vilsack*,[73] the owners of video lottery machines brought claims sounding in contract, takings, equal protection, and due process when the Iowa legislature ended the lottery games. With respect to the contract claim, it was undisputed that the owners had invested heavily in the video machines in anticipation of carrying out their contracts with the state. But that was not enough. Assuming that there was a contract here, the regulated nature of the gaming industry was enough for the court to conclude that the parties should have anticipated that the legislature could step in and impose new regulations in the future.[74]

As for the takings claim, this too was a novel claim. There is no precedent holding that regulation of the gaming industry, or even its outright prohibition, can lead to takings liability.[75] Here, the court found that the machines and the business of operating them were interests in property.[76] The state never took possession of the machines; it just disallowed their use. And the business operation, although a property interest, was limited by the requirement to obtain a license to operate. And because "'[t]he possession of . . . [a] license . . . is a privilege personal to that person or entity and is not a legal right'" and "because Hawkeye's . . . license cannot be sold, assigned, or transferred, it 'lacks the indicia of a property interest.'"[77] Along the way to finding no taking violation, the court also, and unnecessarily, found that *Lucas* applies only to real property, and that in a *Penn Central* analysis one factor can be dispositive: that is, despite the near total destruction of the business, the lack of reasonable expectations in not having the legislature shut the business down, combined with the an amorphous third-prong analysis, was enough to obviate any *Penn Central* takings.

---

73. 486 F.3d 430 (8th Cir. 2007).

74. *Id.* at 438 (finding "diminished contract expectations" based on this understanding and in the language of the contract itself).

75. The same company lost a similar argument in South Carolina in an opinion that did not provide much of a rationale for rejecting a takings claim. *See* Armstrong v. Collins, 621 S.E.2d 368 (S.C. Ct. App. 2005).

76. Hawkeye Commodity Promotions, Inc. v. Vilsack, 486 F.3d 430, 43 (8th Cir. 2007).

77. *Id.* at 440.

F. Takings and the Aryan Brotherhood

It is not often that one gets to discuss the Aryan Brotherhood in an article on regulatory takings. But takings lawyers had that opportunity in *Schneider v. California Dep't of Corrections*.[78] For those not familiar with the lead plaintiff in this takings case, Paul "Cornfed" Schneider, here is a brief excerpt from the San Francisco Chronicle:

> Paul "Cornfed" Schneider, a high-ranking member of the Aryan Brotherhood prison gang who came to prominence as the owner of two dogs that killed a San Francisco woman, was sentenced to a third life term in prison Monday during a hearing that was secretly rescheduled to protect him from an assassination plot by fellow gang members.[79]

In other words, he is not the sort of person one would want for a neighbor, especially considering the locale of his present neighborhood. But he is a property owner, of sorts, and has been willing to bring a novel takings claim to protect his property—which happens to be the interest he insists that he earned on his prison trust account. Under California Penal Code, that interest was to be deposited in the "Inmate Welfare Fund," the moneys of which would be applied to certain amenities for the prisoners.[80] The court, however, did not find that this penal code provision answered the question of whether a property

---

78. 151 F.3d 1194 (9th Cir. 1998).

79. The article continues:

> Schneider, who is already serving two life sentences in the California prison system for a variety of crimes, was sentenced in U.S. District Court in San Francisco for his part in a drug smuggling operation he ran from Pelican Bay State Prison and the 1995 murder of Sonoma County Sheriff's Deputy Frank Trejo.
>
> He told The Chronicle during an interview at the Santa Rita Jail in Dublin on Saturday that he hopes his federal prison sentence will keep him safe from the gang he belonged to for 15 years. He said when he arrived at Santa Rita, guards told him the gang knew he was coming and had repeatedly asked if he had arrived yet.
>
> State and federal authorities confirmed last week that the man called "the most dangerous man in California" in the wake of Diane Whipple's brutal death in January 2001 has been marked for assassination—or "placed in the hat," in the parlance of the white supremacist gang.

Charlie Goodyear, *'Cornfed' Draws 3rd Life Term . . .*, S.F. CHRON., Oct. 28, 2003, http://www.sfgate.com/bayarea/article/Cornfed-draws-3rd-life-term-Inmate-in-2580493.php.

80. Schneider v. California Dep't of Corrections, 151 F.3d 1194, 1196 (9th Cir. 1998).

right had been created, noting that many property interests exist "wholly independent of statutes."[81] Ultimately, the court found that Schneider and his fellow travelers did have a property interest in whatever interest their accounts earned, despite the lack of statutory recognition. In response to the state's argument that because property is defined by state law, and a state can define away a property interest, the court noted,

> Rather, there is, we think, a "core" notion of constitutionally protected property into which state regulation simply may not intrude without prompting Takings Clause scrutiny. The States' power vis-a-vis property thus operates as a one-way ratchet of sorts: States may, under certain circumstances, confer "new property" status on interests located outside the core of constitutionally protected property, but they may not encroach upon traditional "old property" interests found within the core.[82]

This is clearly a case of bad facts—because who really cares about petty amounts of interest accruing in the accounts of a collection of bad and very bad people? But what this case did have going for it was the application of some very well defined law holding that government cannot withhold interest on accounts of money held by the government.[83] But, in the end the bad facts led to a dissatisfying result for the prisoners: on remand, the court found that whatever interest had been earned was subsumed on average by the costs of administering the funds and that the compensation owed amounted to nothing.[84] On further appeal, the Ninth Circuit held that each fund had to be looked at individually, but also noted that the state stopped putting any of the funds into interest-bearing accounts in order to avoid the problem altogether.[85]

---

81. *Id.* at 1199.

82. *Id.* at 1200–01.

83. *See, e.g.*, Webb's Fabulous Pharmacies v. Beckwith, 449 U.S. 155 (1980); Brown v. Legal Found. of Wash., 538 U.S. 216 (2003) (interest on lawyer's trust accounts subject to takings analysis).

84. Schneider v. Cal. Dep't of Corrections, 91 F. Supp. 1316 (N.D. Cal. 2000). On appeal of this decision, the Ninth Circuit reversed, holding that each individual account had to be considered separately for purposes of comparing costs to expenses. 345 F.3d 716 (9th Cir. 2003).

85. *Id.* at 722 n.3. There are no further reported decisions explaining what, if anything, Schneider got out of this litigation.

G. Up in Smoke I—Weeding Out Takings Claims

If the sheriff takes your pot plants, is there a taking? In *Young v. Larimer County*[86] the local police raided Kaleb Young's leased property and seized forty-two marijuana plants, cutting them down and killing the plants. Young claimed the plants were for medicinal purposes under that state's medical marijuana law, and he was acquitted. The dead plants were returned to Young, but they had been taken before they were ready to be harvested. Young sued for damages to his plants based on a 1983 claim for just compensation under federal law and a state takings claim. On his federal takings claim, the court found he had no property right in what is contraband under federal law.[87] On his state takings claim, the court held that no right of action accrued when property is temporarily seized for evidence—and that there was no "public use" of his plants when they were seized as evidence. One suspects that this is the result the court wanted to reach—otherwise the judicial process itself would be upended if compensation were to be required for damages caused to seized evidence or damage to anything belonging to a defendant who is eventually acquitted. So after dragging someone through an unsuccessful prosecution, the government isn't going to be held responsible for its attempt at making the world a safer place, even if it is not actually doing that.

H. Up in Smoke II—Smoking Bans and Takings

With the advent of indoor smoking bans across the country, a number of somewhat desperate bar owners—along with their tobacco industry allies—have tried some unconventional approaches to fighting smoking bans—including bringing takings challenges. In the most recent of these, *Big John's Billiards, Inc. v. Nebraska*,[88] the court began where it should have begun, by analyzing the nature of the property right alleged to be taken. Here, Big John's Billiard Parlor alleged that it had a vested property right in "its ability to operate

86. Colo. Ct. Apps., Case No. 13CA1339, 2014 WL 449513 (2014).

87. Along similar lines is *Bennis v. Michigan*, 516 U.S. 448 (1996), in which Mr. Bennis used his wife's car for purposes inconsistent with his marriage vows, and the car was seized under the law of asset forfeiture.

88. 852 N.W.2d 727 (Neb. 2014).

a premises that allowed smoking."[89] Unfortunately for Big John's, the court was not convinced that this was a vested right—finding that "[t]he only 'right' Big John's had to allow its customers to smoke was created by statute—the prior version of the act."[90] Now I suppose that one could make an academic argument that under ancient common law principles an innkeeper or establishment owner had the right to regulate conduct itself within the establishment, but it appears that no such arguments were made here. Nor would it have done much good. Bringing a taking claim here was simply a matter of desperation combined with an ignorance of the realities of takings and property law. Put another way, this one was never going to fly.

The same argument arose in *D.A.B.E. Inc. v. City of Toledo*,[91] in which a group of restaurant owners alleged a smoking ban effected a regulatory taking. Here the court didn't focus on the nature of the property interest, if any. Instead it moved right to a *Penn Central* partial takings analysis and focused on the "character of the government regulation" prong of that test, finding that there were serious adverse impacts on employees working in establishments where smoking is permitted. The court then mentioned, but was not particularly moved by, what was "unquestionably . . . an adverse economic impact on plaintiffs' businesses, two of which closed their doors." Lastly, it found the owners should have anticipated the increasing regulation of smoking, thus negating the existence of any reasonable investment-backed expectations in maintaining the status quo.[92] On appeal, the Sixth Circuit found that the restaurant owner plaintiffs failed to show that the law denied them economically viable use of their property.[93]

I. Up in Smoke III—and Shrapnel

In *National Amusements Inc. v. Borough of Palmyra*,[94] the owner of a flea market was distressed to find unexploded ordnance on his

89. *Id.* at 954.

90. *Id.* at 955. The prior act had an exemption for billiard parlors regulating, but not banning, smoking.

91. 292 F. Supp. 2d 968 (N.D. Ohio 2003), *aff'd*, 393 F.3d 692 (6th Cir. 2005).

92. *Id.* at 973. Of some historical interest, at around this time the Second Circuit held that there were takings implications when a tobacco company was told to divulge its trade secrets in *Philip Morris, Inc. v. Reilly*, 312 F.3d 24 (1st Cir. 2002).

93. 393 F.3d at 695.

94. 716 F.3d 57 (3d Cir. 2013).

property—property that had been at one time used as a firing range. After the borough closed the flea market to the public so that clean-up operations could be conducted, the owner sued for due process and takings violations. The court did not buy it. On the due process claim, the court found the owner was not entitled to a predeprivation hearing because of the public health and safety necessity of moving rapidly to clean up the danger. As for the takings claim, the court found that the five months of cleanup did not constitute a temporary taking, because this was a reasonable exercise of the police power and not a taking.[95] Unfortunately, the court's analysis was rather cursory and misleading. There is no dichotomy between exercises of the police power and takings. Indeed, most compensable regulatory takings do involve legitimate exercises of the police power.

What the court *should have* focused on was whether the so-called "public necessity doctrine" created an "emergency exception" to the Takings Clause. Thus, when a fire threatens to consume a city, and the city destroys private buildings in order to create a firebreak, no compensation is due. But there certainly is no "police power" exception to the duty to pay just compensation. As the Supreme Court explained in *Lucas*, at least since *Pennsylvania Coal*, the courts have recognized that if "the uses of private property were subject to unbridled, uncompensated qualification under the police power, 'the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed].'"[96] There are, however, discrete instances at common law in which extraordinary circumstances render the taking of damaging of property noncompensable. Government's prerogative to destroy, take, or damage private property without paying compensation is limited by the doctrine of "public necessity." In extraordinary situations, not only the government but "everyone ha[s] the right to destroy real and personal property" without incurring liability to the owner.[97] Thus "in times of imminent peril—such as when a fire threatened a whole community—the sovereign could, with impunity, destroy the property of a few

95. "It is difficult to imagine an act closer to the heartland of a state's traditional police power than abating the danger posed by unexploded artillery shells. Palmyra's emergency action to temporarily close the Market therefore constituted an exercise of its police power that did not require just compensation." 716 F.3d at 63.

96. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014 (1992) (citing *Pennsylvania Coal*, 260 U.S. at 415).

97. Bowditch v. Boston, 101 U.S. 16, 18 (1979).

so that the property of many and the lives of many more could be saved."[98] "[I]n virtually all of the decided cases, the property destroyed had temporarily become dangerous itself and was likely to have been destroyed anyway."[99] In the case of setting aside private property for five months in order to clean up unexploded ordnance, it is debatable whether the necessity doctrine could apply—but the court surely failed by not considering the matter.

National Amusements is not unique. In *Warren Trust v. United States*,[100] two family trusts acquired roughly 18,000 acres of property near the city of Hammond, Louisiana. Of this, approximately 11,200 acres were inside a World War II bombing range. The trusts had used the property for timber harvesting and had plans to develop some or most of it. But with adoption of CERCLA in 1980 and amendments in 1986, the Department of Defense inspected the property and found a possibility of contact by "human receptors" to unexploded ordnance. This put a kibosh on development plans. The trusts sued for a taking and lost. At least the court here engaged in a meaningful takings analysis. Holdings include:

1) The fact that the trusts sued first in the court of federal claims and later in another suit involving same underlying facts allowed the claim to move forward under 28 U.S.C. § 1500.[101]
2) The trusts did not allege allegations of tort such as slander of title.[102]
3) There is no taking because trusts did not establish interference with property interest—prohibitory regulations did not apply to non-government property.[103]
4) No categorical taking because:
    a) Parcel as a whole is the larger 18,000 acres.[104]
    b) Some use and value left.[105]

98. United States v. Caltex, 344 U.S. 149, 154 (1952) (World War II destruction of property before falling into enemy hands).

99. W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 24 at 146 (5th ed. 1984).

100. 107 Fed. Cl. 533 (2012).

101. *Id.* at 552.

102. *Id.* at 555.

103. *Id.* at 562.

104. *Id.* at 563–66.

105. *Id.* at 566–67.

5) No *Penn Central* taking because:
   a) Diminution in value is only between 62% and 82%.[106]
   b) Owners knew property had been used for bombing range when they acquired it.[107]
   c) Government acted properly in inspecting property and warning public.[108]

The fact that both of these cases lost—one with a meaningful inquiry and the other without—indicates that courts are going to have difficulty finding novel takings in cases where the property had been heavily damaged and constitutes an inherent public danger.

J. Home Sweet Homeless—Takings of the Possessions of the Homeless

In *Lavan v. City of Los Angeles*,[109] the Ninth Circuit held that there was a taking in the removal and destruction of the property of a class of homeless persons who were "momentarily away" from their possessions on Skid Row in Los Angeles. This certainly qualifies as a novel takings claim. But it was a successful one. The City's petition for writ of certiorari was denied, but it did ask some provocative questions:

> In a divided opinion, the Ninth Circuit held that even in the face of a posted law expressly prohibiting such conduct, personal effects left unattended on the public sidewalk are constitutionally protected. Thus, the majority concluded when city employees dispose of these unattended items during a scheduled cleaning operation, the city commits both an unreasonable seizure in violation of the Fourth Amendment and a deprivation of procedural due process in violation the Fourteenth Amendment. The profound effect of this opinion is that a city can no longer fulfill its obligation to protect the public health. The interest in safe, clean, passable sidewalks has been supplanted. In its place, as the photographs in Appendix E illustrate, are public sidewalks that become home to mounds of tarp-covered items, often tagged with a sign reading "not abandoned." If a city wants to protect the public's health by removing this accumulation of stuff piling up on the sidewalk, yet

106. *Id.* at 568–69.
107. *Id.* at 569–70.
108. *Id.* at 570–71.
109. 693 F.3d 1022 (9th Cir. 2012).

> not violate the Constitution, a city must dedicate resources to sort through these items for contamination, fend off lawsuits alleging illegal search, and then bag, tag, and provide the facilities to store the remainder for retrieval by their owner. Do the protections of the Fourth Amendment and the due process clause of the Fourteenth Amendment extend to these personal effects intentionally left unattended by the owner on the public sidewalk in violation of an express law, such that city workers cannot dispose of these items during routine street cleaning without violating the Constitution?[110]

It is telling that in the Ninth Circuit novel Takings Clause-based claims fare better when brought by prisoners and the homeless than more traditional claims brought by owners of farm commodities and real property.

K. Relaxing of Rules on Mandatory Union Membership

After Indiana passed its controversial right-to-work statute, wherein no individual can be required to join or remain a union member or pay any sort of dues or assessments to the union or other third party, the labor unions sued. In *Sweeney v. Pence*[111] the question arose whether the combination of a federal statute requiring a union to provide fair representation to all employees and the state law prohibiting the union from collecting dues from nonmembers somehow "took" the union's property. It argued nonpaying nonmembers were free-riders, enjoying the benefits of the union's collective bargaining efforts without compensating the union. The court held that to the extent the union was tasked with the duty of fair representation, it was "justly compensated by federal law's grant to the union the right to bargain exclusively with the employer."[112]

> It seems disingenuous not to recognize that the Union's position as a sole representative comes with a set of powers and benefits as well as responsibilities and duties. And no information before us persuades us that the Union is not fully and adequately compensated by its rights as the sole and exclusive member at the negotiating table.[113]

110. City of Los Angeles v. Lavan, 2013 WL 796022, *cert. denied*, 133 S. Ct. 2855 (2012).
111. 767 F.3d 654 (7th Cir. 2014).
112. *Id.* at 666.
113. *Id.* at 666.

The dissent suggested was that forcing the union to provide services without compensation was a taking.[114] But in a convolution of takings doctrine, the dissent continued that "[h]ere, no public purpose was even alleged,"[115] forgetting those cases in which compensable takings were not found despite lack of a public purpose.[116] And the dissent continued that this would be like gasoline retailers being required to give away gasoline to customers who did not want to pay.[117]

With all due respect to the court, missing in the discussion by either the majority or the dissent is anything resembling a cogent discussion of takings law based on established principles or precedent. First of all, there is very little attempt to identify the property right that was taken. Is there a property right to represent nonmembers? Is there a property right in the incidental benefits received by the nonmembers? Perhaps there is. Perhaps there isn't. But some meaningful discussion could help explain why there is, or isn't, a property interest that can be taken in the first place. Next, the dissent's confusion over the impact of a lack of public purpose reflects a lack of understanding of whether this case is actually a claim for an uncompensated taking or something else perhaps more akin to a substantive due process challenge. Finally, the dissent ever so closely skimmed the edge of a *Nollan* and *Dolan* unconstitutional conditions argument but never quite connected the dots. In other words, this court is about as confused about takings law as every other court generally is.

L. Animal Law I: Lions and Tigers and Bears, Oh My Takings Claws

After an Ohio man released over fifty exotic animals before committing suicide,[118] the State of Ohio passed the Ohio Dangerous and

114. *Id.* at 683.

115. *Id.*

116. *See, e.g.*, text accompanying footnote 86 (discussion of *Young v. Larimer*).

117. *Id.* This brings to mind Justice White's dissenting hypothetical of requiring a grocery store to give away groceries to the poor in *Christy v. Lujan*, 490 U.S. 1114 (1989). There the Court denied certiorari to a rancher who was denied the right to terminate a marauding bear.

118. Wikipedia described the incident this way:

> Muskingum County Animal Farm was a private zoo located in Zanesville, Ohio, United States.
>
> The zoo received world-wide attention on October 19, 2011, when dozens of exotic animals were released from their enclosures. Bears, lions, tigers, and wolves were among those who escaped, and were hunted by local law enforcement out

Wild Animals and Restricted Snakes Act. Among the provisions was one requiring that certain exotic animals be microchipped. This in turn led exotic animal owners such as the plaintiff-appellants in *Daniels v. Wilkins*[119] to allege a host of constitutional infirmities, including a physical invasion Takings Clause claim.

The Sixth Circuit addressed first whether it had jurisdiction to hear the claim in light of *Williamson County* and the fact that the plaintiffs-appellants did not seek compensation in state court. Noting that *Williamson County* is a prudential ripeness doctrine, it found that there would be no point in sending the case to state court if it were clear that there had been no taking.[120] Turning to the Takings Clause claim, the court was not convinced that the implantation of microchips effected any kind of physical invasion. It is, after all, one thing to force someone to allow cable wires and boxes onto one's building, but a microchip implanted in an animal is distinguishable both in degree and kind:

> But even after appellants implant the microchips, they retain the ability to use and possess their animals and the implanted microchips. Indeed, the Act is close kin to the general welfare regulations that the Supreme Court ensured were not constitutionally suspect. There is little difference between a law requiring a microchip in an animal and a law requiring handrails in apartment buildings. Both are regulations of individuals' property properly challenged as regulatory takings, *Loretto*, 458 U.S. at 440, 102 S. Ct. 3164, and neither law effects a government occupation of property or a government-authorized occupation of property by a third party. As appellees point out, were the Act's micro chipping

---

> of fear for public safety. The animals were killed or captured and taken to the Columbus Zoo and Aquarium. Owner Terry Thompson set free fifty-six of his exotic animals before shooting himself in the head. Forty-eight were killed by the local police. The animals freed included lions, leopards, wolves, primates, bears, and eighteen tigers. The animals confirmed to be dead were the eighteen tigers, six black bears, two grizzlies, two wolves, one macaque monkey, one baboon, three mountain lions, nine male lions, and eight lionesses. Three leopards, one grizzly bear, and two monkeys were left caged inside Thompson's home. These animals were tranquilized and sent to the Columbus Zoo. One of the surviving leopards was subsequently injured in an accident at the zoo and was euthanized. One monkey was eaten by a tiger, and a wolf was killed after being hit by a car.

Wikipedia entry for Muskingum County Animal Farm, http://en.wikipedia.org/wiki/Muskingum_County_Animal_Farm (last visited June 10, 2015) (footnotes omitted).

119. 744 F.3d 409 (6th Cir. 2009).

120. *Id.* at 418.

> requirement to be ruled a taking, "laws requiring license plates on cars, warning labels on packaging, lighting on boats, handrails in apartment buildings, and ramps leading to restaurants" would be suspect.[121]

This was surely the correct result. As much as one may or may not chafe against government regulations of various sorts, not every regulation effects a taking, no less a physical invasion-style taking.[122] While it may be an "invasion" of some kind, to conclude "unassailably" that this invasion rises to a constitutional dimension is a stretch. *Loretto* involved the use of a measurable amount of Mrs. Loretto's apartment building for the benefit of and continuing use by a third-party utility company. If the animal owners here had asked first what the nature of the property interest alleged to be taken was, then they might have saved some time and effort in litigation.[123]

M. Animal Law II: Big Game and Takings

In Montana, owners of ranches supplemented their income by promoting hunts of captive big game. Sometimes referred to pejoratively as "canned hunts," these operations have engendered significant controversy. They are supported by some hunters and free-market advocates who claim that exotic animal wildlife ranching can help conserve threatened species. On the other hand, animal rights advocates and other conservationists doubt the utility of using exotic wildlife ranches as a means to conserving species. In *Kafka v. Montana Dep't of Fish, Wildlife & Parks*,[124] the owners and operators of livestock

121. *Id.* at 419.

122. Opinions do vary. *See, e.g.*, Stephen D. Lott, *Getting Under Fido's Skin: Analyzing the Objections to Mandatory Pet Microchipping Laws*, 7 OKLA. J. L. & TECH. 52 (2011), *available at* https://www.law.ou.edu/sites/default/files/files/FACULTY/2011okjoltrev52.pdf. The article concludes, "[t]o be sure, mandatory microchipping constitutes a permanent physical invasion of the pet owner's property. Thus, it seems fairly clear that, based upon the Court's finding in Lucas, pet owners must be compensated." *Id.*

123. There have been similar, and so far unsuccessful, challenges brought to the Department of Agriculture's requirement for farm animal microchip identification (for the purpose of tracking disease), although most claims seem to be First Amendment religion challenges alleging that the microchipping is related to the "mark of the beast" as described in the Book of Revelations 13:16–18. For more on one lawsuit, see Tom Leonard, *Amish Sue U.S. Government for "Mark of the Beast" on Livestock*, U.K. TELEGRAPH (Nov. 17, 2008), http://www.telegraph.co.uk/news/worldnews/northamerica/usa/3473461/Amish-sue-US-government-for-mark-of-the-Beast-on-livestock.html.

124. 201 P.3d 8 (Mont. 2008).

game farms sued for a taking of property interests as result of an initiative that prohibited the charging of a fee to shoot ranched big game wildlife. They lost. The game owners had licenses to operate the hunts and the revocation of the licenses after the initiative did not effect a taking because the licenses were not compensable property rights—they were government benefits. Nor, the court held, could the ranchers demonstrate that the value of their ranches had substantially been diminished. Likewise, continuing with a *Penn Central* analysis, the court found the other factors did not militate finding a take.

The dissent was displeased:

> At bottom, the Court holds that any individual in this State who, with the State's encouragement, invests capital and resources to create a going concern, but who does so in a field that this Court considers "highly controversial," simply has no compensable interest in that business. Therefore, when the State up and decides to legislate the business out of existence—through the unique expedient of depriving the business of any income—the State need not provide any compensation for the owner's loss of property.
>
> The injustice in treating Montana business people and property owners in this manner is manifest, not to mention legally indefensible. I strenuously disagree with the Court's determination that the Ranchers, and others similarly situated, are without a remedy for a taking of their property. I also cannot subscribe to the Court's faulty rationales in reaching this result. I therefore respectfully dissent from the Court's decision.[125]

The dissent makes for an interesting read for its detailed Due Process and Takings analyses, in which it ultimately concludes that there should be no exception for the compensation requirement just because game ranches are unpopular businesses in some circles and that the harm to the ranchers is so substantial.

In *Simpson v. Dep't of Fish and Wildlife*[126] an elk rancher sued after Oregon prohibited hunting elk on private ranches. At issue was whether the elk were private property. The court said "no." First, it found that elk are wildlife; second, all wildlife belongs to the state; and third, all elk belong to the state.[127] Therefore, there could no taking.

---

125. 201 P.3d at 33–34 (Nelson, J., dissenting).
126. 255 P.3d 565 (Or. App. 2011).
127. *Id.* at 569.

Thus in Montana there was no property interest in operating a trophy-hunting ranch, and in Oregon there was no property in the wildlife. In neither instance could a taking claim succeed.

N. Taxi Medallions and Takings

In what could be one of the final battles of the last war, taxi companies in New York have complained that increasing the number of legal taxis will diminish the monopoly power that existing medallion owners have. Some have gone on to argue that plans to allow more lawful taxis, especially in the outer boroughs and neighborhoods that are traditionally underserved by medallion cabs, is a potential taking. Recently, the established taxi companies brought suit, arguing a taking.[128] But what kind of property is a government monopoly license to drive a car for hire? This has been the subject of some rather intense debate and speculation. Professor Wyman has suggested that while the medallions may not have *started* out as property in the traditional sense, they have evolved that way.[129] Because of the manner in which medallions are infused with indicia of property, she concludes, somewhat pessimistically, that "[p]roblematic property rights should not only be regarded as burdensome in the present but also potentially burdensome in the future."[130] Whether that burden will consume Uber or be transcended by Uber remains to be seen.

As noted by Steven Oxenhandler, there is precedent out of Chicago for treating taxi licenses as compensable property:

> In other words, despite the lack of an explicit recognition that a taxicab license constituted a compensable property interest, the court reasoned that because the City treated the taxicab license

128. Taxicab Serv. Ass'n v. New York, No. 102553, at 30 (N.Y. Sup. Ct. Aug. 17, 2012) ("Plaintiffs claim . . . that medallions are 'more than mere licenses. Because they create consistent streams of income, have lasting residual value, and are freely transferable, they have long been understood to be valuable property.' Let us assume that this is so. They are still 'intangible' property. Plaintiffs intangible rights are not being 'taken,' they are being shared.") (cited in Katrina Miriam Wyman, *Problematic Private Property: The Case of New York Taxicab Medallions*, 30 YALE J. ON REG. 125, 187 n.84 (2013)).

129. *See, e.g.*,Wyman, *supra* note 128, at 140 ("The evolution of medallions underscores the potential for items to come to be regarded and treated as property absent the benefit of a clear constitutional guarantee against governmental expropriation without just compensation.").

130. *Id.* at 187.

> as a traditional form of property, the City implicitly created a compensable property right in a taxicab license.[131]

But Oxenhandler also notes precedent from California treating taxi licenses as a mere privilege.[132]

Of course, much of this discussion predates what has now become the elephant in the room: Uber. Wherever Uber goes, it is disrupting the traditional model of taxi license monopolies. And wherever Uber goes, Uber gets sued. Whether "allowing" or at least not banning Uber will have takings implications for existing taxi licenses will depend on what those licenses are: protected property interests, mere privileges, or something else. Central to the academic discussions of whether taxi licenses should be treated as compensable property interests are extensive discussions of what constitutes property in the first place.[133]

CONCLUSION

Suffice it to say for the limited discussion in this short article, any litigant seeking to extend the protections of the Takings Clause to a property interest not heretofore protected had better understand and apply one or more of the various theories on the meaning of property before embarking on a novel takings claim. This caution applies across the board: from taxi licenses to smoke-filled billiard halls to microchipped animals. Short of delving into a comprehensive exegesis of theories on the origins of property law, there is also the laugh test: the louder the laugh in reaction to a suggestion that something is a protected property right, the less likely it is to succeed in court.

---

131. Steve Oxenhandler, *Taxicab Licenses: In Search of A Fifth Amendment, Compensable Property Interest*, 27 TRANSP. L.J. 113, 131 (2000) (comparing Boonstra v. City of Chicago, 574 N.E.2d 689, 692 (Ill. App. Ct. 1991) (finding a property right associated with a taxi license), with O'Connor v. City of San Francisco, 153 Cal. Rptr. 306, 310 (Cal. Ct. App. 1979) (finding no property interest in the privilege of a taxi license.)).

132. *Id.*

133. *See, e.g.*, Wyman, *supra* note 128; Oxenhandler, *supra* note 131.

ON ENGINEERING URBAN DENSIFICATION

STEVEN J. EAGLE*

ABSTRACT

City planning in America began as a Progressive Era exercise intended to preserve property values and implicitly incorporate the social norms of officials and planners. Over time, rigid zoning was replaced by flexibility accompanied by opaque bargaining between localities and developers. Still, even in vibrant large cities, homeowner preferences for low density largely prevailed over attempts to enhance agglomeration through increasing density. The effect is to reduce economic opportunity for individuals and make cities less prosperous.

One method of increasing agglomeration is the imposition of densification, utilizing the assembly of transient coalitions that could impose grand bargains between aldermen and strong mayors. Expert planners would devise detailed quotas for desirable and undesirable uses in different parts of the city, and recipients of favorable zoning would receive regulatory property that is locked in place by procedural and constitutional requirements. Roderick Hills and David Schleicher advocate this approach in City Replanning.

This Article reviews the history of idealistic, and later pragmatic, comprehensive planning and zoning. It then analyzes the case for agglomeration and how it might be obtained through density mandates. The Article subsequently reviews undesirable consequences of such mandates. It asserts that grand bargains attenuate democratic decision-making, significantly reinforce the perceived evils of the current system, and are apt to be ineffective.

---

* Professor of Law, George Mason University School of Law, Arlington, Virginia 22201, seagle@gmu.edu. This Article first was presented at the Eleventh Annual Brigham-Kanner Property Rights Conference, on October 31, 2014. It is written in honor of Michael M. Berger, the 2014 Brigham-Kanner Property Rights Prize recipient, the first practicing attorney to be so recognized and one of America's most distinguished takings lawyers. More importantly, in the more than twenty years that I have known him, Mike Berger has personified integrity and compassion.

INTRODUCTION

This Article considers the engineering and densification of vibrant American cities. By "engineering," I refer to something contrived or devised,[1] as opposed to something arising from spontaneous growth, as Jane Jacobs or F.A. Hayek might have understood it.[2] By "densification," I mean increasing population density. "Densification" is an ugly word, having the sole merit of accuracy.[3]

The Article has three themes. Densification has beneficial effects on societal productivity to the extent coincident with positive agglomeration. The process of engineering densification exacerbates some of the same problems that it was intended to overcome. The detriments of agglomeration, conventionally lumped together with the label "congestion," are more broad and deep than generally realized.

I. THE BENEFITS AND LURES OF AGGLOMERATION

Agglomeration theory has its roots in the observation of Alfred Marshall a century ago that the agglomeration of firms in the same industry within limited geographical confines conferred great benefit.[4] From this beginning, subsequent scholars explained how talented

---

1. The word is comes from the Latin *ingenium*, meaning "cleverness." OXFORD ENGLISH DICTIONARY (3rd ed., 2011).

2. *See* JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES (1961) (envisioning cities as naturally growing communities not marked by sterile over-planning); 1 FRIEDRICH A. HAYEK, LAW, LEGISLATION AND LIBERTY: RULES AND ORDER (1973) (generalizing theories of regulatory government from the decentralized character of market norms).

3. Some years ago, the municipal planner working on downtown revitalization in a major North American city confided in me that his staff used "densification" only among themselves. For public consumption, they used the term "smart growth."

4. ALFRED MARSHALL, PRINCIPLES OF ECONOMICS 271 (8th ed. 1920).

> When an industry has . . . chosen a locality for itself, it is likely to stay there long: so great are the advantages which people following the same skilled trade get from near neighbourhood to one another. The mysteries of the trade become no mysteries; but are as it were in the air, and children learn many of them unconsciously. Good work is rightly appreciated, inventions and improvements in machinery, in processes and the general organization of the business have their merits promptly discussed: if one man starts a new idea, it is taken up by others and combined with suggestions of their own; and thus it becomes the source of further new ideas. And presently subsidiary trades grow up in the neighbourhood, supplying it with implements and materials, organizing its traffic, and in many ways conducing to the economy of its material.

workers flock to areas rich in amenities and, perhaps more importantly, to areas where they could also interact with existing talented residents from whom they could learn new skills and thus raise their incomes.[5]

Scholars have long contrasted teeming cities with residential suburbs, where exclusionary zoning has been a barrier to employment opportunities for low-income residents of central cities.[6] More recently, however, commentators have argued that stringent land use restrictions in desirable cities themselves constitute "the new exclusionary zoning."[7]

A recent paper by Peter Ganong and Daniel Shoag[8] suggests that anti-growth regulation is a substantial cause of the high cost of housing in desirable large cities. The authors conclude that the United States is "increasingly characterized by segregation along economic dimensions, with limited access for most workers to America's most productive cities," and that their work might "highlight the role land use restrictions play in supporting this segregation."[9]

In recent decades, scholars have looked beyond the effects of urban growth restrictions on excluded socio-economic groups. They have focused on the effects of restrictions on workers more generally and, relatedly, upon the prosperity of the cities themselves and the Nation as a whole. Ganong and Shoag stated that there was a "striking" convergence in per capita incomes across U.S. states from 1880 to 1980 but that during the ensuing thirty years, that relationship had "weakened considerably, as observed at the metro-area level."[10] In

5. *See* Nestor M. Davidson & Sheila R. Foster, *The Mobility Case for Regionalism*, 47 U.C. DAVIS L. REV. 63, 89–102 (2013) (summarizing scholarship).

6. *See, e.g.*, Henry A. Span, *How Courts Should Fight Exclusionary Zoning*, 32 SETON HALL L. REV. 1, 19 (2001) (noting that exclusionary zoning creates "a spatial mismatch between job opportunities and people with low incomes"). *But see* Christopher Serkin & Leslie Wellington, *Putting Exclusionary Zoning In It's Place: Affordable Housing and Geographical Scale*, 40 FORDHAM URB. L.J. 1667 (2013) (urging change of focus from municipal exclusionary practices to the needs of lower-income households for ready access to attractive mixes of services, taxes, and employment opportunities).

7. *See, e.g.*, John Mangin, *The New Exclusionary Zoning*, 25 STAN. L. & POL'Y REV. 91, 92 (2014) ("The anti-development orientation of certain cities is turning them into preserves for the wealthy as housing costs increase beyond what lower-income families can afford to pay.").

8. Peter Ganong & Daniel Shoag, *Why Has Regional Income Convergence in the U.S. Declined?* (Harvard Kennedy Sch., Working Paper No. RWP12-028, 2013), *available at* http://ssrn.com/abstract=2081216.

9. *Id.* at 31.

10. *Id.* at 2.

explaining this shift, they noted the work of Christopher Berry and Edward Glaeser, who postulated "the clustering of skilled people in metropolitan areas is driven by the tendency of skilled entrepreneurs to innovate in ways that employ other skilled people and by the elasticity of housing supply."[11]

Consistent with the caveat of Berry and Glaeser that the benefits of agglomeration are in part dependent upon "the elasticity of housing supply," research by Chang-Tai Hsieh and Enrico Moretti likewise indicates that high housing prices in dynamic cities dampens productivity.[12] "It's as if we have some of the most productive metropolitan areas in the world, but we don't allow American workers to flow to these areas to take advantage of that high productivity."[13] The broader point is that preventing more workers from moving to highly productive cities is holding back the productivity of the U.S. economy.[14] A study by Glaeser and Joseph Gyourko similarly concluded: "In the places where housing is quite expensive, building restrictions appear to have created these high prices."[15] In Manhattan, density restrictions were found to increase the cost of housing by almost 50 percent.[16]

The concerns about growth restrictions in highly productive cities are buttressed by a recent empirical study by Vicki Been and associates.[17] Although restrictions on development long have been associated in the literature with suburban local government, their analysis

---

11. *Id.* (citing Berry, Christopher R. & Edward L. Glaeser, *The Divergence of Human Capital Levels Across Cities*, 84 REG'L SCI. 407, 407 (2005)).

12. Chang-Tai Hsieh & Enrico Moretti, *Why Do Cities Matter? Local Growth and Aggregate Growth* (Nat'l Bureau of Econ. Research, Working Paper No. 21154, 2015) *available at* http://www.nber.org/papers/w21154.pdf.

13. Emily Badger, *How Big Cities that Restrict New Housing Harm the Economy*, WASH. POST WONKBLOG (July 25, 2014), http://www.washingtonpost.com/blogs/wonkblog/wp/2014/07/25/how-big-cities-that-restrict-new-housing-harm-the-economy/ (quoting Enrico Moretti).

14. *Id.* (referring to Moretti's research with Chang-Tai Hsieh, *supra* note 12).

15. Edward L. Glaeser & Joseph Gyourko, *The Impact of Building Restrictions on Housing Affordability*, 9 ECON. POL'Y REV. 21, 23 (2003).

16. Edward L. Glaeser, Joseph Gyourko & Raven Saks, *Why is Manhattan So Expensive? Regulation and the Rise in House Prices*, 48 J. L. & ECON. 331, 350–51 (2005).

17. Vicki Been, et al., *Urban Land Use Regulation: Are Homevoters Overtaking the Growth Machine?*, 11 J. EMPIRICAL LEG. STUD. 227 (2014). Their research is based on a database created by the authors of about 811,000 lots in New York City. Been taught at NYU Law School and was Director of NYU's Furman Center for Real Estate and Urban Policy when the article was written. She now is on leave as Commissioner of the New York City Department of Housing Preservation and Development.

suggests that large cities also are responsive to homeowners' desire for restraints on growth and not, as generally thought, the pecuniary imperatives of developers, financiers, consultants, and politicians to foster a "growth machine."[18]

One approach to increasing urban density and agglomerative benefits is that municipal governments use condemnation to acquire large tracts of land from their multiplicity of owners and transfer reconfigured super parcels to private developers who would maximize positive externalities.[19] A similar proposal would simply authorize private takings of land by those who presumably could use it better.[20]

A frontal attack on regulations resulting in insufficient density in leading cities has been urged by Roderick Hills and David Schleicher,[21] who propose "city replanning" to achieve increased residential density through grand legislative bargains. Like the original wave of comprehensive planning almost a century ago, urban replanning is predicated on a set of experts devising plans to which others would adhere. However, Hills and Schleicher's main operative mechanism would lock in urban growth through the development of regulatory property and procedural techniques to make deals politically and legally difficult to unwind.[22]

Justice Holmes wrote of our proclivity to place new wine into old bottles[23] in order to meet the felt imperatives of the times.[24] In this manner, land use regulation has evolved from common law nuisance to Progressive Era comprehensive planning, then turned to flexibility and deal making, and now perhaps will cycle back to top-down comprehensive planning. These swings reflect in part the alternating supremacy of our quest for certainty in the law and recognition of the need for flexibility and for adjusting to changing circumstances.[25]

---

18. *Id.* at 229 ("[O]ur results show considerable evidence that homeowners have much more influence on land-use policy than the received wisdom . . . would predict.").

19. Gideon Parchomovsky & Peter Siegelman, *Cities, Property, and Positive Externalities*, 54 WM. & MARY L. REV. 211 (2012) (condemnation for retransfer to private developers for positive externalities).

20. Abraham Bell, *Private Takings*, 76 U. CHI. L. REV. 517 (2009).

21. Roderick M. Hills, Jr. & David Schleicher, *City Replanning* (George Mason Univ. Law & Econ. Research Paper No. 14-32, 2014) [hereinafter Hills & Schleicher, *City Replanning*], *available at* http://ssrn.com/abstract=2477125.

22. *Id.* at 45–59.

23. OLIVER W. HOLMES, THE COMMON LAW 5 (1881).

24. *Id.* at 1.

25. *See* Michael G. Faure, et al., *The Regulator's Dilemma: Caught between the Need for*

But who decides if a resurgent growth machine is worth the cost and whether refurbished comprehensive land use plans or similar devices will achieve that end? Those issues are explored here.

The present author is sympathetic to the removal of artificial barriers that restrict density in vibrant large cities. As I have elaborated upon elsewhere, limitations on density lead to the creation of regulatory property, which is of value only insofar as others are excluded from similar activities.[26] Such bounty is conceived in interest group politics, and its distribution nurtures the culture of crony capitalism.[27] Also, zoning and similar regulations are coarse-grained instruments, and their effects are elusive.[28]

The imposition of new municipal regulatory schemes to enhance local prosperity is problematic. The "citywide bargains"[29] proposed by Hills and Schleicher would enshrine regulatory property on a grand scale and likely serve as a straight jacket that would hinder further city adaptation to change. Furthermore, the positive advantage sought by such grand bargains is not densification as such but rather agglomeration.

In her recent paper *Agglomerama*,[30] Lee Anne Fennell illustrated the subtleties of agglomeration and how it differs from densification. The provision of more housing in large cities is not necessarily coextensive with the synergies to be derived from achieving a critical mass of talented people. Achieving optimal agglomeration, if possible at all, would require a plethora of regulations, just as fastening Jell-o to the wall would require a lot of nails. Moreover, as I have explicated elsewhere,[31] mandates that attempt to mimic spontaneous ordering are oxymoronic and come about largely through a misreading of Jane Jacobs' classic book *The Death and Life of Great American Cities*.[32]

Flexibility and the Demands of Foreseeability. Reassessing the Lex Certa *Principle*, 24 ALB. L.J. SCI. & TECH. 283 (2013).

26. *See* Steven J. Eagle, *The Perils of Regulatory Property in Land Use Regulation*, 54 WASHBURN L.J. 1 (2014).

27. Steven J. Eagle, *Public Use in the Dirigiste Tradition: Private and Public Benefit in an Era of Agglomeration*, 38 FORDHAM URB. L.J. 1023 (2011).

28. *See* Steven J. Eagle, *Urban Revitalization and Eminent Domain: Misinterpreting Jane Jacobs*, 4 ALBANY GOV'T L. REV. 106 (2011).

29. Hills & Schleicher, *City Replanning*, *supra* note 21, at 26.

30. Lee Anne Fennell, *Agglomerama*, BYU L. REV. (forthcoming) (citations omitted), *available at* http://ssrn.com/abstract=2532270.

31. *See* Eagle, *supra* note 28, at 106.

32. JACOBS, *supra* note 2.

It is true, of course, that urban land use planning has been a fixture of American municipal life for almost a century, and there is much that we have learned from observing it. On the other hand, moving from the relatively modest goal of preventing nuisance-like land use incompatibilities to the ambitious goal of optimizing urban prosperity leaves lots of room for unintended consequences, some of which are noted here.

Hills and Schleicher argue "the common law of property is far less important than it once was as a method for regulating real property ownership and use."[33] To a certain extent this is true, but the principle of increasing subordination of property rights to government controls can be self-justifying as well as self-leveraging. As District of Columbia Circuit Judge Stephen Williams summed up the spiral of increased regulation and decreased owner expectations that, in turn, justified more regulations—"regulation begets regulation."[34]

As we contemplate the comprehensive replanning of great American cities, we must ask if we would be doomed to repeat the same cycle of overly prescriptive regulation followed by tortuous ad hoc workarounds.

II. COMPREHENSIVE PLANNING: FROM IDEALS TO EXACTIONS

This Part discusses the evolution of American land use regulation, beginning with its origins in common law nuisance. The early twentieth century was marked by the growth of comprehensive planning, which generally provided rigid requirements with development as of right if the requirements were met. Later in the century, zoning rules were modified to provide flexibility. However, development as of right was replaced by land use approvals conditioned on governmental review based on vague criteria and typically involving bargaining with developers for development exactions.

A. From Common Law Nuisance to Prophylactic Regulation

Before the twentieth century, American land use regulation was primarily a function of the private law concept of nuisance, which

33. Hills & Schleicher, *City Replanning*, *supra* note 21, at 1.

34. Dist. Intown Props. Ltd. P'ship v. District of Columbia, 198 F.3d 874, 887 (D.C. Cir. 1999) (Williams, J., concurring).

precluded owners from using their parcels in ways that detracted from the rights of neighbors to reasonable use and enjoyment of their lands,[35] although, to be sure, it coexisted with the concept of property as enhancing civic virtue.[36] This was based on a non-instrumental view of property as an expression of human nature,[37] a view carried over from natural rights theory to the United States Constitution.[38]

However, common law nuisance did not deal well with urban aesthetic problems or with protecting public health in congested apartment blocks. Towns in America were "largely unattractive, muddy, cluttered clusters of buildings. Individual residences sported trash-strewn alleys and yards, and there was little monumental civic architecture."[39] In the cities, reformers such as Jacob Riis denounced "old-law" urban tenements, which were bereft of light and air and full of contagious disease.[40]

The aspiration to replace urban tenements with standard housing motivated a significant segment of the Progressive reform community in the decades around the turn of the twentieth century. These Progressives "believed that changing surroundings would change behavior. Advances in public health, sanitation, and social science

---

35. *See generally* Steven J. Eagle, *The Common Law and the Environment*, 58 CASE W. RES. L. REV. 583 (2008). This approach did not preclude uncompensated state prohibitions of uses that clearly were injurious to the public's health, safety, and welfare. *See, e.g.*, Mugler v. Kansas, 123 U.S. 623 (1887) (upholding, pursuant to state prohibition of alcoholic beverages, the uncompensated loss of value of a now-unusable brewery).

36. *See* William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 821 (1995) (asserting that civic republicans, as contrasted to Lockeans, "see the end of the state as the promotion of the common good and of virtue. Rights, rather than being prepolitical, are created by the polity and subject to limitation by the polity when necessitated by the common interest."); *see also* Gregory S. Alexander, *Time and Property in the American Republican Legal Culture*, 66 N.Y.U. L. REV. 273 (1991).

37. Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549 (2003). "Most modern property theory is strongly utilitarian; the nineteenth-century cases justified the free use of property as an extension of the moral freedom inherent in being human." *Id.* at 1549; *see also* Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 957 (1982) (arguing, from a Hegelian perspective, the instantiation of personhood in property).

38. *See* Douglas W. Kmiec, *The Coherence of the Natural Law of Property*, 26 VAL. U. L. REV. 367 (1991); Douglas W. Kmiec, *The Original Understanding of the Taking Clause is Neither Weak Nor Obtuse*, 88 COLUM. L. REV. 1630 (1988).

39. DONALD G. HAGMAN & JULIAN CONRAD JUERGENSMEYER, URBAN PLANNING & LAND DEVELOPMENT CONTROL LAW 16 (2d. ed. 1986). This discussion borrows from STEVEN J. EAGLE, REGULATORY TAKINGS § 3-1 (5th ed. 2012).

40. JACOB A. RIIS, HOW THE OTHER HALF LIVES (1890).

allowed positive environmentalists to theorize about designing urban environments that would lead people to make better moral decisions about the structure of their lives."[41] "Control over land use would be removed from the amoral hand of the market and entrusted to expert elites removed from politics and business. . . ."[42]

Against this backdrop, the City Beautiful movement, often traced to the Chicago World's Fair of 1893, led to the creation of over one thousand municipal associations by the turn of the century. At the first National Conference on City Planning and the Problems of Congestion in 1909, the renowned landscape architect Frederick Law Olmsted proposed "police rules," which would include building codes and the "districting" of land.[43]

These impulses for reform resulted in now-familiar zoning rules. "[Z]oning is a quintessential Progressive concept" because it relied on experts to design and enforce regulations that would create a more pleasant environment that, in turn, would "foster healthy, responsible citizens."[44] This "embodied the progressive movement's belief that the application of expertise to a problem would produce better outcomes, a notion underlying the *Euclid* decision."[45]

Pecuniary interests, as well as public health and aesthetics, drove the widespread adoption of zoning in the early part of the last century. Many Progressives shared the "decidedly negative view of the immigrants, particularly southern and eastern Europeans, who from the 1880s to the mid-1920s poured into America's cities in 'alarming' numbers."[46] In New York City, concerns about loft building manufacturing and housing for waves of immigrants led business leaders to protect prosperous residential neighborhoods and upscale retailing

41. Richard H. Chused, *Euclid's Historical Imagery*, 51 CASE W. RES. L. REV. 597, 601 (2001) (quoting PAUL BOYER, URBAN MASSES AND MORAL ORDER IN AMERICA, 1820–1920, at 221–23 (1978)) (noting that Boyer described positive environmentalism as a strategy to discourage urban vice by the provision of healthy social substitutes).

42. DENNIS J. COYLE, PROPERTY RIGHTS AND THE CONSTITUTION: SHAPING SOCIETY THROUGH LAND USE REGULATION 21 (1993).

43. *Id.* at 16–19. Olmstead's many projects included designing New York City's Central Park.

44. MICHAEL ALLAN WOLF, THE ZONING OF AMERICA: *EUCLID V. AMBLER* 30 (2008).

45. Daniel P. Selmi, *The Contract Transformation in Land Use Regulation*, 63 STAN. L. REV. 591, 630 (2011) (citing Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), and asserting a much more recent transformation to zoning by contract between municipalities and developers).

46. WOLF, *supra* note 44, at 30–31.

through a 1916 ordinance, the first comprehensive zoning plan in the nation.[47] The issue involved "Fifth Avenue versus the garment industry" and was asserted to manifest "racism with a progressive, technocratic veneer."[48]

A more general motivation for the widespread adoption of zoning was that surging ownership of automobiles gave more mobility to those less well off. Buyers, real estate agents, and mortgage lenders envisioned zoning as ensuring the stability of eagerly sought-after new, expensive residential districts.[49]

The U.S. Supreme Court gave its imprimatur to comprehensive zoning in 1926 in *Village of Euclid v. Ambler Realty Co*.[50] The opinion's author, Justice George Sutherland, was one of the "Four Horsemen" of economic substantive due process.[51] Nevertheless, he apparently thought zoning to be consistent with his conservative philosophy as a means to protect against urban contagious diseases and overpopulation that would threaten social stability.[52]

Euclid adjudicated a facial challenge to zoning brought under the rubric of substantive due process. However, it gave cities considerable latitude in as-applied cases as well, since it declared that "[i]f the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control."[53] Even as Sutherland explained that zoning was a justified use of the police

---

47. HAGMAN & JUERGENSMEYER, *supra* note 39, at 20–21.

48. William M. Randle, *Professors, Reformers, Bureaucrats, and Cronies: The Players in* Euclid v. Ambler, *in* ZONING AND THE AMERICAN DREAM: PROMISES STILL TO KEEP 31, 40–41 (Charles M. Haar & Jerold S. Kayden eds., 1989) (quoting SEYMOUR I. TOLL, ZONED AMERICA 29 (1969)).

49. Peter L. Abeles, *Planning and Zoning*, *in* ZONING AND THE AMERICAN DREAM: PROMISES STILL TO KEEP 122, 126–27 (Charles M. Haar & Jerold S. Kayden eds., 1989).

50. 272 U.S. 365 (1926).

51. *See, e.g.*, Adkins v. Children's Hosp., 261 U.S. 525 (1923) (opinion by Sutherland, J., invalidating minimum wage for women in the District of Columbia as violative of freedom of contract and due process). For a revisionist view, see Barry Cushman, *The Secret Lives of the Four Horsemen*, 83 VA. L. REV. 559, 560–61 (1997) (describing Justices Van Devanter, McReynolds, Sutherland, and Butler as "closet liberals . . . who struck a reactionary pose to remain in the good graces of the conservative sponsors to whom they owed their positions . . . while in legions of low-profile cases they quietly struck blows for their own left-liberal agendas").

52. *See* JOEL FRANCIS PASCHAL, MR. JUSTICE SUTHERLAND: A MAN AGAINST THE STATE 126–27, 166, 242–43 (1951); HADLEY ARKES, THE RETURN OF GEORGE SUTHERLAND: RESTORING A JURISPRUDENCE OF NATURAL RIGHTS 70–71 (1994).

53. *Euclid*, 272 U.S. at 388 (citing Radice v. New York, 264 U. S. 292, 294 (1924)).

power,[54] he emphasized its continuity with private ordering through the doctrine of nuisance.[55]

B. The Comprehensive Plan

1. From Long-Term Planning to Short-Term Improvisation

One of the most successful model statutes is the Standard Zoning Enabling Act (SZEA), drafted by a Department of Commerce advisory committee in 1928.[56] The SZEA was the "prototype" of most state enabling legislation and divides communities into districts, each of which proscribes uniform use restrictions and size restrictions for structures.[57] SZEA Section 3 provides that ordinances shall be drawn "in accordance with a comprehensive plan." In Charles Haar's explication, "[t]hese words appear to be a directive to put zoning on a base broader than and beyond itself, and a warning that an ordinance not 'in accordance with a comprehensive plan' is ultra vires the enabling act."[58] The plan is predicated on "comprehensive surveys analyses of existing social, economic, and physical conditions in the community," and, "clarified by planning experts," it "directs attention to the goals selected by the community" and selects means to achieve them.[59]

Professor Haar made clear that the comprehensive plan is a "long-term, general outline of projected development."[60] However, that was easier said than done. Eight years after Haar's pronouncement, a leading planner expressed forebodings in one of the profession's principal journals:

> [P]lanning requires relatively long-range projections of future conditions. . . . Yet, our ability to forecast future conditions in

54. *Id.* at 387.

55. *Id.* ("In solving doubts, the maxim 'sic utere tuo ut alienum non laedas' [use your rights so as not to injure the rights of others] which lies at the foundation of so much of the common law of nuisances, ordinarily will furnish a fairly helpful clew.").

56. ADVISORY COMMITTEE ON CITY PLANNING AND ZONING, U.S. DEP'T OF COMMERCE, A STANDARD CITY PLANNING ENABLING ACT (1928).

57. Charles M. Haar & Barbara Hering, *The Lower Gwynedd Township Case: Too Flexible Zoning or an Inflexible Judiciary?*, 74 HARV. L. REV. 1552, 1552–53 (1961).

58. Charles M. Haar, *In Accordance with A Comprehensive Plan*, 68 HARV. L. REV. 1154, 1156 (1955).

59. *Id.* at 1155.

60. *Id.* at 1156.

> society is notoriously poor. The record of population forecasts is a dismal one. The record of land use forecasting is far worse and no one correctly foresaw such a major innovation as the automobile or its consequences for urban growth. . . . Until some radical change in the quality of forecasts becomes possible, only a system of continuously revising projections and of continuously calculating the consequences of current investments can provide the best possible degree of knowledge for current or future decisions.[61]

The needed radical change in the quality of forecasts did not come about. Instead, comprehensive planning increasingly has become a short-term process. "Land use planning is sometimes associated with the now-repudiated practice of dreaming about how a community might appear on a specific date far in the future."[62]

> By around 1980, virtually all planning professionals had come to recognize both the limits of rationality and the unpredictability of modern civilization. Planners thus have tended to become less ambitious in the dimensions of space and time. . . . Many planners also have come to believe that the planning period should not stretch beyond 25 years (at the very most) and that detailed planning should concentrate on the next five years or so. There also is agreement that plans have to be continually revised to take account of new information and events. In sum, flexible, middle-range planning has come to replace long-range, end-state planning.[63]

One result of this, as predicted in 1965, is that "the fundamental distinction between planning and other specialties is likely to become progressively more blurred."[64] The comprehensive plan's increasingly

---

61. William L.C. Wheaton, *Operations Research for Metropolitan Planning*, 29 J. AM. INST. PLANNERS 250, 256–57 (1963), *available at* http://dx.doi.org/10.1080/01944366308978074. Wheaton headed the Institute of Urban and Regional Development at the University of California, Berkeley, taught planning at the University of Pennsylvania and Harvard, and was on the board of the American Institute of Planners, a forerunner of the American Planning Association.

62. ROBERT C. ELLICKSON, ET AL., LAND USE CONTROLS: CASES AND MATERIALS 69 (4th ed. 2013) (noting that, in the middle of the twentieth century, the year 2000 was a popular target).

63. *Id.* at 70.

64. Alan Altshuler, *The Goals of Comprehensive Planning*, 31 J. AM. INST. PLANNERS 186, 186 (1965), *available at* http://dx.doi.org/10.1080/01944366508978165.

short time horizon makes it hard to distinguish from periodically adjusted zoning ordinances, if it is not altogether superfluous.

2. Planning and Its Biases

Daniel Mandelker and Dan Tarlock observed that the planning profession "has defined the ideal zoning decision as one based on technical criteria and accepted by open and informed political debate."[65] However, they added that, in practice, zoning decisions are "too often ad hoc, sloppy and self-serving," and this affects "the judge's 'sense' of the legitimacy of the institution that produced the decision."[66] The "self-serving" nature of planning is illustrated by the summary of a leading planner effectively equating the profession's predilections to natural law:

> The planners' biases are quite clear. They regard the present pattern of scattered development as inherently evil. Often in planning literature this needs no demonstration: like natural law, it is obvious to all right-thinking people. . . .
>
> A second universal planners' bias is one in favor of the preservation of open space. . . . Somehow, if open space can be preserved and if people will but go to see it, their lives will be elevated and mankind will be the better. . . .
>
> A third traditional bias of the planner favors the maintenance of a strong central business district and the preservation of the density pattern of past cities. Here it is assumed that the city must have a high-density core, containing a high proportion of the area's shopping, banking, commercial, managerial, civic, public, educational, and cultural functions. Because central districts have in the past provided for a large proportion of the cities' tax revenue, it is argued that they must do so in the future. . . .
>
> The fourth planners' bias is that the journey to work should be reduced by shortening the distance between places of residence and places of employment. . . .
>
> Finally, . . . [m]ost planners will express a greater preference for row houses, garden apartments, and elevator apartments than for single-family houses, and most will express a greater

65. Daniel R. Mandelker & A. Dan Tarlock, *Shifting the Presumption of Constitutionality in Land-Use Law*, 24 URB. LAW. 1, 2–3 (1992).

66. *Id.* at 2.

> preference for central or urban locations as opposed to suburban locations. It is assumed that the American public has similar preferences but is deprived by the operation of the housing market of opportunities to express them in the purchase or rental of homes.[67]

The last statement is particularly remarkable, since it assumes that any discrepancy between planners' preferences for dense residential living and the existing predominance of single-family homes surely results from the public's will being thwarted. Perhaps unsurprisingly, however, there is a strong correlation between people's views about housing and residential density and their overall political preferences.[68]

Perhaps another reason for popular dislike of densification is its architecture. "For too long, our profession has flatly dismissed the general public's take on our work, even as we talk about making that work more relevant with worthy ideas like sustainability, smart growth and 'resilience planning.'"[69] "We're attempting to sell the public buildings and neighborhoods they don't particularly want, in a language they don't understand."[70]

Also, regulations ostensibly pertaining to the use of land use increasingly were designed to achieve social purposes such as mandating "in lieu art fees" as a development condition for private buildings in *Ehrlich v. City of Culver City*.[71] Dozens of local governments have adopted "anti-agglomeration zoning" against undesired businesses, such as payday lenders, apparently in a misguided effort to protect consumers by limiting competition among them.[72] David Schleicher refers to the facilitation of social evils, such as crime, as

---

67. Wheaton, *supra* note 61, at 254–55 (emphasis added).

68. *See* Press Release, Pew Research Ctr., Political Polarization in the American Republic: How Increasingly Ideological Uniformity and Partisan Antipathy Affect Politics, Compromise and Everyday Life (June 12, 2014), *available at* http://www.people-press.org/files/2014/06/6-12-2014-Political-Polarization-Release.pdf. For discussion, see *infra* text accompanying note 207.

69. Steven Bingler & Martin C. Pedersen, *How to Rebuild Architecture*, N.Y. TIMES, Dec. 16, 2014, at A29.

70. *Id.*

71. Ehrlich v. City of Culver City, 911 P.2d 429 (Cal. 1996) (upholding mandatory fee in lieu of art as aesthetic control).

72. *See* Sheila R. Foster, *Breaking Up Payday: Anti-Agglomeration Zoning and Consumer Welfare*, 75 OHIO ST. L.J. 57 (2014).

"negative agglomeration."[73] Socio-economic population patterns and neighborhood character also sometimes are taken into account[74] and may lead to requiring developer subsidization of affordable housing.[75]

But, the *Ehrlich* 1 percent art fee did not result from the new development using up all of the space for art available to the community.[76] Likewise, a blithe statement that a 15 percent set-aside requirement for below-market housing was simply a "land use ordinance," and therefore "a valid exercise of the police power," did not make it so.[77]

This broad scope of planning's regulatory reach is consistent with the growth of the administrative state,[78] a phenomenon that mostly eludes judicial review.[79] Those facts, coupled with polarization along political and cultural lines of popular attitudes about ideal communities,[80] also lead to a perceived lack of legitimacy of the land use planning enterprise.

Perhaps most indicative of the hubris of planning has been the destruction and recreation of entire neighborhoods in the mid-twentieth century. The leading case of *Berman v. Parker*[81] is a paradigmatic example.[82] There, the Federal government bulldozed a neighborhood

---

73. *See* David Schleicher, *City Unplanning*, 122 YALE L.J. 1670, 1737 (2013).

74. *See* Chinese Staff & Workers Ass'n v. City of New York, 502 N.E.2d 176 (N.Y. 1986) (declaring proposed high-rise luxury condos on vacant lot must be reviewed to determine environmental impact on socio-economic character of neighborhood).

75. *See* California Bldg. Indus. Ass'n v. City of San Jose, 157 Cal. Rptr. 3d 813, 824 (Ct. App. 2013), *review granted and opinion superseded by* California Bldg. Indus. Assn. v. City of San Jose, 307 P.3d 878 (Cal. 2013) (conditioning housing development permit on the set aside of 15% of units for below-market affordable housing). *See infra* text accompanying notes 327–29.

76. *See* Gideon Kanner, *Tennis Anyone? How California Judges Made Land Ransom and Art Censorship Legal*, 25 REAL EST. L.J. 214, 231 (1997) (observing: "Just how construction of new housing and businesses diminishes the availability of artistic resources no one has bothered to explain.").

77. *California Bldg. Indus. Ass'n.*, 157 Cal. Rptr. 3d at 824.

78. *See* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994) (arguing that the post-New Deal administrative state contravenes the Constitution's design); Edward L. Glaeser & Andrei Shleifer, *The Rise of the Regulatory State*, 41 J. ECON. LIT. 401 (2003) (asserting that Progressive Era reformers eroded the nineteenth-century belief that private litigation was the sole appropriate response to social wrongs).

79. *See* Nestor M. Davidson & Ethan J. Leib, *Regleprudence—at OIRA and Beyond*, 103 GEO. L.J. 259 (2015).

80. *See infra* text accompanying notes 207–10.

81. 348 U.S. 26 (1954) (establishing aesthetics as well as public health as valid bases for exercise of the police power for neighborhood-wide urban renewal).

82. *See* Amy Lavine, *Urban Renewal and the Story of* Berman v. Parker, 42 URB. LAW. 423 (2010) (providing a detailed account of *Berman* and its background).

in Southwest, Washington, D.C. The cost to existing residents, and their wistfulness for their demolished neighborhood, was reported by the *Washington Post* in 1999.[83] A recent account in the *New York Times* noted that redevelopment of the Southwest was "once a symbol of urban renewal's high hopes and then of its crushing failure."[84]

> Southwest was the nation's first urban renewal project, approved in 1946 to replace what were then considered slums with a modern community that would include federal buildings, town homes and a variety of amenities. What it did, primarily, was displace thousands of residents, mostly African-Americans. That gave rise to the pejorative term "Negro removal" applied to urban renewal and derived from this failed experiment, and destroyed a viable commercial waterfront.[85]

A new $2 billion mixed-use project is being built in Southwest "to correct what is now regarded as an egregious error imposed on the city by people then thought to be visionary planners."[86] The city's selected developer lauded it: "It's a critical mass, the Big Bang theory."[87]

3. Lack of Knowledge Leads to Use of Heuristics

In attempting to make sense of the staggering array of inputs that inform land use decisions, it is tempting to rely on the conclusions of experts who employ heuristics. It is ironic that the problems with which the present generation of planners must wrestle result largely from the decisions of a previous generation of experts and that the early errors of overreaching, from which planners slowly have withdrawn, now come back in new forms.[88] Yet experience dictates that humility is imperative. As Federal Circuit Judge Jay Plager observed, "yesterday's Everglades swamp to be drained as a mosquito haven

---

83. Linda Wheeler, *Broken Ground, Broken Hearts; In the '50s, Many Lost SW Homes to Urban Renewal*, WASH. POST, June 21, 1999, at A1.

84. Eugene L. Meyer, *Contrite over Failed Urban Renewal, Washington D.C. Refreshes a Waterfront*, N.Y. TIMES, Nov. 19, 2014, at B10.

85. *Id.*

86. *Id.*

87. *Id.* (quoting Monty Hoffman, chief executive of PN Hoffman).

88. *See generally* Steven J. Eagle, *Reflections on Private Property, Planning and State Power*, 61 PLAN. & ENVTL. L. 3, 5 (2009).

is today's wetland to be preserved for wildlife and aquifer recharge; who knows what tomorrow's view of public policy will bring, or how the market will respond to it."[89]

For this reason, there is a great deal to be said for the incremental change that marked the common law[90] for the taking into account tacit knowledge[91] and harnessing the combined insight of all who might enter into transactions.[92] Good development is dependent on evaluating the myriad of interrelated details in a proposed project.[93] When attempting to plan for positive benefits of agglomeration, that problem is compounded.

C. From Idealism to Zoning for Dollars

Comprehensive plans also have become less idealistic. In mid-century, local planning commissions "helped to create wholly new communities, the suburbs, which for many embodied the vision of the future America."[94] By the waning years of the century, however, "recurrent stresses" resulted in American society "put[ting] its faith in economic pragmatism. A shorter view dominated planning processes, replacing comprehensiveness with a focus on narrower and more immediate strategic opportunities. Local plans no longer reflected a sense of community need; instead, they were bent to serve entrepreneurial opportunity."[95]

As will be discussed later, the high transactions costs implicit in bargaining for favorable development regulation on a parcel-by-parcel

---

89. Florida Rock Indus., Inc. v. United States, 18 F.3d 1560, 1566 (Fed. Cir. 1994) (citation omitted).

90. *See, e.g.*, David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 925 (1996) (noting that "the common law can serve as a model for incremental change in society as a whole, as it did for [Edmund] Burke").

91. *See generally* MICHAEL POLANYI, TACIT DIMENSION (1966) (dealing with impressionistic or tacit knowledge, gained from experience, that is difficult to convey to others).

92. *See generally* F. A. HAYEK, THE FATAL CONCEIT (1988) (urging use of prices as a mechanism by which millions of individuals can send signals as to what kinds of goods and services they are willing to supply or demand under various circumstances, thus contributing insights to the store of public knowledge).

93. *See* Steven J. Eagle, Penn Central *and Its Reluctant Muftis*, 66 BAYLOR L. REV. 1, 57 (2014).

94. David J. Allor, *Toward a Longer View and Higher Duty for Local Planning Commissions*, 60 J. AM. PLAN. ASS'N. 437, 438 (1994).

95. *Id.*

basis[96] is a principal reason asserted in support of comprehensive urban replanning.[97]

However, land economist William Fischel supports such bargaining as economically efficient.[98] He notes that a developer seeking to acquire land owned by a privately governed community might want to build eight houses instead of the four the community permits. "The amount by which the value of eight building lots exceeds the value of four larger lots is economic rent, which the developer and the homeowners association with power to grant permission will share in a bargaining process."[99]

Fischel then asserts that the exact same principles should apply if the development permission must be sought from public land use regulators. Restrains on the ability of the municipality to engage in such bargaining "are inefficient in that they retard exchanges that would be mutually beneficial to the parties involved."[100] However, what is the source of a municipality's claim to ownership of all development rights beyond existing development? Perhaps it is a Georgian notion that growing value of land is caused by actions of society and of government.[101] Perhaps it is based upon the United Kingdom's Town and Country Planning Act of 1947, which nationalized development rights with payment of only very limited compensation.[102]

The clash between idealistic shaping of communities and pragmatic acceptance of strategic imperatives has an effect on judicial perceptions of the legitimacy of planning and zoning. To be sure, it has been almost ninety years since *Euclid* was decided[103] and thirty-five years since *Penn Central Transportation Co. v. City of New York*.[104]

---

96. *See infra* Part III.B.1.

97. Hills & Schleicher, *City Replanning*, *supra* note 21, at 6.

98. William A. Fischel, *The Economics of Land Use Exaction: A Property Rights Analysis*, 50 L. & CONTEMP. PROBS. 101 (1987).

99. *Id.* at 101–3.

100. *Id.* at 104.

101. *See* HENRY GEORGE, PROGRESS AND POVERTY THE REMEDY: AN INQUIRY INTO THE CAUSE OF INDUSTRIAL DEPRESSIONS AND OF INCREASE OF WANT WITH INCREASE OF WEALTH 406 (1940) (asserting the efficiency of a single tax on the value of land, without improvements as a substitute for all other taxes). This reasoning motivated much of the opinion of the New York Court of Appeals in *Penn Central Transp. Co. v. City of New York*, 366 N.E.2d 1271 (N.Y. 1977), *aff'd on other grounds*, 438 U.S. 104 (1978).

102. *See* Daniel H. Cole, *Political Institutions, Judicial Review, and Private Property: A Comparative Institutional Analysis*, 15 SUP. CT. ECON. REV. 141, 163 (2007).

103. Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

104. 438 U.S. 104 (1978).

Whatever the theoretical merits of carefully distinguishing between "planning" and "regulation," to demand that courts do so now, as the Supreme Court observed in a different context, "would be asking us to disinvent the wheel."[105] While the demand for zoning by homeowners and its supply by officials and planners were interactive, William Fischel suggests that an indication of which factor is more important is the failure of planners to obtain the speedy elimination of all prior nonconforming uses, without which planners regarded zoning districts as seriously flawed.[106]

As noted earlier, comprehensive planning has changed its focus from long-term to short-term[107] and from "the vision of the future America" to "entrepreneurial opportunity."[108] In his influential article *Zoning for Dollars*, Jerold Kayden described "incentive zoning" as the process by which "cities grant private real estate developers the legal right to disregard zoning restrictions in return for their voluntary agreement to provide urban design features."[109]

Kayden explored the implications of government approval of development in excess of that normally permitted in exchange for receipt of some benefit[110] and concluded that "government will manipulate the base matter of right zoning FAR [floor-area ratio] to a lower level than otherwise necessary in order to obtain amenities at no marginal physical planning cost."[111] Similarly, in *Nollan v. California Coastal Commission*,[112] Justice Scalia noted that a restriction on development could be a legitimate exercise of the police power but that the restriction would fail if there were no nexus between the restriction and an unrelated condition that would excuse adherence to it. "In

105. Barefoot v. Estelle, 463 U.S. 880, 896 (1983) (rejecting suggestion, despite evidence to the contrary, that it would be erroneous to permit psychiatrists to predict dangerousness).

106. William A. Fischel, *The Persistence of Localism*, *in* PROPERTY IN LAND AND OTHER RESOURCES 259, 277 (Daniel H. Cole & Elinor Ostrom, eds. 2012). Fischel argues that the seminal Supreme Court decision in *Hadacheck v. Los Angeles*, 239 U.S. 394 (1915), which upheld the uncompensated closure of a brickyard that was subsequently surrounded by residential areas, both involved what was akin to a traditional nuisance and has not, as a practical matter, resulted in the termination of most nonconforming uses. *Id.* at 277–82.

107. *See supra* text accompanying notes 60–63.

108. *See supra* text accompanying note 95.

109. Jerold S. Kayden, *Zoning for Dollars: New Rules for an Old Game? Comments on the* Municipal Art Society *and* Nollan *Cases*, 39 WASH. U. J. URB. & CONTEMP. L. 3 (1991) (describing bargaining for incentive zoning fees to fund various community needs and amenities).

110. *Id.* at 3.

111. *Id.* at 46.

112. 483 U.S. 825 (1987).

short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.'"[113] Scalia presciently added: "One would expect that a regime in which this kind of leveraging of the police power is allowed would produce stringent land-use regulations which the State then waives to accomplish other purposes. . . ."[114]

By making it clear that aspirational planning for the ideal city differs from regulation to ensure the safe and healthy city, spheres for community protection and landowner autonomy could be fostered.[115] If it is to possess integrity, planning must instantiate important police power boundaries. As Kayden observed, the fact that it has become the polity's opening bid in a bargaining process "intrinsically delegitimizes the entire regulatory system."[116]

In any event, planners simply do not have the ability to say "how much" development should be allowed. As I have noted elsewhere, planners cannot readily apply their tools in any linear sense, since the question is not how much development will be permitted but, rather, how to evaluate the myriad of interrelated details in the application.[117] Likewise, sheer density might be measured in a gross sense by the number of dwelling units per acre, but that would not be a useful measure of the housing stock, much less the subtle issues involved in the interactions among residents and others that would have a bearing on positive agglomeration.

III. THE NEW COMPREHENSIVE REPLANNING AND ITS INFIRMITIES

This Part of the Article discusses proposals for enhancing the prosperity of vibrant cities through densification and the ensuing

113. *Id.* at 837 (quoting J.E.D. Associates, Inc. v. Atkinson, 432 A.2d 12, 14–15 (1981)).

114. *Id.* at 837 n.5.

115. *See* MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983).

116. Kayden, *supra* note 109, at 7 ("Zoning expresses conclusions about theoretically objective physical planning criteria such as street, sidewalk, sewer, and water pipe capacity; light and air availability at ground level; and compatibility of new buildings with the existing neighborhood. Thus, any overriding of that zoning, no matter what the proposed amenity, intrinsically delegitimizes the entire regulatory system. This critique gains particular currency when the amenity is geographically or conceptually unrelated to the development project obtaining the incentive.").

117. Steven J. Eagle, Penn Central *and Its Reluctant Muftis*, 66 BAYLOR L. REV. 1, 57 (2014).

benefits of positive agglomeration. It notes that the benefits are uncertain. Furthermore, long-term comprehensive planning proved unworkable in a dynamic society and was replaced by short- to intermediate-term flexible (*i.e.*, improvisational) recipes for municipal opportunistic bargaining with developers. Although proposals for densification stress "replanning," the actual mechanism by which they would work is not planning at all but rather the creation and lock-in of regulatory property. The political grand bargain needed to achieve this requires the purchase of political support from powerful landowners and others. As is the case of regulatory property generally, the benefits that they receive inure from government deprivation of the property rights of others less well placed or less lucky.

A. Expertise Redux—the New Comprehensive Planning

As noted earlier, planning and zoning were "quintessential" Progressive ideas.[118] Adherents of the somewhat disparate strands of Progressivism were united in their belief that "the talents of experts drawn from the newly professionalized ranks—chiefly economists, political scientists, social workers, lawyers, and teachers—should be harnessed by government at all levels to help individual Americans reach their full potential."[119] Soon enough, urban planners joined this elite.[120] From this perspective, "property" is marked by land use governance,[121] and individuals' autonomous ownership of land underlying Lockean property is described as "depend[ent] upon social and public values for conceptual coherence."[122]

The new comprehensive planning asserts that the proper basis for urban land use planning is the city as a whole,[123] that neighborhood

118. *See* WOLF, *supra* note 44 and accompanying text.

119. *Id.* at 30.

120. *See* LEWIS MUMFORD, THE CITY IN HISTORY: ITS ORIGINS, ITS TRANSFORMATIONS, AND ITS PROSPECTS 484–85 (1961) (noting that the profession of planning dates to the Progressive Era).

121. *See generally* Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. S453 (2002).

122. *See* Gregory S. Alexander, *Property's Ends: The Publicness of Private Law Values*, 99 IOWA L. REV. 1257, 1287 (2014).

123. This term is employed here to echo "parcel as a whole," an apparently simple exposition in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). Alas, the term is rife with subjectivity and complexity. *See*, *e.g.*, Dwight H. Merriam, *Rules for the Relevant Parcel*, 25 U. HAW. L. REV. 353 (2003); Steven J. Eagle, *The Parcel and Then Some: Unity of Ownership and the Parcel as a Whole*, 36 VT. L. REV. 549 (2012).

autonomy ("localism") is deleterious, and that economic productivity is the desideratum. Once a proper citywide bargain is imposed, it should be locked in place. The lock-in serves to solidify current planning views of the social nature of cities in property law and is reminiscent as well of the similar goal of locking in government licensure and largess that Charles Reich's *The New Property*[124] expounded a half century ago. *Plus ça change, plus c'est la même chose.*

According to *City Replanning*, the importance of common law property is attenuated, and legislative and administrative actions now "determine most of the rules government how real property is used and purchased."[125] Furthermore, in a view akin to the United Kingdom's Town and Country Planning Act, Hills and Schleicher suggest "the community is entitled to new value created by a change in the land-use *status quo*."[126]

It is true that in 1926 the Supreme Court in *Euclid* gave localities great deference in land use regulation.[127] Furthermore, the Court's 1978 opinion in *Penn Central Transportation Co. v. City of New York*[128] introduced an ad hoc, multifactor analysis of regulatory takings that incorporated elements of subjectivity and fairness that defies operationalization and essentially leaves local political decisions intact except in cases of egregious abuse.[129]

One practical constraint on the ability of localities to impose onerous regulation is the need to compete with other localities for residents.

---

124. Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964) (arguing that the key to ensuring continued enjoyment of government licensure and largess is to accord them the same rights as traditional property).

125. Hills & Schleicher, *supra* note 21, at 1.

126. *Id.* at 57 (noting that too low a charge for a development permit "might be regarded as distributively unjust" under this presumption). This view is similar to that of the English Town and Country Planning Act of 1947, 10 & 11 Geo. 6, c. 51, which expropriated development rights to all land and established a special fund to provide small and gratuitous payments to aggrieved landowners. *See also* MALCOLM GRANT, URBAN PLANNING LAW 63 (1982).

127. Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926) ("If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.").

128. 438 U.S. 104 (1978).

129. For explication, see Eagle, Penn Central *and Its Reluctant Muftis*, *supra* note 117 (emphasizing the nature of the *Penn Central* doctrine and its uneasy embrace of substantive due process); Steven J. Eagle, *The Four Factor* Penn Central *Regulatory Takings Test*, 118 PENN. ST. L. REV. 601 (2014) (emphasizing the development and application of the conventional "economic impact," "investment-backed expectations," and "character of the regulation" factors, and advocating recognition of the equal status of a fourth spatial and temporal "relevant parcel" factor).

The sorting model developed by Charles Tiebout postulates that localities will compete for residents through offering varying packages of amenities and taxation.[130] However, Hills and Schleicher assert that Tiebout's sorting model does not solve the problem of excessive land use regulations because there are "notorious limits" on the mobility of existing residents.[131] The "immobility of land and the uniqueness of cities" give municipalities "pricing power."[132] Many large cities, they add, "have no adequate substitutes, because they create agglomeration economies that rivals cannot duplicate."[133]

Yet the very agglomeration that Hills and Schleicher seek to nurture already fosters the differentiation of thriving regions.[134] Also, in New York, "middle-class outer-borough homeowners remain a potent force in the City's politics."[135] It remains true that property ownership and use conveys distinctions of status,[136] and housing is a vital source of self-identity and of presentation of the self to others.[137]

A reminder of consequences of experts riding roughshod over communities is the saga of urban renewal underlying *Berman v. Parker*.[138] As detailed by Amy Lavine,[139] in the mid-twentieth century the federal government engaged in massive redevelopment in Southwest, Washington, D.C., bulldozing neighborhoods, sound buildings included. Three decades later the *Washington Post* recounted costs to existing residents and their wistfulness for their demolished neighborhood.[140] The *New York Times* recently described that

130. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

131. Hills & Schleicher, *City Replanning*, *supra* note 21, at 34.

132. *Id.* at 35.

133. *Id.*

134. *See infra* text accompanying notes 257–59 for discussion.

135. Richard Briffault, *Voting Rights, Home Rule, and Metropolitan Governance: The Secession of Staten Island As A Case Study in the Dilemmas of Local Self-Determination*, 92 COLUM. L. REV. 775, 847 (1992).

136. *See*, *e.g.*, Nestor M. Davidson, *Property and Relative Status*, 107 MICH. L. REV. 757 (2009).

137. *See*, *e.g.*, Edward K. Sadalla et al., *Identity Symbolism in Housing*, 19 ENV'T & BEHAV. 569, 572 (1987) ("The house, being a fixed and fairly permanent piece of sign equipment, may be viewed as an especially significant tool employed in the performances of its users.").

138. 348 U.S. 26 (1954) (establishing aesthetics as well as public health as valid bases for exercise of the police power for neighborhood-wide urban renewal).

139. Amy Lavine, *Urban Renewal and the Story of* Berman v. Parker, 42 URB. LAW. 423 (2010).

140. Wheeler, *supra* note 83.

redevelopment as "once a symbol of urban renewal's high hopes and then of its crushing failure."[141]

> Southwest was the nation's first urban renewal project, approved in 1946 to replace what were then considered slums with a modern community that would include federal buildings, town homes and a variety of amenities. What it did, primarily, was displace thousands of residents, mostly African-Americans. That gave rise to the pejorative term "Negro removal" applied to urban renewal and derived from this failed experiment, and destroyed a viable commercial waterfront.[142]

A new $2 billion mixed-use project is being built in Southwest, "to correct what is now regarded as an egregious error imposed on the city by people then thought to be visionary planners."[143] The city's selected developer lauded it in perhaps an inadvertent paean to agglomeration: "It's a critical mass, the Big Bang theory."[144]

B. Economic Concerns Driving Densification

Enrico Moretti asserted that "for each new high-tech job in a metropolitan area, five additional local jobs are created outside of high tech in the long run[,]" but that "attracting one job in traditional manufacturing generates 1.6 [new] jobs."[145] College-educated young people, unlike others, "continue to move at a high clip," and "[w]here they end up provides a map of the cities that have a chance to be the economic powerhouses of the future."[146] Booming high tech industries, environmental amenities, and "cultural cool" are important factors.[147]

---

141. Meyer, *supra* note 84.

142. *Id.*

143. *Id.*

144. *Id.* (quoting Monty Hoffman, chief executive of PN Hoffman).

145. ENRICO MORETTI, THE NEW GEOGRAPHY OF JOBS 60–61 (2012) (incorporating research based an analysis of 11 million American workers in 320 metropolitan areas).

146. Claire Cain Miller, *Hello, Buffalo: Urban Migration of College Graduates is Expanding*, N.Y. TIMES, Oct. 20, 2014, at A15.

147. *Id.* (noting that "Denver has become one of the most powerful magnets," and that it has "many of the tangible things young people want . . . including mountains, sunshine, and jobs in booming industries like tech"). Contributing to "cool" are "microbreweries and bike-sharing and an acceptance of marijuana and same-sex marriage." *Id.*

At the heart of current concerns driving densification is a problem that affects the prosperity and productivity at all skill levels.

> When housing supply is completely elastic, workers of all skill types gradually move to the productive locale, generating convergence. Low-skilled workers are more sensitive to changes in housing prices, and as housing supply becomes constrained, low-skill workers stop moving to the productive locale, leading to a decline in convergence.[148]

Furthermore, a paper by Chang-Tai Hsieh and Moretti estimates that the economic effects of high housing costs resulted in a potential reduction in output in the United States of 13 percent between 1964 and 2009.[149]

1. Unclear Development Rights Lead to High Transactions Costs

While property rights have the effect of delegating to owners the ascertaining of the best use of a resource,[150] it is a vital predicate that owners know what their property rights are.[151] As Carol Rose observed, "crystalline rules" discourage rent-seeking behavior by legislative and other decision-makers, who otherwise might sell clarifications of muddy rules to the highest bidder. "Hard-edged rules define assets and their ownership in such a way that what is bought stays bought and can be safely traded to others, instead of repeatedly being put up for grabs."[152]

In the era of improvisational land use regulation that followed the demise of long-term comprehensive planning, an important example of poorly defined property rights involves the extent and intensity of development that will be permitted a developer. Even when zoning ordinances purport to allow nominally fixed development as of right, ostensibly crystalline ordinance provisions are understood by all to

148. Ganong & Shoag, *supra* note 8, at 3.

149. Hsieh & Moretti, *supra* note 12.

150. Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1754–56 (2004).

151. R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 19 (1960) ("[I]f market transactions were costless, all that matters (other than questions of equity) is that the rights of the various parties should be well-defined and the results of legal actions easy to forecast.").

152. Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 591 (1988).

be the city's opening bid. Indeed, as Kayden recognized, the ordinance level of development might be considerably less than the locality thinks appropriate so that it could sell rezoning to a reasonable level.[153]

The argument is based upon Ronald Coase's seminal insight into the importance of transaction costs.[154] Thomas Merrill and Henry Smith subsequently placed the conceptual development of property rights within the Coasean tradition[155] and explored the importance of having standardized property rights that were easily understood and tradable.[156] Merrill argued more generally that property rights should be delineated by mechanical rules instead of judgment-based standards in order to facilitate transactions.[157] Along the same lines, Gary Libecap and Dean Lueck asserted development and land transactions were eased by urban land being platted in a rectangular grid.[158]

2. Soaring Housing Prices and Their Consequences

The argument that restrictive land use regulation is the culprit for high housing costs was set forth a decade ago by Edward Glaeser and associates:

> In Manhattan, housing prices have soared since the 1990s. Although rising incomes, lower interest rates, and other factors can explain the demand side of this increase, some sluggishness in the supply of apartment buildings is needed to account for high and rising prices. In a market dominated by high-rises, the marginal cost of supplying more housing is the cost of adding an extra floor to any new building. Home building is a highly competitive industry with almost no natural barriers to entry, and yet prices in

153. *See* Kayden, *supra* note 109, at 46 (observing that "officials might set a base FAR [floor-area ratio] at an artificially low twelve rather than a planning-supported fifteen, and then offer three FAR bonuses in exchange for desired amenities").

154. Coase, *supra* note 150.

155. Thomas W. Merrill & Henry E. Smith, *Making Coasean Property More Coasean*, 54 J.L. & ECON. S77, S79 (2011).

156. Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The* Numerus Clausus *Principle*, 110 YALE L. J. 1 (2000).

157. Thomas W. Merrill, *Trespass, Nuisance, and the Costs of Determining Property Rights,* 14 J. LEGAL STUD. 13 (1985).

158. Gary D. Libecap & Dean Lueck, *Land Demarcation Systems*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF PROPERTY LAW (Kenneth Ayotte & Henry E. Smith eds., 2011).

> Manhattan currently appear to be more than twice their supply costs. We argue that land use restrictions are the natural explanation for this gap. We also present evidence that regulation is constraining the supply of housing in a number of other housing markets across the country. In these areas, increases in demand have led not to more housing units but to higher prices.[159]

While one might think that supporters of lower housing prices would focus on impediments to enhanced supply, which has not been the case. Instead, "affordable housing" advocates have concentrated on distributional issues related to inequality and on hostility to "market interests."[160] As earlier observed, many planners believe that market interests thwart the popular desire for denser housing as well.[161]

In *Levin v. City and County of San Francisco*,[162] a federal district court noted the city's "affordable housing crisis of remarkable proportions."[163] It explained that this was due to "deep structural problems in the housing market" in a city that has not produced housing to meet its expanding population.[164] The city's response was not to permit new housing but rather, among other things, to replace existing rules requiring landlords to pay the relocation expenses of tenants evicted without fault with draconian new conditions on erstwhile landlords who withdrew apartments from the rental market.[165]

In evaluating housing affordability from the perspective of the individual, instead of focusing on the ratio of housing costs to income in various locales, we might focus on the ratio of income net of housing costs in the same locations. That might suggest that housing costs

---

159. Glaeser, Gyourko & Saks, *supra* note 16, at 331.

160. *See, e.g.*, Marcia Rosen & Wendy Sullivan, *From Urban Renewal and Displacement to Economic Inclusion: San Francisco Affordable Housing Policy 1978–2014*, 25 STAN. L. & POL'Y REV. 121 (2014) (celebrating how San Francisco, "which consistently has amongst the nation's highest housing costs, counteract[s] destructive redevelopment practices and market interests to preserve and enhance housing opportunities for low-income families and create inclusive communities"). *Id.* at 122–23.

161. *See supra* text accompanying note 67.

162. ___ F.3d ____, 2014 WL 5355088 (Oct. 21, 2014). *Notice of Appeal filed* Mar. 4, 2015.

163. *Id.* at *2.

164. *Id.*

165. *Id.* at *3–4 (noting payments to departing tenants were pegged to their rents, which results in high-income tenants, who could afford high rents, sometimes being entitled to in excess of a quarter-million dollars).

should rise in the high-cost locale, "so that after-housing earnings were equalized" between it and the low-cost location.[166] However, it also suggests the gains that would inure to society through agglomeration are stymied by actions of existing residents. One reason why residents resist change might be excessive risk aversion.[167]

> Other local government theorists, led by William Fischel, focus instead on the political power of homeowners and their "mercenary concern with property values." In this view, policymakers cater to homeowners' demands for low property taxes (for homeowners, anyway), high levels of public services, uncongested public amenities, and protection from competition in the housing market when it comes time to sell.[168]

While the empirical case for replanning is based on very high rents in New York, San Francisco, and a few other highly desired cities, the conceptual case is built upon the urban agglomerative model that people flock to the most desirable cities because those they desire to associate with already live there.[169] Thus, just as agglomeration attracts people, its related congestion repels them, and the task is to try to find a good balance.[170]

> The location decisions of households are influenced less by workplace accessibility than by availability of amenities, recreational opportunities, and public safety. In addition, the locations of firms are clearly becoming more footloose under the influence of the information revolution, just at a time when core *agglomeration diseconomies* (pollution, congestion, crime, fiscal instability, etc.) appear to be outweighing the original agglomeration economies

166. Edward L. Glaeser & Abha Joshi-Ghani, *The Urban Imperative: Toward Shared Prosperity* (World Bank Pol'y Research, Working Paper No. 6875, 2014), *available at* http://ssrn.com/abstract=2439697.

167. Been, et al., *supra* note 17, at 228. However, given their inability to protect against loss in value to their major asset, homeowners' aversion might not be so excessive. *See infra* text accompanying notes 219–21.

168. Been, et al., *supra* note 17, at 228 (quoting WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT, TAXATION, SCHOOL FINANCE AND LAND-USE POLITICS 18 (2001)).

169. *See* Glaeser, Gyourko & Saks, *supra* note 16.

170. *See* Jeffrey C. Brinkman, *Congestion, Agglomeration, and the Structure of Cities* (Fed. Reserve Bank of Phila., Working Paper No. 13-25, 2013), *available at* http://ssrn.com/abstract=2272049 (analyzing methods of optimizing relationship).

> that pulled people and economic activities together. In this view, the central cities are not coming back any time soon.[171]

3. Positive Economics Does Not Mandate Densification

While agglomeration might be economically more productive, that is not dispositive of whether it should be embraced.

From a utilitarian perspective, a practice is desirable if it maximizes happiness.[172] Where individuals freely transact in the marketplace, the resulting bargain appears value maximizing for them, without the need for external evaluative criteria.[173] However, this principle does not provide a solution where legislation takes into account the interests of others. Some commentators, notably Judge Richard Posner, have argued that the maximization of "welfare," or "utility," best can be considered as maximization of pecuniary wealth.[174] On the other hand, scholars have argued that this approach slights subjective values[175] and that calculations of "value" might result from "trivializing anything that cannot be reduced to economic efficiency."[176] Tellingly, James Buchanan warned that the "'value-maximization' perspective cannot be extended from the market to politics since the latter does not directly embody the incentive compatible structure of the former."[177] More generally, all desirable things might not be commensurable, *i.e.*, measurable by the pecuniary metric of the

---

171. Robert W. Burchell & Naveed A. Shad, *The Evolution of the Sprawl Debate in the United States*, 5 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 137, 151 (1999).

172. The classic exposition is JEREMY BENTHAM, INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1789).

173. James M. Buchanan, *The Constitution of Economic Policy*, 77 AM. ECON. REV. 243, 244 (1987).

174. Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 119 (1979). Posner referred, inter alia, to the fact that the wealth principle is "more definite" than the happiness principle, that wealth generally is obtained through productive activities that benefit others, and that obtaining wealth generally results from adhering to "conventional pieties" such as honesty in dealings. *Id.* at 122–23.

175. Jules Coleman, *The Normative Basis of Economic Analysis: A Critical Review of Richard Posner's the Economics of Justice*, 34 STAN. L. REV. 1105, 1114 (1982).

176. Bruce A. Ackerman, *Foreword: Law in an Activist State*, 92 YALE L.J. 1083, 1119 (1983) (asserting that "[j]ust as some true believers simplify their Coasean statement of the facts by refusing to take pervasive market failure seriously, so too they may simplify their statements of value by trivializing anything that cannot be reduced to economic efficiency").

177. Buchanan, *supra* note 172; *see also* James M. Buchanan, *The Limits of Market Efficiency*, 2 RMM J. 1, 2 (2011) ("For the market to generate fully efficient results, all valued goods must be 'private', that is, both excludable and rivalrous.").

marketplace.[178] Some things, like love, or perhaps rootedness in place, are not instrumental.[179] That should be kept in mind in evaluating statements like "[m]obility and flexibility are key principles of the modern economy. Home ownership limits both."[180]

C. The Virtues of Localism

1. A Sense of Place and Its Disregard

For many, density intuitively detracts from the well-being that comes from being rooted in a place.

> Americans are of two minds as to how we ought to live. Publicly we say harsh things about urban sprawl and suburbia, and we encourage activity in the heart of town. In theory, but only in theory, we want to duplicate the traditional compact European community where everyone takes part in a rich and diversified public life. But at the same time most of us . . . feel a deep and persistent need for privacy and independence in our domestic life. That is why the freestanding dwelling on its own well-defined plot of land . . . is so persistent a feature of our landscape. That is why our downtown areas, however vital they may be economically, are so lacking in what is called a sense of place.[181]

This view of "place" engenders scant sympathy from those in more urbane precincts who view "sprawl" as the "ogre of land use and urban policy."[182] That said, many residents of cities or older suburbs who dislike low-density growth in the hinterlands absolutely detest "infill" growth if it takes place in the neighborhoods in which they are settled and comfortable.[183]

---

178. *See, e.g.*, JOSEPH RAZ, THE MORALITY OF FREEDOM 322 (1986) ("*A* and *B* are incommensurate if it is neither true that one is better than the other nor true that they are of equal value.").

179. *See* ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 6 (1995) ("Love is its own end. My contention is that, in this respect, private law is just like love.").

180. RICHARD FLORIDA, THE GREAT RESET: HOW NEW WAYS OF LIVING AND WORKING DRIVE POST-CRASH PROSPERITY 173 (2010).

181. JOHN BRINCKERHOFF JACKSON, A SENSE OF PLACE, A SENSE OF TIME 157 (1994).

182. Paul J. Boudreaux, *Looking the Ogre in the Eye: Ten Tough Questions for the Antisprawl Movement*, 14 TUL. ENVTL. L.J. 171, 172 (2000).

183. *See, e.g.*, Sandra Fleishman, *The Debate Over Infill Developments: There Goes the Neighborhood?*, WASH. POST, Feb. 5, 2000, at G1.

Localism seems a manifestation of and a way to develop "social capital," which "refers to the ways in which individuals and communities create trust, maintain social networks, and establish norms that enable participants to act cooperatively toward the pursuit of shared goals."[184] Thus, annexation of small communities by larger ones has been deemed a threat to liberty.[185] In this sense, rent control has been defended as an impetus for long-term social capital.[186]

Evidence of such assortative matching is the explosive growth of homeowner association communities.[187] Because of their more fine-grained appeal, they can allocate resources and provide public goods that satisfy minority preferences better than local governments.[188] Indeed, homeowner association covenants "are not only meant to keep property values from declining; they are meant to preserve community character, *even when threatened by actions that increase property values*."[189]

Economic analyses purporting to demonstrate the "irrationality" of homeowner behavior may well miss these nonpecuniary motivations. While the existence of private property has long been the bête noire of romantics,[190] property involves more than market wealth,

184. Sheila R. Foster, *The City As an Ecological Space: Social Capital and Urban Land Use*, 82 NOTRE DAME L. REV. 527, 529 (2006).

185. *See* Christopher J. Tyson, *Annexation and the Mid-Size Metropolis: New Insights in the Age of Mobile Capital*, 73 U. PITT. L. REV. 505, 520 (2012) ("Annexation is now widely perceived as a threat to individual liberty and autonomous self-government, pitting metropolitan region residents against metropolitan region central city governments.").

186. *See* Curtis J. Berger, *Home is Where the Heart Is: A Brief Reply to Professor Epstein*, 54 BROOK. L. REV. 1239, 1240 (1989) ("Rent control, in New York City and elsewhere, makes it possible for tenants to regard their apartment as a home, and to think of themselves as belonging to a community.").

187. *See, e.g.*, Paul Boudreaux, *Homes, Rights, and Private Communities*, 20 U. FLA. J.L. & PUB. POL'Y 479, 481 (2009) (noting that "[i]n some regions during the housing boom of the early 2000s, more than half of all new housing construction was in communities in which residents were bound by a panoply of covenants").

188. Clayton P. Gillette, *Courts, Covenants, and Communities*, 61 U. CHI. L. REV. 1375, 1388–93 (1994).

189. Nadav Shoked, *The Community Aspect of Private Ownership*, 38 FLA. ST. U. L. REV. 759, 777 (2011) (emphasis added).

190. *See, e.g.*, Jean Jacques Rousseau, *Discourse on the Origins and Foundations of Inequality Among Men* (1755), *in* THE FIRST AND SECOND DISCOURSES 141 (Roger D. Masters ed., 1964) ("[T]he fruits belong to all and the earth to no one!"); Pierre-Joseph Proudhon, WHAT IS PROPERTY? 13 (Donald R. Kelley & Bonnie G. Smith eds. & trans., Cambridge Univ. Press 1994) (1840) ("[P]roperty is theft."). *Cf.* Richard A. Posner, *The Constitution as an Economic Document*, 56 GEO. WASH. L. REV. 4, 22 (1987) ("So, for Proudhon's 'property is theft,' the economist is likely to substitute 'government is theft.' This insight provides the essential underpinning for proposals to constitutionalize laissez-faire.").

and a system of property rights cannot survive "unless property ownership is infused with moral significance."[191] The "genius" of individual ownership of land is commended both from its morality in inculcating individual responsibility and in its productivity as giving the owner the fruits of his or her labor.[192]

Those fruits represent more than pecuniary gain. For many, individual autonomy is the key so that property and contract are valued not because they are economically efficient but rather because they "best serve[] our preference for private ordering."[193] One aspect of the quest for autonomy is the instantiation of personality through things, or, put another way, our ownership and use of real property both reflects and help shape individuals' sense of personhood.[194]

With "community" itself being a transmogrified and sometimes abused term,[195] it is easy to overlook that the *relevant* community has more to do with the normative values of the discerner than with objective principles. Those values certainly have much to do with our reaction to stringent and arguably appropriative regulation.

On a national scale, people outside leading cities bristle at being labeled *provinciaux* by Parisians or inhabitants of "flyover country" in bicoastal America. In the New York metropolitan area, people residing in the "outer boroughs" or, to include those in New Jersey, "bridge and tunnel people," feel similarly not amused by the perceived arrogance of Manhattanites, which most memorably is encapsulated in Saul Steinberg's iconic *New Yorker* cover.[196] While it might

---

191. *See* Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1850 (2007) (noting the genius of making the owner "account for all events pertaining to his property, large and small").

192. Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1327–28 (1993) (citing Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 350 (Pap. & Proc. 1967)).

193. *See* Stephen M. Bainbridge, *Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Scholarship*, 82 CORNELL L. REV. 856, 896 n.199 (1997); *see also* Stewart E. Sterk, *Neighbors in American Land Law*, 87 COLUM. L. REV. 55, 55, 90 (1987) (noting the consistency between the division of landed property into "discrete parcels separated by rigid boundary lines," and "a society whose members highly value individualism and autonomy").

194. *See* Radin, *supra* note 37.

195. The term "community" has its origins in the Latin noun *communitas*, referring to the unstructured commonality of people marked by social equality. In contemporary usage, it typically refers instead to a distinct subset of the general population (e.g., arts community, gay community) or as a euphemism for what the American founders referred to as a "faction" (e.g., underwriting messages on a Washington, D.C. public radio station are sponsored by the "aerospace community").

196. The *New Yorker* cover, *View of the World from 9th Avenue*, appeared on March 29, 1976. It has spawned many parodies and also a well-known copyright case, *Steinberg v.*

be economically justifiable, the notion that government should cut back on assistance to ailing communities and refocus its efforts on assisting individuals to resettle among the more educated and productive also leads to a sense of estrangement.[197]

These perceptions of existing city residents are fueled in large part by the rise of income inequality, which is particularly acute in vibrant cities,[198] and its attendant justification of "meritocracy." That term originated as a sardonic commentary on a system where those who succeed believe that they deserve their fate.[199] When we consider sweeping land use change to effectuate massive economic goals, it is easy to overlook those with whose plight we do not associate. Carol Rose noted that past expropriations of property from those for whom we feel distaste "gave rise to no demoralization among us. . . . They were not members of our moral and political community. . . ."[200]

Mary Ann Glendon, observing the destruction of the entire close-knit and blue-collar Poletown neighborhood in Detroit for the creation of a General Motors auto assembly plant, declared that "no amount of compensation . . . could repair the destruction of roots, relationships, solidarity, sense of place, and shared memory that was at stake."[201]

Economists have suggested that propinquity for social interaction and the presence of numerous restaurants and cultural amenities

---

Columbia Pictures, 663 F. Supp. 706 (S.D.N.Y. 1987) (claiming that the movie *Moscow on the Hudson* infringed).

197. *See* Edward L. Glaeser & Joshua D. Gottlieb, *The Economics of Place-Making Policies*, 39 BROOKINGS PAPERS ON ECON. ACTIVITY 155, 155–56 (2008) (asserting that "the mere existence of agglomeration externalities does not indicate which places should be subsidized," that "there appear to be human capital spillovers, whereby concentrations of educated people increase both the level and the growth rate of productivity," and that "the case for national policy that favors specific places must depend more on efficiency—internalizing externalities—than on equity"). On the other hand, there is evidence that judicial mandates leading to improved schools in central cities facilitate the return of suburbanites, and, presumably, agglomeration. *See* Zachary D. Liscow, Are Court Orders Responsible for the "Return to the Central City"? The Consequence of School Finance Litigation 69–70 (Jan. 16, 2015) (unpublished manuscript), *available at* http://ssrn.com/abstract=2551082.

198. Douglas Rae, *Two Cheers for Very Unequal Incomes*, *in* JUSTICE AND THE AMERICAN METROPOLIS 105, 105 (Clarissa Rile Hayward & Todd Swanstrom eds., 2011) (observing that "healthiest central city economies . . . turn out to have *very* unequal income structures").

199. MICHAEL YOUNG, THE RISE OF THE MERITOCRACY 69–72, 122–23 (1958) (introducing term).

200. Carol M. Rose, *Property and Expropriation: Themes and Variations in American Law*, 2000 UTAH L. REV. 1, 29 (adding that the disruption of the property of British loyalists or Southern slave-holders "seemed to carry very little threat to the property of insiders").

201. MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 29–30 (1991).

might mean that urban life is conducive to the production of social capital.[202] However, "[d]enser places appear to have less, rather than more, social capital."[203] This, too, might reinforce voters' taste for localism.

From the perspective of a city's economic prosperity, however, substantial income inequality may well be a good thing. It largely reflects that affluent individuals have stopped moving out to the suburbs and started moving back to the central city.[204] Also, in New York, "[h]ouseholds earning more than $100,000 a year . . . pay two-thirds of the personal income taxes collected by the city, even though they account for a mere 11 percent of all those who file."[205]

2. Housing Choices Reflect Personal Values

While cities are centers of human creativity, "generating most of our art, culture, commerce and technology," they also "represent the excesses of human activity, which encroach upon and alter our way of life in profound and often indelible ways."[206] "Modern land use regulation grows directly out of efforts to control particular excesses and impacts from city life and urban growth."[207]

According to a recent Pew Research Center report on *Political Polarization in the American Public*,[208] individuals' residential land use preferences very much reflect their cultural and political values. To be sure, "[m]ost Americans, regardless of their ideological preferences, value communities in which they would live close to extended family and high-quality schools."[209] However, there are differences between right and left that go beyond disagreements over politics, friends, and neighbors. Most germane here, if they could choose anywhere to live, three-quarters of consistent conservatives prefer a community where "the houses are larger and farther apart, but schools, stores, and restaurants are several miles away."[210] The preferences

202. Nicole Stelle Garnett, *The People Paradox*, 2012 U. ILL. L. REV. 43, 56.

203. Garnett, *supra* note 201, at 56 (quoting Edward L. Glaeser & Joshua D. Gottlieb, *Urban Resurgence and the Consumer City*, 43 URB. STUD. 1275, 1295 (2006)).

204. *See generally* Rae, *supra* note 197.

205. Steven Malanga, *Bloomberg to City: Drop Dead*, 13 CITY J. 27–35 (Winter 2003).

206. Foster, *supra* note 183, at 527.

207. Foster, *supra* note 183, at 527–28.

208. Pew Research Ctr., *supra* note 68.

209. *Id.* at 12.

210. *Id.*

of consistent liberals are almost the exact inverse, with 77 percent saying they'd chose to live where "the houses are smaller and closer to each other, but schools, stores, and restaurants are within walking distance."[211]

The notion that adoption of a comprehensive plan will signal closure on a values debate and change the arena to technical issues of conformity are unrealistic. Dan Tarlock observed that Charles Haar made the "unwarranted assumptions" that the planning process will "generate consensus over time," as people accept its allocations, and that "the plan can embody reasoned choices that command wide acceptance."[212] Tarlock asserted instead "[p]rocedures that rest on expertise and attempt to gain acceptance for general principles . . . will do little to resolve fundamental value conflicts."[213]

One way of recognizing and harmonizing the importance of localism, as Jane Jacobs argued, is that cities should be divided into diverse districts of intermediate size: "The chief function of a successful district is to mediate between the indispensable, but inherently politically powerless, street neighborhoods, and the inherently powerful city as a whole."[214]

In *Balancing the "Zoning Budget*,"[215] Hills and Schleicher noted that, at least in theory, "developers could simply bribe the neighbors into accepting greater housing density in their neighborhood whenever they actually wanted to build."[216] Yet when Edward Glaeser and Bryce Ward studied land use controls in Greater Boston and enumerated regulatory barriers to new construction,[217] their "primary puzzle" was that communities were not "choosing density levels to maximize their land values."[218] Glaeser and Ward conjectured that this was related to zoning being based on historical considerations,

---

211. *Id.*

212. A. Dan Tarlock, *Consistency with Adopted Land Use Plans As a Standard of Judicial Review: The Case Against*, 9 URB. L. ANN. 69, 86 (1975) (discussing Charles M. Haar, *The Master Plan: An Inquiry in Dialogue Form*, *in* LAND-USE PLANNING 745 (Charles M. Haar, ed., 3d ed. 1971)).

213. Tarlock, *supra* note 211, at 86–87.

214. JACOBS, *supra* note 2, at 121–40; *see generally* Steven J. Eagle, *Urban Revitalization and Eminent Domain: Misinterpreting Jane Jacobs*, 4 ALB. GOV'T L. REV. 106 (2011).

215. Roderick M. Hills, Jr. & David N. Schleicher, *Balancing the "Zoning Budget"*, 62 CASE W. RES. L. REV. 81, 94 (2011).

216. *Hills & Schleicher, Zoning Budget*, *supra* note 214, at 94–95.

217. Edward L. Glaeser & Bryce A. Ward, *The Causes and Consequences of Land Use Regulation: Evidence from Greater Boston*, 65 J. URB. ECON. 265 (2009).

218. Glaeser & Ward, *supra* note 216, at 277.

the difficulty of transfers of wealth between developers and current owners, and the possibility of (unspecified) "global externalities."[219]

William Fischel also adopted the hypothesis that "the local electorate exercises its land use authority in ways that look economically rational."[220] He found a "more coherent explanation" for homeowners' reluctance to trade in risk aversion. "The concentration of their wealth in their homes and the inability of most homeowners to insure against neighborhood decline seem to offer a better explanation" of why suburbanites are "wary of value-enhancing transactions that would promote the higher-density development desired by both profit-minded developers and public-spirited promoters of smart growth."[221]

Indeed, the value of homes is fragile and affected by many things. Even the designation of a neighborhood school under the No Child Left Behind Act as "in need of improvement" has been shown to result in a substantial decrease in neighborhood property values.[222]

D. Are Local Officials Over Solicitous of Homeowner Concerns?

There are some land uses that are useful to society, like airports or trash transfer stations, that are not nuisances per se but to which people say "not in my back yard" (NIMBY). This gives rise to the chronic complaint that local officials are indulgent of homeowners' NIMBYism.

The notion that local officials should be responsive to the desires of their electorate regarding the character of the community hardly is novel. Generally speaking, courts defer to local decisions, unless the result is to place unfair burdens on individuals,[223] arbitrarily deprives

---

219. *Id.* at 278.

220. Fischel, *supra* note 106, at 260.

221. *Id.* at 271.

222. Alexander Bogin & Phuong Nguyen-Hoang, *Property Left Behind: An Unintended Consequence of a No Child Left Behind "Failing" School Designation*, 54 J. REG'L SCI. 788, 789 (2014). The authors add: "Additional analyses suggest that this home price effect is largely due to strong perceptions of poor school quality or social stigma surrounding a 'failing' designation." *Id.* at 788.

223. *See* Armstrong v. United States, 364 U.S. 40, 49 (1960) (The Just Compensation Clause of the Fifth Amendment is "designed to bar Government from forcing some people along to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."). The Supreme Court has continually reaffirmed this principle, most recently in *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537 (2005).

them of due process of law[224] or cuts too deeply against the broader public interest.[225]

In smaller, more homogeneous, residential communities, the attentiveness of public officials to homeowners' concerns and desires was accepted as a given.[226] Employing public choice analysis,[227] William Fischel suggested that this results from homeowners' "mercenary concern with property values."[228] On the other hand, in large cities, where voters were thought too heterogeneous to fight for exclusionary policies, the "growth machine" of elites was thought to prevail.[229]

Vicki Been and associates recently revisited these views in light of a large dataset of New York City rezoning proposals.[230] They reiterated that the "growth machine is typically thought to describe urban land-use politics, while the homeowner theory explains suburban land use."[231]

> Recently, however, cities have begun to engage in land use practices long associated with suburbs—downzoning land to more restrictive regulations, imposing substantial fees for development approval, and taking significant quantities of land off the market through programs to preserve historic landmarks and open space. That shift should lead to a reexamination of received wisdom about urban land use politics.[232]

---

224. *See, e.g.*, Nectow v. City of Cambridge, 277 U.S. 183 (1928) (holding zoning as "residential" of sliver of land in manufacturing area to be arbitrary).

225. Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). The Court cautioned that it did not mean "to exclude the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way." *Id.* at 389–90.

226. *See generally* Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385 (1977) (analyzing officials' deference to the desire of suburban majorities for exclusionary zoning).

227. Public choice economics describes government activity through the lens of a marketplace where favorable legislation and regulation are exchanged for votes and campaign contributions. Foundational works include KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (3rd ed. 2012) (1951); ANTHONY DOWNS AN ECONOMIC THEORY OF DEMOCRACY (1957); and JAMES BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT (1962).

228. FISCHEL, *supra* note 167, at 18.

229. *See, e.g.*, JOHN R. LOGAN & HARVEY L. MOLOTCH, URBAN FORTUNES: THE POLITICAL ECONOMY OF PLACE (1987).

230. Been, et al., *supra* note 17, at 228–29. The data set was based on 200,000 lots considered by the New York City Planning Commission for rezoning between 2002 and 2009. *Id.* at 227.

231. *Id.* at 229.

232. *Id.*

For its advocates, densification is a collective action problem,[233] in which numerous small interest groups are able to take advantage of the checks and balances of a pluralist system to block change that would be salutary for society as a whole. Its political manifestations are popularized using terms such as "demosclerosis"[234] and "vetocracy."[235] Of course, when change is salutary is a matter of opinion.

IV. THE GRAND BARGAIN OF REPLANNING

The heart of the Hills and Schleicher argument for comprehensive replanning is that it is "a mechanism for enforcing citywide deals."[236] They define a "plan," in this context, as "(1) a citywide or multi-neighborhood determination of permissible land uses (2) made simultaneously that is (3) 'sticky,' as a practical matter, against future piecemeal alteration."[237] In important result would be to counteract the anti-agglomerative bias that Schleicher previously asserted was present in local government law.[238]

A. Expertise Coupled with a Strong Mayor

David Schleicher has argued that political parties provide legislatures with their basic organizing principles, that in legislatures with strong political parties, members have an incentive to vote with their leaders so as to burnish the party's "brand" and ultimately ensure their reelection.[239] Similarly, as Roderick Hills and Schleicher add, in cities where strong parties vie for control, "the leadership of the prevailing party can impose a citywide plan and thus supervene

233. *See generally* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1965).

234. JONATHAN RAUCH, DEMOSCLEROSIS: THE SILENT KILLER OF AMERICAN GOVERNMENT (1994).

235. Thomas L. Friedman, Op-Ed., *Down with Everything*, N.Y. TIMES, Apr. 22, 2012, at SR11, *available at* http://www.nytimes.com/2012/04/22/opinion/sunday/friedman-down-with-everything.html.

236. Hills & Schleicher, *City Replanning*, *supra* note 21, at 28.

237. *Id.*

238. David Schleicher, *The City as a Law and Economic Subject*, U. ILL. L. REV. 1507, 1561–62 (2010).

239. *See* Schleicher, *City Unplanning*, *supra* note 73, at 1700 (citing, inter alia, GARY W. COX & MATHEW D. MCCUBBINS, LEGISLATIVE LEVIATHAN: PARTY GOVERNMENT IN THE HOUSE 84–97 (2d ed. 2007)).

the power that district legislators otherwise would exercise through 'aldermanic privilege.'"[240]

However, in most cities the local legislature is formally nonpartisan or totally dominated by one political party.[241] Without strong partisan leadership, there is a collective action problem, in which individual members opt to protect the special interests of their constituents, as opposed to what generally is understood as the common good.[242] The result is "the 'ironclad principle of Aldermanic privilege,'" where every legislator must approve land use regulatory changes in his or her own fiefdom.[243] This creates a prisoner's dilemma problem, in which members collectively prefer lower spending but individually steer "pork" to their districts and veto locally undesirable land uses.[244]

Hills and Schleicher propose to counter the problem of piecemeal land use votes on individual zoning changes, with its Aldermanic privilege and NIMBYism, with comprehensive replanning.[245]

> Ordinarily, the Mayor's city planning department, or a newly created independent body appointed by politicians elected citywide, proposing a new plan or map to the city council after extensive hearings. The Mayor faces the broadest electorate and thus has the greatest incentive to be responsive to citywide concerns. Putting the agenda-setting power in the Mayor's hands further promotes citywide interests. Particularly if the remapping is considered under a closed rule (i.e. no amendments are allowed), the Mayor is in a position to propose a map that goes as far to protect citywide interests as the legislature will bear.[246]

While professional planners and perhaps an "independent body" devise a system that addresses the entire city's concerns,[247] implementation requires the kind of political skills and backroom deals honed by aldermen through the ages.[248]

---

240. Hills & Schleicher, *City Replanning*, *supra* note 21, at 30–31.

241. *See* David Schleicher, *Why Is There No Partisan Competition in City Council Elections?: The Role of Election Law*, 23 J.L. & POL. 419, 419 (2007).

242. Hills & Schleicher, *City Replanning*, *supra* note 21, at 31–32.

243. *Id.*

244. *Id.* at 30 (citing, inter alia, Barry Weingast, *A Rational Choice Perspective on Congressional Norms*, 23 AM. J. POL. SCI. 245, 249–53 (1979)).

245. *Id.* at 32.

246. *Id.* at 32–33.

247. *See supra* text accompanying notes 118–22. Disinterested expertise as a mark of original Progressive Era comprehensive planning.

248. *See infra* Part IV.C.3.

B. Selling Density Increases Through a Standard "Price Sheet"

Hills and Schleicher suggest that standardization of densification, in the form of uniform development rights in individual neighborhoods, accompanied by an upzoning "price sheet," will facilitate enhanced land use by reducing transaction costs.[249] In effect, this would revive development as of right. *City Replanning* posits that transparency in the allocation of development rights best can be achieved through municipal pricing and sale of development rights. "A comprehensive map that sets out what can be built as of right will produce higher property values than a system in which government would allow the same amount of development through an *ad hoc* amendment process."[250]

In what might be an inadvertently potent aside, Hills and Schleicher state that if the uniform price sheet sets prices for new development that are "too low," the "money left on the table might be regarded as [] distributively unjust (*at least if one presumes that the community is entitled to new value created by the change in the land-use* status quo)."[251] This telling parenthetical reveals an important aspect of the mechanism that *City Replanning* work. After utilizing adroit procedure to present the local legislature with only one non-amendable choice, the mayor will appropriate development rights in private land, and sell those rights to present owners or interested developers. How the city comes to own future development rights is left unclear.[252]

As Hills and Schleicher indicate, a "price sheet" regime would mean the loss of the "potentially useful information" that city officials might glean from developers' "custom-tailored proposals."[253] Officials are not experts at the creative ferreting out subtle opportunities; imaginative developers are. But developers will not disclose such information only to have it incorporated into uniform price sheets or respecting condemnation where bidding for redevelopment is open to all. They will share such information only when they can

249. Hills & Schleicher, *City Replanning*, *supra* note 21, at 54 (noting that "[s]uch uniform definitions of use rights would allow buyers to have a clearer idea of the uses accompanying title").

250. *Id.* at 36.

251. *Id.* at 57 (emphasis added).

252. *See supra* notes 101–2 and accompanying text.

253. Hills & Schleicher, *City Replanning*, *supra* note 21, at 57.

capitalize on it.[254] While uniformity reduces costs, valuable private information is expensive. In that sense, urban revitalization through stealth coordination—often associated with "crony capitalism"—can be worth the price.[255]

A top-down plan imposed on local legislatures might encourage the kind of homogeneous development that Jane Jacobs explained was bad for the development of a heterogeneous and organic vibrant neighborhood.[256] Jacobs also rejected government-sponsored "spontaneity"[257]

However, there are many paths to development. Silicon Valley and Houston both have become economic powerhouses, although their cultures have led to different growth models. The former is based on technology and the latter on energy, which reflects our growing economic pluralism and diversity.[258] "The Bay Area is the hands-down winner when it comes to creativity and charm. But it's a luxury region, unaffordable and wildly unequal. Houston wins when it comes to livability, especially for people who want to have children."[259] While densification is prescribed as a corrective, the differences in cities reflect not only economics but, more fundamentally, social and political polarization. "Each economic sector attracts different kinds of people and nurtures different kinds of values."[260]

Ian Ayres and Joshua Mitts recently analyzed one-size-fits-all regulations for development permit applications.[261] They conceded "it's easier for bureaucrats to monitor compliance if all licenses convey the same privileges and obligations."[262] However, they argued that there are circumstances in which such uniformity requirements are affirmatively harmful and must be met by countervailing "anti-herding" rules. One reason is that "anti-herding regulation can reduce the kinds of systemic risk that occur when there is excessive behavioral

254. *See generally* Steven J. Eagle, *Public Use in the Dirigiste Tradition: Private and Public Benefit in an Era of Agglomeration*, 38 FORDHAM URB. L.J. 1023, 1079 (2011).

255. *Id.* at 1078–80.

256. JACOBS, *supra* note 2.

257. *Id.* at 441 (arguing against a deductive approach to planning methodology by stating that "[c]ity processes in real life are too complex to be routine, too particularized for application as abstractions").

258. *See* David Brooks, *The Sorting Election*, N.Y. TIMES, Oct. 13 2014, at A25.

259. *Id.*

260. *Id.*

261. Ian Ayres & Joshua Mitts, *Anti-Herding Regulation*, 5 HARV. BUS. L. REV. 1 (2015), *available at* http://ssrn.com/abstract=2399240.

262. *Id.* at 3.

uniformity."[263] The other reason is that "anti-herding regulation can produce socially beneficial information. Inducing separating equilibria among the regulated can, for example, avoid the inefficiency of informational cascades and help steer both private and public actors toward better evidence-based outcomes."[264]

Even if it is correct that building in a specified city is more expensive because engaging in a bargaining process is daunting to out-of-town developers, and a coterie of local developers have monetized the advantages of familiarity and trust, developers with specialized knowledge of the planning and approval process also are apt to have specialized knowledge of local markets. Their incentive to come up with innovative plans depends upon the possibility of executing them. Even as officials and developers have an eye towards exactions, campaign contributions, and profits, all will benefit if projects are completed and successful.[265]

C. Devices to Make Replanning "Sticky"

In order for replanning to work, Hills and Schleicher require that plans must be "sticky" in the sense that "they must resist the individual legislators' constant temptations to defect from the commitment" under pressure from community groups and when asked to "fine-tune" by developers and neighbors.[266] Their goal of is to prevent backsliding to parcel-by-parcel bargaining, although that had been the history of earlier comprehensive planning.[267]

1. Replanning and the Collective Action Problem

City Replanning outlines how comprehensive plans might successfully address the NIMBY problem. Generally, the mayor or planning

263. *Id.*

264. *Id.*

265. *See, e.g.*, George Lefcoe, *Finding the Blight That's Right for California Redevelopment Law*, 52 HASTINGS L.J. 991, 995 (2001) (quoting BERNARD J. FRIEDEN & LYNNE B. SAGALYN, DOWNTOWN, INC.: HOW AMERICA REBUILDS CITIES 23 (1990)) (describing how, in proposing urban renewal projects for subsidies, officials and developers seek out "'the blight that's right'—places just bad enough to clear but good enough to attract developers").

266. Hills & Schleicher, *City Replanning*, *supra* note 21, at 45.

267. *See infra* Part II.B.1.

commission or independent commission would propose a new plan to the city council after extensive hearings.[268]

> The Mayor faces the broadest electorate and thus has the greatest incentive to be responsive to citywide concerns. Putting the agenda-setting power in the Mayor's hands further promotes citywide interests. Particularly if the remapping is considered under a closed rule (i.e. no amendments are allowed), the Mayor is in a position to propose a map that goes as far to protect citywide interests as the legislature will bear.[269]

The fact that the mayor, elected citywide, puts comprehensive rezoning to the local legislature on a take-it-or-leave-it basis gives it substantial advantage. However, the mayor might have other considerations, such as seeking reelection or another office, and networks of friends, business associates, and campaign contributors. Some other sweetener might be needed. Also, the plan must be "sticky" (*i.e.*, have staying power).[270]

One answer supplied by *City Replanning* is that the new plan would distribute in equitable fashion denser housing and other locally desirable and undesirable land uses (LULUs) across neighborhoods using a "zoning budget."[271]

> Such a budget would specify an overall goal of locally undesirable land uses, or simply quantity goals for different types of housing, for the entire jurisdiction. It would also allocate those land uses across neighborhoods, seeking to allay concerns from council members about being dumping grounds for new construction and to capture the benefits of cross-neighborhood trades. Finally, the budget would include an enforcement mechanism, creating some sort of presumptive entitlement for developers to build the budgeted use until the citywide goal is met.[272]

They add: "[T]he entire scheme relieves individual legislators of political pressure to unbundle the package and force a vote on the site-specific decision."[273]

---

268. Hills & Schleicher, *City Replanning*, *supra* note 21, at 32.
269. *Id.* at 32–33.
270. *Id.* at 45.
271. *Id.* at 46; *see also* Hills & Schleicher, *Zoning Budget*, *supra* note 214.
272. Hills & Schleicher, *City Replanning*, *supra* note 21, at 46.
273. *Id.* at 47.

However, the granularity of cities is such that aldermanic districts often are much larger than locales that are generally regarded as neighborhoods or that might identify and organize themselves as neighborhoods if sufficiently threatened. It is of little recompense to homeowners in a residential subdivision faced with an adjacent looming condominium tower if a trash transfer station is to be built across town.

Many landowners who would benefit from denser development would seek a "presumptive entitlement." One might assume that such entitlements would be distributed only "until the city-wide goal is met." However, municipal officials sometimes make promises beyond budgetary constraints. Even within the budget, there still is the issue of determining recipients. The likely outcome is that a frenzy of wheeling, dealing, and cashing of political IOU's from political leaders and others would ensue.

Hills and Schleicher attempt to avoid that result by stating that planners might constitute an "extra-legislative body" that could bundle together many site-specific zoning decisions as to dissuade legislators from trying to unravel it.[274] This is possible but requires political as well as planning acumen. It also requires a working knowledge of pressures and lures, political, financial, and otherwise, to which legislators are subject.

In "hot button" situations where legislators might feel too much political heat, such as inclusionary zoning requiring the construction of low- or moderate-income housing together with market-rate housing, they propose that the "local legislature could delegate the task to an expert planning staff led by the mayor. . . . [T]he staff would provide additional political cover for legislators in sensitive districts, allowing them to endorse the general idea of inclusionary zoning while feeling free to rail against the formula that the planning staff ultimately presents."[275]

While here and elsewhere *City Replanning* cites the Congressional Base Closure and Realignment Act (BRAC) as an example of the success of such expert bundling schemes, its post-2005 history not inspire confidence.[276]

---

274. *Id.* at 47–48.
275. *Id.* at 52.
276. *See infra* notes 352–55 and accompanying text.

2. The Retrenchment Problem and Regulatory Property

When one engineers an important legislative advance, the obvious next move is to lock it in place so that legislators (or their successors) cannot retreat. "A literal example of this principle was recounted by Thomas Schelling: In World War I, German soldiers were sometimes chained to their machine guns so that they could not act on an impulse to flee."[277]

While soldiers during war are not permitted to flee, the rules for legislators are somewhat different. Efforts to ensure "sticky" legislation must confront the doctrine of entrenchment, which the Supreme Court has described as the principle of constitutional law holding that "one legislature may not bind the legislative authority of its successors."[278] This principle prevents legislative bodies from making their ordinary legislation unrepealable.[279]

The entrenchment doctrine does not prevent governments from entering into contracts, and government breach or arrogation of counterparties' contract rights gives rise to claims under the Contracts Clause,[280] or Takings Clause,[281] respectively. "Takings law, for example, interferes (or should interfere) with the ability of interest groups to lobby for property transfers that come at the expense of particular members of the public."[282] Therefore, local governments "have become increasingly adept at using private law mechanisms like contracts and property conveyances to make binding precommitments into the future."[283] Christopher Serkin notes that "[t]he first and perhaps most obvious form of entrenchment comes from the creation of property rights. The vested rights doctrine is the best example."[284]

---

277. Lee Anne Fennell, *Beyond Exit and Voice: User Participation in the Production of Local Public Goods*, 80 TEX. L. REV. 1, 46 (2001).

278. United States v. Winstar Corp., 518 U.S. 839, 872 (1996) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *90).

279. *See generally* Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665 (2002).

280. U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts. . . .").

281. *Id.* amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.").

282. Posner & Vermeule, *supra* note 278, at 1690 (citing RICHARD A. EPSTEIN, TAKINGS (1985)).

283. Christopher Serkin, *Public Entrenchment Through Private Law: Binding Local Governments*, 78 U. CHI. L. REV. 879 (2011).

284. *Id.* at 898.

A fortunate developer who obtains an entitlement for a high-density, high-rise residential tower is apt to commence work quickly or take whatever other action is required under state law for vesting of that development right as a protected property interest.[285] The developer may express gratitude to officials making the award, in one form or another. That might offset the animosity engendered among adjoining single-family home residents and developers whose applications are denied. But that raises the issue of how the fortunate parcel and its owner were selected.

3. The Creation of Regulatory Property and Cronyism

"Regulatory property" is a property right that is created and allocated by government and derives its value from the fact that holders are permitted to engage in activities forbidden to others.[286] A land use example is the "transferable development right" (TDR), which gives the holder a government entitlement to develop a parcel in the area in which it could be used ("receiving area") more intensely than other parcels located there.[287] The Supreme Court has adjudicated the rights of TDR recipients[288] but never ruled on the rights of owners in the receiving areas. Assuming that denser development of parcels in the receiving area is not inimical to the public health, safety, or welfare, owners may claim that their land has been downzoned so that now-valuable TDRs could be sold or given to owners of other parcels to mitigate what otherwise would be takings.

---

285. *See generally* John J. Delaney & Emily J. Vaias, *Recognizing Vested Development Rights as Protected Property in Fifth Amendment Due Process and Takings Claims*, 49 WASH. U. J. URB. & CONTEMP. L. 27, 31 (1996) ("Generally, the black-letter rule for acquisition of vested rights provides that a landowner will be protected when: (1) relying in good faith, (2) upon some act or omission of the government, (3) he has made substantial changes or otherwise committed himself to his substantial disadvantage prior to a zoning change.").

286. *See* Bruce Yandle & Andrew P. Morriss, *The Technologies of Property Rights: Choice Among Alternative Solutions to Tragedies of the Commons*, 28 ECOLOGY L.Q. 123, 129 (2001) (originating term).

287. *See generally* Matthew C. Garvey, Note, *When Political Muscle is Enough: The Case for Limited Judicial Review of Long-Distance Transfers of Development Rights*, 11 N.Y.U. ENVTL. L.J. 798 (2003).

288. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 137 (1978) (holding that TDRs "mitigate" financial burdens imposed on landowners by stringent land use regulation rather than constituting (inadequate) just compensation).

It might be, however, that "density-mixing TDRs . . . constitute a valid and rational exercise of the police power in most instances."[289] But that view conflates density mixing with government sale of development rights. Assume, for instance, that 50 lots in a district of 1,000 lots might be developed as six-unit buildings and the other 950 lots restricted to single-family homes. Should government have a right to sell TDRs, permitting 50 buyers to construct the multifamily structures? How might that differ from selling any other zoning?

That problem involves what Lee Anne Fennell termed "lumpy property,"[290] where the size or other attributes of parcels in the area under consideration for a certain purpose do not comport with the functional need. In the case of TDRs, for instance, the receiving area where mixed density would be appropriate is not congruent with individual parcels. A single owner of the entire receiving area presumably could apply for a development permit for 950 single-family residences and 50 six-unit buildings. There would be no mismatch serving as a justification for TDRs.

If the right to limited multifamily development thus is intrinsic to the receiving area, every landowner should own an aliquot share. As Professor Fennell stated: "When market transactions prove unequal to the task of shifting from one scale of use or form of ownership to another, the government may turn to coercive reconfiguration, as through eminent domain or partition."[291]

This is the same principle as has been applied in other land-based common pool situations, such as regulatory unitization of petroleum reserves located beneath the lands of multiple owners.[292] Likewise, in *Barancik v. County of Marin*,[293] the county revised its countywide and local plans to provide for TDRs. The amendments were "[d]irected specifically to the homogeneous community of Nicasio Valley" and treated it "as one complete land forum."[294] Interestingly, TDRs had been given to landowners deprived of development rights in a case decided by

289. Garvey, *supra* note 286, at 799–800.

290. Lee Anne Fennell, *Lumpy Property*, 160 U. PA. L. REV. 1955 (2012).

291. *Id.* at 1971.

292. *See, e.g.*, Richard A. Forster, *Oil and Gas: The Corporation Commission's Role in Evaluating the Prudence of Operations in Statutory Unitization*, 24 WASHBURN L.J. 191, 193–95 (1985) (noting and describing how numerous states have enacted compulsory unitization statutes responding to "the physical and economic waste that often result from the drilling of unnecessary wells and promotion of oil and gas conservation").

293. 872 F.2d 834 (9th Cir. 1988).

294. *Id.* at 835.

the U.S. Supreme Court on a narrow standing issue, *Suitum v. Tahoe Regional Agency*.[295]

This analysis of TDRs directly implicates the "zoning budget" recommended as an element of comprehensive replanning by Hills and Schleicher.[296] The budget would "allocate . . . land uses across neighborhoods," and it would "include an enforcement mechanism, creating some sort of presumptive entitlement for developers to build the budged use until the city-wide goal is met."[297]

In large cities with high housing prices, presumptive entitlements that are in short supply would be most desirable. Those who obtain development rights within the quota will have land worth much more than those who do not. Should developers (or, more likely, indigents hired for the purpose) camp out on the street at the entitlement office days in advance of the acceptance of applications? Should applicants procure testimonials to their (often expensive) good works from civic and religious leaders, as applicants for new TV channel licenses were wont to do, thus dissipating associated economic rents?[298]

Might a point system be devised so that development applications are graded based on established criteria?[299] Would that even be permissible in light of Hills and Schleicher's desire for a "presumptive entitlement for developers" and their strong proclivity "in favor of lower information costs and less custom-tailoring?"[300] The "standard 'price sheet' for density increases" they propose[301] might help in getting away from parcel-by-parcel development negotiation, but it is hard to

---

295. 520 U.S. 725 (1997) (holding that the landowners' claims were ripe for judicial review, since disbursement of the TDRs was the agency's final determination).

296. *See supra* text accompanying notes 270–71.

297. *Id.*

298. *See* J. Gregory Sidak, *An Economic Theory of Censorship*, 11 SUP. CT. ECON. REV. 81, 98 (noting that FCC interpretations of a Supreme Court ruling gave it the right "to force all competing applicants for a particular radio or television frequency into a self-destructive process of mutual rent dissipation"); *see also* James M. Buchanan, *Rent Seeking and Profit Seeking*, *in* TOWARD A THEORY OF THE RENT-SEEKING SOCIETY 4 (James M. Buchanan, Robert Tollison & Gordon Tullock eds. 1980) ("Rent seeking is designed to describe behavior in institutional settings where individual efforts to maximize value generate social waste rather than social surplus."); Fred S. McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J. LEGAL STUD. 101 (1987) (asserting that politicians and bureaucrats create rents through legislation and regulation and extract them from applicants through campaign contributions, votes, and political favors).

299. *See* Golden v. Planning Bd. of Town of Ramapo, 285 N.E.2d 291 (1972) (upholding comprehensive plan providing for point system for development applicants).

300. Hills & Schleicher, *City Replanning*, *supra* note 21, at 43.

301. *Id.* at 53–54.

envision this being done with sufficient granularity to take into account relevant circumstances in particular neighborhoods or blocks.

Finally, the frantic activity likely at the time when replanning budget entitlements are distributed is a magic moment when great profits are to be made or lost and in which those whose expertise or favor are necessary to deals are apt to prosper.[302] In the area of land use, this is exactly when the Supreme Court's recent decision in *Koontz v. St. Johns River Water Management District*[303] is most relevant. *Koontz* states: "Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation."[304]

Explicit or even implicit municipal exactions of development applicants for cash or in-kind benefits, such as paving off-site streets or paying for nearby parks, might be treated as "extortionate demands." While there is yet little case law indicating how far *Koontz* will be extended, the myriad of ways for localities to engage in low-visibility extortionate practices makes that course of action tempting.[305]

One unintended consequence of *Koontz* might be an increase in the conditioning of development on developer accession to arguably extortionate demands. As local officials become more cautious about the possibility of unconstitutional claims, they well may concentrate their receptivity to proposals from developers who are local repeat players and who play the game with discretion.[306] This, in turn, would exacerbate problems with cronyism and corruption. Favored developers might supply tips about opportunities for tax-favored or otherwise subsidized projects on lands they control or that might be acquired

---

302. *See* KURT VONNEGUT, GOD BLESS YOU, MR. ROSEWATER 4 (1998) (1965) ("In every big transaction, there is a magic moment during which a man has surrendered a treasure, and during which the man who is due to receive it has not yet done so. An alert lawyer will make the moment his own, possessing the treasure for a magic microsecond, taking a little of it, passing it on."); *see also Shark Attack: Why American Firms Cannot Do Deals Without Being Sued*, ECONOMIST, June 2, 2012, *available at* http://www.economist.com/node/21556248 ("Like so many novelists, [Vonnegut] was talking bosh. No alert lawyer takes only 'a little.'").

303. 133 S. Ct. 2586 (2013).

304. *Id.* at 2596. "As in other unconstitutional conditions cases in which someone refuses to cede a constitutional right in the face of coercive pressure, the impermissible denial of a governmental benefit is a constitutionally cognizable injury." *Id.*

305. *See generally* Steven J. Eagle, Koontz *in the Mansion and the Gatehouse*, 46 URB. LAW. 1 (2014).

306. *Id.* at 14–16.

for their subsequent redevelopment on targeted sites that might be acquired through municipal condemnation.[307]

While Hills and Schleicher do not spell out the nature of advisory commissions, enforcement mechanisms, presumptive entitlements, zoning budgets, and interactions between private and publically subsidized projects that they have in mind, the integrity of the development process rests on this myriad of details and not on the formulation of a "citywide deal," as such.[308]

D. Densification and Agglomeration are Different Concepts

Charles Tiebout postulated that business people and professionals in a metropolitan area would sort themselves into one of its rings of suburbs based on the mixes of amenities and taxes that they offered.[309] Similarly, one might assume that cities might compete for achieving a critical mass of firms and workers specialized in one industry or another.[310] However, to the extent that lifestyle provides the ultimate agglomeration, it is plausible to think that, like London or Paris in their respective countries, a handful of American cities might predominate in all fields.

Furthermore, increased densification in the name of promoting the wealth effects of agglomeration tend to be resented by those who feel disrespected and displaced. While plans for engineering densification implicitly aim at overcoming their resistance, the estranged majority votes in large numbers and otherwise has influence.[311]

1. "Congestion" in Its Broader Aspect

David Schleicher noted that agglomeration economists generally conflate the detriments of density under the heading of "congestion costs."[312] "True congestion costs are the increased expenses caused

307. *See* Eagle, *supra* note 27, at 1078–81.

308. Hills & Schleicher, *City Replanning*, *supra* note 21, at 45–53.

309. Tiebout, *supra* note 130.

310. *See, e.g.*, MARSHALL, *supra* note 4.

311. Richard Briffault, *Voting Rights, Home Rule, and Metropolitan Governance: The Secession of Staten Island as a Case Study in the Dilemmas of Local Self-Determination*, 92 COLUM. L. REV. 775, 847 (1992); *see also supra* notes 134–37, 195, and accompanying text.

312. Schleicher, *City Unplanning*, *supra* note 73, at 1737.

by many people crowding into a small area. Higher land costs are the primary congestion cost, but traffic and things like noise or other forms of pollution also fall into this camp."[313]

A few cities, such as London, impose congestion fees on automobiles entering the center during business hours, which presumably is less of a burden on the finally well off, who presumptively are more productive.[314] But might we impose a Pigovian congestion tax on residents in areas such as Greenwich Village who do not make positive agglomerative contributions, perhaps those who declare their occupations as lawyers or bankers rather than artists? Aside from this suggestion's political impracticality, "[v]irtually every author points out that we do not know how to calculate the ideal Pigouvian tax or subsidy levels in practice, but because the point is rather obvious rarely is much made of it."[315]

Likewise, since the end of World War II, highways in the United States have been thought of as a way of dispersing the talented and prosperous from the center city. However, mass transit might have the opposite effect in making it easier for workers who add lesser value to commute into the center city.[316] Might Pigovian taxes on center city "space eating slugs" subsidize such congestion-relieving measures?[317] The Article next focuses on problems of increased density resulting from population growth parasitic on agglomeration and from displacement of community.

2. Agglomeration Benefits are Difficult to Achieve

In her article *Agglomerama*, Lee Anne Fennell characterizes urban spaces a "type of commons" which could be overcrowded or,

313. *Id.*

314. *See generally* Michael H. Schuitema, Comment, *Road Pricing as a Solution to the Harms of Traffic Congestion*, 34 TRANSP. L.J. 81 (2007).

315. Stephen W. Salant & Nathan Seegert, *Private Access Fees and Congestion: Is there a Role for Government After All?*, at 29 (Resources for the Future Discussion Paper 14-26, 2014), *available at* ssrn.com/abstract=2537848 (quoting William J. Baumol & Wallace E. Oates, *The Use of Standards and Prices for Protecting the Environment*, 73 SWEDISH J. ECON. 42, 42 (1971)).

316. Badger, *supra* note 13 (quoting Enrico Moretti) ("California high-speed rail has always been thought of as a fast way to move people from Los Angeles to San Francisco, as competing with the plane. . . . But it might be that actually its most meaningful economic impact would be as a way to allow people in Central Valley low-wage cities to commute to the Bay Area.").

317. *See infra* text accompanying note 320.

alternatively, "fail[] to attract parties who are well suited to generate agglomeration benefits."[318] "The challenge," she added, "is to assemble participants together whose joint consumption and production activities will maximize social value."[319]

In discussing urban spaces as commons, Fennell noted that every firm or household is eager to incorporate positive externalities of others into its own private income but is "largely indifferent to the magnitude or sign of its own contributions to the collective."[320]

Furthermore, market mechanisms and self-sorting cannot be depended upon to generate optimal agglomerations. "If cash prices were the sole basis for allocating urban locations, a buzz builder who would add a large premium in kind to the community could be outbid by a space-eating slug."[321] This problem occurs in many contexts, notably the downtown shopping district, where the most desirable merchants cannot capture the positive spillovers of the traffic they draw to the area. The privately owned regional shopping center facilitates internalization of positive externalities so that "anchor" stores pay much lower rents per square foot than merchants parasitic on the traffic anchors generate.[322]

This problem is difficult to overcome using traditional public land use controls. Some general designations might help, such as those discouraging "formula" stores and restaurants in favor of those that are more novel and would attract business to the neighborhood[323] or preserving urban manufacturing loft buildings by forbidding conversion to residential use.[324] However, zoning is not sufficiently fine-grained to capture synergies that swirl among entrepreneurs and artisans at a given time, much less keep current with dynamic changes over short periods of time.

---

318. Fennell, *supra* note 30, at 102–3.

319. *Id.* at 103.

320. *Id.* at 113.

321. *Id.* at 120.

322. *See, e.g.*, Marcus Gerbich, *Shopping Center Rentals: An Empirical Analysis of the Retail Tenant Mix*, 15 J. REAL EST. RES. 283, 284–86 (1998).

323. *See, e.g.*, Frona M. Powell, *Economic Regulation and the Power to Zone*, 38 REAL EST. L.J. 421, 422 (2010) (noting some polities "are not receptive to Wal-Mart and other large formula stores locating within their community, and they rely on their zoning codes or in some cases state environmental laws to limit or block [them] entirely").

324. *See* Roderick M. Hills, Jr. & David Schleicher, *The Steep Costs of Using Noncumulative Zoning to Preserve Land for Urban Manufacturing*, 77 U. CHI. L. REV. 249 (2010).

Another possible solution is what Fennell calls "differential pricing,"[325] where the government strikes individualized bargains in the context of permit applications, such as incentives for legitimate theaters in the most propitious locations. This is similar to "performance zoning" designed to generate positive externalities, such as guarantees of foot traffic to stores by requiring firms to eliminate employee lunchrooms or limit telecommuting.[326] However, such custom solutions arrived at through bargaining regarding uses of individual parcels goes directly against the goal of comprehensive replanning to limit transactions costs.[327]

Higher housing costs that result from increased density might well result in demands for more affordable housing, and developers, who typically agitate for higher density, might be allowed to build more luxury units if the construct affordable housing units.[328] In her current capacity as Commissioner of New York City's Department of Housing Preservation and Development, Professor Vicki Been has announced that her department is being reorganized to implement Mayor Bill de Blasio's plan to create and preserve 200,000 units of low-cost housing during the next decade.[329] Been's department will "oversee the 'cornerstone' of the effort: Mandatory inclusionary housing," and in every neighborhood the city will "target for development through rezonings. . . . every single housing project will be required to include affordable housing."[330] Regardless of the social benefit thereby created, increased density without positive agglomerative effects creates congestion that discourages agglomeration.

Here, however, it is useful to focus on the demand for residences in agglomerative neighborhoods by what might be deemed as high-income but "parasitical" new residents. The principal difference between

---

325. Fennell, *supra* note 30, at 133.

326. *Id.* at 137.

327. *See infra* Part III.B.1.

328. *See* David L. Callies, *Mandatory Set-Asides as Land Development Conditions*, 42/43 URB. LAW. 307, 322 (2010) (noting that "California Density Bonus Law requires local governments to 'reward developers that agree to build a certain percentage of low-income housing' with increased density bonuses above those permitted by applicable local regulations").

329. Ryan Hutchins, *H.P.D. Plans Major Changes to Jump-Start Affordable Housing Development*, CAPITAL PLAYBOOK, Oct. 1, 2014, *available at* http://www.capitalnewyork.com/article/city-hall/2014/10/8553747/hpd-plans-major-changes-jump-start-affordable-housing-development.

330. *Id.*

the apartment house for lower-income persons, gratuitously described in *Euclid* as a "mere parasite,"[331] and new luxury buildings to be occupied by their ostensible betters is that the affluent pay higher taxes but might have more potential for diluting the agglomerative aspects of the neighborhood that foster economic productivity.

Individuals seeking to move to areas possessing strong positive agglomerations of cultural amenities and where productive businesses prevail must bid against each other for that privilege. Housing prices, taxes, and regulatory burdens tend to be high, and the level of government services tends to be low.[332] Those whose efforts and presence collectively provide the value of agglomeration are trapped into paying more and more to enjoy the value that they themselves created and that is enjoyed by residents who do not add agglomerative value. This is the opposite of mutualization, whereby members of private clubs collectively internalize the joint value of their relationships.[333]

Recent books by Richard Florida[334] have trumpeted the notion that attracting the "creative class"—well-educated young people with an entrepreneurial bent—is the key to urban prosperity.[335] Richard Schragger notes that amenities attracting such young people include "waterfront parks, arts districts, the creation of edgy urban streetscapes, and the repurposing of downtown turn-of-the-century industrial warehouses."[336] He added that these would augment amenities,

---

331. Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (noting that, in sections of detached homes, "very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district").

332. Schleicher, *supra* note 237, at 1511–12 (noting that "[a]gglomeration gains at the local level give otherwise mobile residents a reason not to move, even when governmental policies affect them in a negative way").

333. James M. Buchanan, *An Economic Theory of Clubs*, 32 ECONOMICA 1 (1965) (explaining strong preference of elite individuals to join social clubs with mutual ownership, as opposed to proprietary clubs whose owners could charge high dues for the benefits of mutual association).

334. RICHARD FLORIDA, THE RISE OF THE CREATIVE CLASS: AND HOW IT'S TRANSFORMING WORK, LEISURE, COMMUNITY, AND EVERYDAY LIFE (2002); FLORIDA, THE GREAT RESET, *supra* note 179; RICHARD FLORIDA, CITIES AND THE CREATIVE CLASS (2005). Florida's "creative class" has been the subject of considerable debate. *See, e.g.*, Joel Kotkin, *Biscotti and Circuses: Richard Florida Concedes the Limits of the Creative Class*, THE DAILY BEAST (Mar. 20, 2013, 4:45 AM), http://www.thedailybeast.com/articles/2013/03/20/richard-florida-concedes-the-limits-of-the-creative-class.html.

335. FLORIDA, THE GREAT RESET, *supra* note 179, at 173.

336. Richard C. Schragger, *Is a Progressive City Possible? Reviving Urban Liberalism for the Twenty-First Century*, 7 HARV. L. & POL'Y REV. 231, 234 (2013).

such as "art museums, symphony orchestras, theaters, and parks," that James Buchanan earlier had recommended as a way for cities to attract and retain the wealthy.[337] The city, on this account, is a consumer good that needs to create a brand that will appeal to a particularly desirable demographic.

However, what if a city's "brand" becomes so important that it swamps the traditional measure of agglomeration—the propinquity of many firms and workers specializing in a particular trade? One current example is the move of General Motors' Cadillac division from Detroit to New York. For generations, Cadillac was located in Detroit and was GM's prestige division.[338] Alas, Cadillac—it last was America's top-selling luxury car in 1997. "Since then, its executives have tried seemingly everything—from new models to new management to new marketing—to revive its flagging fortunes, with little to show for it."[339]

On September 23, 2014, General Motors announced that Cadillac headquarters would move from Detroit to New York's "trendy" SoHo neighborhood.[340] The *New York Times* reported that Cadillac's new head, Johan de Nysschen, "was convinced that to reinvent the struggling brand, it needed more autonomy, more focus and more of a connection to what is cool and fashionable."[341] As the *Wall Street Journal* added, "GM's brass feels being in Manhattan will help Cadillac better reach luxury buyers."[342] There was no indication that New York had an agglomeration of automotive engineering excellence. Instead, as Mr. de Nysschen added, "[t]here is no city in the world where the inhabitants are more immersed in a premium lifestyle."[343]

However, the wealthy in general prefer a "premium lifestyle," as do well-remunerated physicians, lawyers, and bond traders. A *New York Times Magazine* account of life in Greenwich Village questioned how

337. *Id.* at 234 (quoting James M. Buchanan, *Principles of Urban Fiscal Strategy*, 11 PUB. CHOICE 1, 14 (1971)).

338. *See generally* Generations of GM—Cadillac, GM HERITAGE CENTER, https://history.gmheritagecenter.com/wiki/index.php/Cadillac (last visited May 15, 2015).

339. Aaron M. Kessler, *Cadillac Tries to Make a Fresh Start in New York*, N.Y. TIMES, Sept. 23, 2014, at B1.

340. *Id.*

341. *Id.*

342. Jeff Bennett & John D. Stoll, *Cadillac Seeks Brighter Future in New York*, WALL ST. J., Sept. 23, 2014, at B7.

343. *Id.* (quoting Johan de Nysschen).

its local shops could "survive extreme gentrification."[344] It said that the impact of the tremendous growth of the financial industry since the 1970s "may be most evident in the Village. The artists, weirdos and blue-collar families . . . are long gone. They've been replaced, in large part, by guys in suits."[345]

The saga of Greenwich Village indicates how easy it is for those attracted to neighborhoods made vibrant by the "creative class" to raise density and rents and thus dissipate the agglomerative creative energies of the artists and entrepreneurs whose presence they sought. The transition from creators to parasites, so to speak, is hastened by increasingly effective means of signaling by their home address that the arrivistes are both wealthy and cultivated.[346]

Also, in the most vibrant American cities, many wealthy people, including a substantial number from abroad, acquire residences in prime neighborhoods as pieds-à-terre, investment apartments, and as hedges against unrest or currency devaluations at home.[347] A recent series of *New York Times* articles on "towers of secrecy" asserts that shell corporations own a substantial number of the most expensive new condominiums, with beneficial ownership traced to oligarchs who derived their fortunes through questionable means.[348] In New York City, "[t]wenty-four percent of co-op and condo apartments citywide are not the primary residence of their owners."[349] Substantial numbers of vacant units also drain agglomerative interactions from a neighborhood.

E. Would a Grand Bargain Last?

Just as the Progressives envisioned comprehensive land use planning as a one-time exercise, so contemporary reformers, such as Hills and Schleicher,[350] see comprehensive city replanning as a

344. Adam Davidson, *Jane Jacobs vs. Marc Jacobs*, N.Y. TIMES SUN. MAG., June 5, 2012, at MM16.

345. Davidson, *supra* note 343.

346. *See generally* Michael Spence, *Signaling in Retrospect and the Informational Structure of Markets*, 92 AM. ECON. REV. 434 (2002) (illustrating the basic signaling model in which expensive credentials proxy desirable characteristics not directly ascertainable).

347. Julie Satow, *Why the Doorman is Lonely*, N.Y. TIMES, Jan. 11, 2015, at RE1 (quoting George V. Sweeting, deputy director of the New York City budget office).

348. *See, e.g.*, Louise Story & Stephanie Saul, *Hidden Wealth Flows to Elite New York Condos*, N.Y. TIMES, Feb. 8, 2015, at A1.

349. Satow, *supra* note 346.

350. *See* Hills & Schleicher, supra note 21, at 45–59.

way to cut the Gordian knot and establish the framework for long-term progress.

However, despite efforts to thwart them through procedural obstacles and vested rights,[351] grand bargains have a way of eroding. It is instructive to consider Milton Friedman's critique of the Tax Reform Act of 1986,[352] which reduced rates and abolished special preferences wholesale. "[A]s of 1986 . . . the tax system had gotten so complicated, you had filled up the blackboard essentially so that Congressmen had nothing more to sell, and they were therefore willing to wipe the slate clean and start over again. . . ."[353]

An example of a highly lauded grand bargain was the military base closure process devised by Congress to shelter individual members from constituent demands that obsolete local bases be kept open. It resulted in the Base Closure and Realignment Act (BRAC), which resulted in more than 350 installations being closed in five rounds ending in 2005.[354] Hills and Schleicher discuss BRAC as an example of a successful bundle.[355] However, the process was seen nevertheless as putting political careers in jeopardy,[356] and Congress barred the Pentagon from even planning future rounds.[357]

To the extent that a land use regime put in place by comprehensive replanning perseveres, its primary cause would be lock-in through regulatory property. However, I assert that the creation of regulatory property entails the same sort of deal making that Hills and Schleicher reject[358] and that losers in the scramble for regulatory property might obtain judicial vindication that would vitiate its achievements.[359]

---

351. *See infra* Part IV.C.

352. Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (1986).

353. Lawrence Zelenak, *The Theory and Practice of Tax Reform*, 105 MICH. L. REV. 1133, 1148 (2007) (quoting remarks of Milton Friedman, Sixth Meeting of the President's Advisory Panel on Federal Tax Reform 117–18 (2005)).

354. *See* Pub. L. No. 100-526, 102 Stat. 2623 (1988) (codified and amended as 10 U.S.C. § 2687 (2006)) (providing authorization to facilitate the closure and realignment of military bases); Hills & Schleicher, *Zoning Budget*, *supra* note 214, at 107–8 and n.68 (outlining legislative process).

355. Hills & Schleicher, *City Replanning*, *supra* note 21, at 47.

356. *See* Carl Hulse, *Freshman Senator Can Finally Breathe Easy*, N.Y. TIMES, Aug. 27, 2005, at A10 (discussing removal from closing list of Ellsworth Air Force Base in South Dakota, a decision that would "decide [the] political fortunes" of Senator John Thune).

357. Walter Pincus, *Hagel Turns Up the Heat on Closing Surplus Military Bases*, WASH. POST, Mar. 18, 2014, at A15.

358. *See infra* Part IV.C.2.

359. *See supra* notes 301–4 and accompanying text.

V. SOME POSSIBLE SOLUTIONS

Comprehensive replanning, of course, is not the only possible answer to reforming land use so as to enhance density, agglomeration, and urban prosperity.

A. Privatization of Land Use Regulation

One possible alternative to comprehensive replanning is Robert Nelson's suggestion that zoning regulation is best regarded as a neighborhood property right.[360] Nelson railed against zoning abuse, concluding that it "ultimately served the political interests of the most powerful elements of the municipality, rather than any public interest."[361]

Nelson proposed instead that state law be changed so that supermajorities of landowners should have the right to organize a new type of neighborhood association. It would have sweeping powers to regulate land use, including the ability to sell rights of entry to convenience stores, "or even sell all the neighborhood property in one package for comprehensive redevelopment."[362] However, as I observed at the time, "[t]here is a certain irony in Nelson's privatization proposal: at the behest of interested parties, state law would impose a contractarian regime upon those who prefer a regulatory one."[363]

Another purported solution to the inefficient use of land, developed by Abraham Bell, would permit private takings in order to eliminate the monopoly on land use generally belonging to the incumbent owner.[364] Switching from individual parcels to neighborhoods, he and Gideon Parchomovsky "seek to harness the insights of auction theory to devise an improved governance model for common-interest communities, perhaps the most important real-property form today."[365]

---

360. ROBERT H. NELSON, ZONING AND PROPERTY RIGHTS 22–51 (1977); Robert H. Nelson, Comment: *A Private Property Right Theory of Zoning*, 11 URB. LAW. 713 (1979).

361. Robert H. Nelson, *Privatizing the Neighborhood: A Proposal to Replace Zoning with Private Collective Property Rights to Existing Neighborhoods*, 7 GEO. MASON L. REV. 827, 847 (1999) (citing BERNARD H. SIEGAN, LAND USE WITHOUT ZONING 231 (1972)).

362. Nelson, *supra* note 359, at 835.

363. Steven J. Eagle, *Devolutionary Proposals and Contractarian Principles*, *in* THE FALL AND RISE OF FREEDOM OF CONTRACT 184, 187 (F. H. Buckley, ed., 1999).

364. Bell, *supra* note 20.

365. Abraham Bell & Gideon Parchomovsky, *Governing Communities by Auction*, 81 U. CHI. L. REV. 1, 2 (2014).

Likewise, Parchomovsky and Peter Siegelman suggest that government condemn large blocks of land and auction off the consolidated parcels.[366]

CONCLUSION

Many existing residents of vibrant cities object to densification, both because of the disamenities it imposes upon them and also because they perceive gentrification as embodying class-based arrogance. Others, perhaps the majority, are tepid at best. Yet agglomeration leads to enhanced material prosperity for the broader community and enriched lives for many.

Approaches advocating top-down agglomeration, such as that in *City Replanning*, are conducive to circumventing democratic values, insofar as they move from individual autonomy and subsidiarity towards decision-making by technocratic experts.[367] Rather, bargains are made and consolidated through transient alliances cemented, in part, by the liberal employment of regulatory property both as sweeteners and as constitutional roadblocks to further change. In fairness, Rick Hills and David Schleicher propose only general methods to ameliorate contemporary political paralysis and assume that equitable institutions, procedures, and results will follow.

History, however, suggests that salutary results should not be expected. Garrett Hardin insisted that overpopulation was a fundamental environmental problem,[368] justifying "the necessity of abandoning the freedom to breed"[369] through "mutual coercion, mutually agreed upon."[370] James Krier replied that a society capable of achieving consensus on coercing its members into cooperation is a society that can cooperate without coercion.[371] Likewise, a society where top-down urban planning might obtain good results in the long term is a society where more subsidiarity should work better.

366. Parchomovsky & Siegelman, *supra* note 19, at 251–52.

367. *See* Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2125, 2125–27 (1990) (citing and discussing authorities).

368. Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968) (introducing the term).

369. *Id.* at 1248.

370. *Id.* at 1247.

371. James E. Krier, *The Tragedy of the Commons, Part Two*, 15 HARV. J.L. & PUB. POL'Y 325, 337 (1992).

Alternatives to Progressive Era reliance on top-down mandates might be premised on the Burkean perspective that we build upon fallible human nature and make only incremental changes to customs and rules that have generally worked successfully, absent urgent reason for radical change.[372] Likewise, a Hayekian view that focuses on the importance of tacit or local knowledge, and the impossibility of central decision makers to gather all of the information needed for good planning, leads to the same results.[373]

Thus, the need for humility in land use planning suggests the importance of incremental steps and decentralized decision making. The predictions of individual landowners are not always going to correctly anticipate the future and might sometimes lead to pernicious consequences. However, individual owners are most apt to be knowledgeable about local conditions. With their own property on the line, they have a strong incentive to achieve satisfactory results.

It might be that grand bargains, such as that suggested in *Comprehensive Replanning*, will prove salutary. But they are leaps of faith, and the foibles of imperfect people will infiltrate the details.

372. *See, e.g.*, Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1208 (2002) ("Burke used the incremental and organic model of the common law as his metaphor for how social change should proceed generally.").

373. *See, e.g.*, F. HAYEK, THE CONSTITUTION OF LIBERTY 193–204 (1960) (noting legislation that is generalized, predictable, and impersonally applied to all as indicative of the rule of law).

THE BUNDLING PROBLEM IN TAKINGS LAW: WHERE THE EXACTION PROCESS GOES OFF THE RAILS

RICHARD A. EPSTEIN*

Thank you very much for having me speak at this conference, and congratulations to you, Michael, for having done so much work in this area for the past forty years. My job on this occasion is to explain why it is necessary to examine the exaction question from the ground up in order to reach a principled solution to what has become a confused body of legal doctrine about an ever-more common legal practice.

I take this view because what is striking about virtually all of the Supreme Court decisions in this area is that they assume a legal universe in which the status quo ante is unquestioned. Thus the cases proceed as though it were perfectly legitimate to make claims that the state possesses some kind of omnibus environmental easement that in turn requires all private owners to engage in actions of environmental mitigation before being allowed to develop their private land. The rule in question surely applies to wetlands in light of the record in the recent Supreme Court decision in *Koontz v. St. John's River Water Management District*.[1] But it is not limited to wetlands, for in *Koontz* it applied to uplands as well. Indeed, I will go further to note that the same logic applies to all sorts of urban and rural land. The government thinks that it is within its right to insist that it need issue permits for development only to private parties who toe the line on the conditions that it imposes. The common view of most lawyers, moreover, is that this process escapes any serious challenge under the Takings Clause, which provides, as we all know, "nor shall private property be taken for public use, without just compensation." On this issue, *Koontz* gave a modest victory to the landowner, which resulted

* The Laurence A. Tisch Professor of Law, New York University School of Law, The Peter and Kirsten Bedford Senior Fellow, the Hoover Institution, and the James Parker Hall Distinguished Service Professor of Law, Emeritus and Senior Lecturer, The University of Chicago. This Article is an expanded version of the remarks that I made at the Brigham-Kanner Conference on Property Rights held at William & Mary Law School on October 30, 2014.

1. 133 S. Ct. 2586 (2013). For my earlier views, see Richard A. Epstein, *The Supreme Court's Mischievous Environmental Easement*, POINTOFLAW.COM (Feb. 5, 2013, 5:46 PM), http://www.pointoflaw.com/archives/2013/02/richard-epstein-the-supreme-courts-mischievous-environmental-easement.php.

in a remand. But even that action has led at least one commentator to ask whether *Koontz* is "The Very Worst Takings Decision Ever."[2]

It is equally clear that one reason for the reticence is that neither the Supreme Court nor most commentators want to attack head on the basic question, which is, whether it is possible to optimize social welfare by the consistent application of the Takings Clause, and if so, how. Instead there is a tendency to follow the unfortunate trend set out by Justice William J. Brennan in *Penn Central Transportation Co. v. City of New York*,[3] who insisted that general principles cannot be developed under the Takings Clause, which in the end is best explicated by a series of ad hoc decisions that cannot be reduced to first principles.[4] It is all too apparent that no such approach will succeed if the Supreme Court is not prepared to undertake the effort. So let us go back first to the theory of the Eminent Domain Clause, then see how it applies to the *Nollan* case, which I think is paradigmatic, and then see how it applies to the situations in *Koontz*.

I. THE ECONOMIC LOGIC OF THE TAKINGS CLAUSE

The basic problem in organizing a system of rights over real property is that land, and the improvements made to it, are not movable, so conflicts necessarily arise in which neither party has within it the power to move out of harm's way. In addition, developers need at times to assemble land, which cannot be done through voluntary transactions, in order to make spaces suitable for productive development, whether for a new city hall or for a railroad track.

Now, at this point there is a choice. The assembly in question could be done by fiat: the government just announces that it will take land to devote to these public uses without having to pay compensation for what it has taken. But it is just that option that is foreclosed by the Takings Clause, which at the very least is meant to be a bulwark

2. *See* John D. Echeverria, *Koontz: The Very Worst Takings Decision Ever?*, 22 N.Y.U. ENVTL. L.J. 1 (2014).

3. 438 U.S. 104 (1978).

4. *Id.* at 124 (noting the use of "essentially ad hoc, factual inquiries," because his Court, "quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons") (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

against the all too foreseeable instances of arbitrary exercises of government power. There is an enormous danger in allowing the government to take property for public use, without just compensation, even after the most solemn deliberation. Those deliberations can stress public benefits without offering the disinterested observer any indication as to whether the transaction that the government proposes will *on net* advance the public welfare. Yet that desired social outcome will not be the case if the value of the property in public hands, when used for public use, is lower than its value in private hands, when used for the private use that the government action displaces. The Takings Clause is meant not only to compensate people whose property has been taken; it is also needed to stop that stream of unwise government actions from taking place.

Yet what is the alternative? One possibility is to use a model of voluntary transaction so that all the parcels intended for a particular development can only be taken with the unanimous consent of every individual whose property is going to be taken. That insistence on consent follows from a strong libertarian model that holds that the only proper uses of government power are to prevent the use of force and fraud. The recalcitrant landowner has done neither, so his power to hold out for the price that he desires must be protected. The result is not simply that it will cost more money to build the public project. It is that in many cases the project will not get built at all, as the multiple, strategic demands of individual landowners will block the public project even when its completion does serve the common good by the metric mentioned above: the property is more valuable in public hands than in private ones.

The constitutional solution that gets us between the horns of this dilemma is that the government may take for public use so long as it pays just compensation. In the case of the town hall or the railroad, it becomes a political judgment as to whether that public use is wise or not. That judgment in turn is exercised more sensibly when the taxing power of the state is so constrained that government can neither force the cost of the taking onto one select group when the benefit is widely dispersed, nor conversely require payments to come from general revenues when the benefit is limited to a select group of the public at large.

Bracketing that public use problem in this case, it is clear that the takings power gets rid of the holdout power that could otherwise be

exercised by determined individuals, while the just compensation requirement constrains greedy government officials from taking something for nothing. As Jim Burling said in his earlier remarks, there is no question that if the government can take property at a zero price, it will take a lot of property. But if government has to pay market value for the property taken, it will take a lot less. In most cases we do not allow private parties to take individual pieces of property from others without just compensation, because a competitive market helps determine correct prices. But even if they had the power to take, it would never be for zero price. Government may have the power to force transactions that are denied to private parties, but if they are endowed with the special power to take without consent, then just compensation limitation is critical to making sure that this power is exercised only for proper purposes—namely, at fair value when the holdout problem cannot be avoided through voluntary transactions.

The just compensation formula is thus the key to good government. It helps shape the way in which the government takes land and the way in which the government collects its taxes. In each case the proper application of government power is restricted, to the extent that human institutions can make it so, to cases in which the value of particular pieces of private property are greater in public hands than in private hands. If it is not, then it is unlikely that the government would make the purchase in the first place.

Social welfare is at the core of the takings power. Knocking out the takings power undermines social welfare by inducing the government—or more accurately, some dominant political coalition—to overconsume. The upshot is the same type of resource distortions that arise whenever private parties are allowed to take each other's property for zero price. Our laws are intended to block private theft. They should do the same thing with government theft.

II. EXACTIONS

It is ironic that it took so long for the exactions question to receive explicit treatment under the Takings Clause in the famous decision in *Nollan v. California Coastal Commission*.[5] That delayed response

5. 483 U.S. 825 (1987).

is particularly surprising since the law of exactions has long been a part of the general law of unconstitutional conditions. "Stated in its canonical form, this doctrine holds that even if a state has absolute discretion to grant or deny any individual a privilege or benefit, it cannot grant the privilege subject to conditions that improperly 'coerce,' 'pressure,' or 'induce' the waiver of that person's constitutional rights."[6] Sometimes it is said that the "greater" power to exclude necessarily entails the "lesser" power to allow exercise of right, subject to conditions. Originally that position was accepted as a constitutional tautology,[7] but with time it became clear that the power to *select* the target of regulation was a far more dangerous power. Thus the doctrine of unconstitutional conditions was applied as early as the 1920s in *Frost v. Railroad Commission*[8] to strike down a California law that required all private haulers to act as common carriers—i.e., take all comers at reasonable rates—if they wanted to gain access to the public highways. Justice Sutherland made it clear, at least for the moment,[9] that the state could not use its monopoly power over the public roads to destroy competition among various types of carriers using those roads. The point is worthy of generalization. The correct use of exclusive government powers is the advancement of competition in all relevant dimensions.

This problem is an enormous one, for the government exerts monopoly power not only when it operates the only public highway system in town, but also when it issues or withholds building permits. It was just that power that set up the Supreme Court's decision in *Nollan*. In that case the Coastal Commission wished to condition the

---

6. For an extensive discussion, see RICHARD A. EPSTEIN, BARGAINING WITH THE STATE 5 (Princeton Univ. Press 1993).

7. See Davis v. Massachusetts, 167 U.S. 43, 47 (1897).

> For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house. When no proprietary right interferes the legislature may end the right of the public to enter upon the public place by putting an end to the dedication to public uses. So it may take the less step of limiting the public use to certain purposes.

Id. The decision was rightly overruled in Hague v. Comm. for Indus. Org., 307 U.S. 496 (1939). For my discussion of this evolution, see RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT 425–32 (2014).

8. 271 U.S. 583 (1926).

9. *Frost* was largely gutted by Sutherland himself in Stephenson v. Binford, 287 U.S. 251 (1932).

issuance of a building permit to the Nollans on their willingness to convey to the public a lateral easement that cut across the front of their land above the high-water mark. There was in fact no substantive difficulty with the application, for the Nollans only wished to replace their small beachfront bungalow with a larger house that was similar in all respects to those along its stretch of the beach, so there were no traditional police power issues of either health or safety. For these purposes, it is also safe to assume that an easement open to all counts is one that is dedicated to public use. But the real challenge is to decide whether the public gain from the creation of this lateral easement exceeds the private loss. Accordingly, the correct intellectual inquiry runs as follows: let the government figure out exactly what that lateral easement is worth to its citizenry. Once it has collectively made that determination, it then can raise funds through taxes or fees to compensate the landowner for the loss of value to his property after it condemns the easement. If the public body does its calculations correctly, and it concludes that the value of the easement is indeed greater than the reduction in value of the servient land to its owner, it takes the easement and pays the compensation.

That simple process yields a social improvement because the public is better off, and the individual landowner is not worse off. Equally important, if it turns out that the price is *not* worth paying, then the government does not condemn the easement, which again leads to the correct social outcome. The purpose of prices in markets is to prevent some ill-advised transfers. The same happens in the government context. Clearly, the effectiveness of this argument depends on the accurate valuation, but that point is true in all takings cases whenever there is no ready market to measure the value of any divided interest in property, which is commonly the case.

Now, most government agencies are convinced of the worth of their public mission, so they would like to find a way to move forward with their regulatory programs without having to pay anything at all. It is there where the permit power intervenes by allowing the state regulator to *bundle* the permission to build with the willingness of the owner to sacrifice that lateral easement or other interest. Allowing this tactic to work should be regarded as an abject form of judicial capitulation to the destructive forces of special interest politics.

To see why, consider two cases. First, assume that the building permit is worth $100,000 to the property owner who wants to build or

expand a beachfront house. Assume further that the lateral easement across the front of the property imposes on the landowner a cost of only $25,000. Faced with this inevitable choice, the rational landowner will compare the gains from receiving the building permit against the losses from surrendering the easement. He will then choose the more valuable item and accept the condition, ending up $75,000 to the good. At one level, this looks like a bargain for mutual gain, which it is against the status quo ante in which no permit is granted and no easement created.

Unfortunately, the analysis above asks the wrong question, because the choice made by the landowner does not address the social choice of whether or not the lateral easement is worth more to the public at large than the cost the encumbrance imposes on the original owner. What is needed here is the head-to-head comparison of the rival uses. So in each and every case in which the government bundles the permit with the easement, it is avoiding the fundamental question behind the Takings Clause: is the easement worth more in public or private hands? If it is worth more in public hands, there is an increase in social welfare. But if not, then the taking should not take place, given the decline in social welfare. Bundling always obscures that choice, and so it should never ever be allowed. Once it is prohibited, then the government body has to make the normal social calculation by asking whether the easement costs the government in taxes and fees more than it is worth. Thus if the value of the easement to the public is only $15,000 in the above case, the government should not receive it, because overall social value dips from $100,000 to $90,000 ($100,000 – $25,000 + $15,000). In the other case it increases from $100,000 to $110,000 ($100,000 – $25,000 + $35,000). But under the bundling technique, it is impossible to tell whether that easement is worth $35,000 or $15,000, so there is a built-in certainty that error will manifest itself in some cases. That won't happen if the permit is separated from the easement, in which case the payment of compensation supplies a strong sorting mechanism. The condemnation goes forward only when the easement produces gains, but not otherwise.

Now, this bundling problem is compounded in *Koontz* by the incorrect way in which the law now defines the relevant set of property rights. Generally speaking, the orthodox theory of the Takings Clause holds that private property is defined under state law, after which

the government then decides whether or not to exercise its powers of condemnation. In order to figure out what the phrase "private property" means, however, it is not possible to work with two inconsistent definitions simultaneously. It is not correct to say that that private property means one thing in disputes between private parties and quite another when the dispute is between the government.

Unfortunately, this intellectual confusion now dominates the Supreme Court's tortured view on the enormous breadth of the federal government's navigation servitude, which is said to dominate all private interests in any navigable body of water. Textually, it is a huge stretch to say that the power of Congress to regulate commerce among the several states gives it the power to sweep aside all private property interests in water. Yet just that thoroughly mischievous and confused proposition was roundly endorsed by Justice Robert Jackson in *United States v. Willow River Co.*[10] That position was later endorsed by Justice William O. Douglas in a narrow five-to-four vote in *United States v. Twin City Power Co*[11]:

> It is no answer to say that these private owners had interests in the water that were recognized by state law. We deal here with the federal domain, an area which Congress can completely preempt, leaving no vested private claims that constitute "private property" within the meaning of the Fifth Amendment.[12]

This creation of government property by fiat wipes out all traditional private rights, and it does so when there is nothing about the navigation system that precludes the standard application of the eminent domain power to protect the complex array of "usufructuary" water interests: riparian access, the ability to maintain a wharf of a mill, and so on. The mindset behind the navigation easement also leads to a similar assertion of powers outside the navigation easement, for it is no accident that Justice Brennan in *Penn Central* placed explicit reliance on *Willow River* in a decision that, when all was said and done, refused to recognize that air rights were fully vested property interests under New York law.[13]

---

10. 324 U.S. 499 (1945). For my extensive criticism of the navigation servitude, see Richard A. Epstein, *Playing by Different Rules? Property Rights in Land and Water*, in PROPERTY IN LAND AND OTHER RESOURCES 317, 342–51 (Daniel H. Cole & Elinor Ostrom eds. 2012).

11. 350 U.S. 222 (1956).

12. *Id.* at 227.

13. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 125 (1978).

Note the political dynamic that follows. If there is a set of neighbors who wish to restrict certain use by a private party, they will typically have to purchase a restrictive covenant to achieve their ends. But if the government has rights that transcend those of the citizens it represents, acquisitive neighbors may not seek to obtain that same restriction at no cost to them by the enactment of some kind of a zoning law or other restrictive program. The Takings Clause was intended to rein in these grand factional ambitions. The ability to redefine property rights undercuts that function and opens up endless opportunities to public abuse and confusion, which thus undercuts the central mission of that clause.

It is now easy to predict what will happen in a wide variety of political circumstances. Let us suppose a majority gets together and thinks that it is appropriate to restrict what the neighbor can do with his property. So the local majority, in the form of the local water management district, informs someone like Mr. Koontz, who wishes to build on his property, that he must comply with an environmental easement over his property. That decision in effect requires him to buy back the right to use his property from government in order to go forward with his building plans.

Not surprisingly, this supposed environmental easement has been recognized nowhere in the history of Western civilization until the rise of the modern environmental movement. Generally speaking, easements have to be created by agreement or by prescription. In a few limited cases they are created by implication[14] or necessity.[15] But the environmental easement has no known contours but is so definite that the government can pump up its contours by assertion in order to increase the size of its exaction. The grand assertion of this easement should be treated as a massive taking. Since no compensation is ever forthcoming for its creation, the condition should be struck down forthwith under a per se rule. That decision does not block any water district decision to take private lands for environmental purposes. It only ensures that the desirable set of incentives with it are created through the standard eminent domain process in which the government, acting as the agent for the public, pays full value for what it takes.

---

14. *See, e.g.*, Sanborn v. McLean, 296 N.W. 496 (Mich. 1925) (sewage easement by implication on the subdivision of a single parcel of land).

15. Othen v. Rosier, 226 S.W.2d 622 (Tex. 1950) (denying the doctrine when the lock in is not created by a single conveyance).

What is so appalling about the *Koontz* case is that both sides agree on the one point that should be emphatically rejected—namely, that the government has the environmental easement that allows it to insist as of right on a program of environmental mitigation as a precondition for issuing a building permit. At this point, *Koontz* starts to resemble the current situation under rent control laws, where at the end of a lease the landlord has to *repurchase* the right to reoccupy the premises from his newly empowered tenant, even though he is entitled to regain possession as of right under the terms of the lease. The definition of what the landlord owns is the exclusive right to buy back from the government, at a price satisfactory to the government, that which he already owned under the common law of property. I commend Justice Samuel Alito for writing an opinion that imposed some modest limits on government power. But the incurable defect of his opinion is to address, and to reject, the claim that the government easement allows it to impose, as of right, a duty of environmental mitigation on a private landowner.

Once the environmental easement is rejected, the case takes on a radically different posture, for it is now necessary to first establish the relationships between private parties in order to understand the scope and limits on government power. In *Koontz*, this inquiry raises some serious issues. To recap, Koontz owned about fourteen acres of land on which he wanted to build on a little less than four acres. As an aside, it is not clear whether or not he reduced his demands solely because he knew that he would have to respond to the demand for environmental mitigation. Anyhow, for him to accomplish his program he agreed in his permit application to build up the land in one place and regrade it in another. He also agreed to build a dry-bed pond that would allow him to control the flow of storm water that could run off from his building and its nearby parking lot. This last request is surely appropriate, for there is no doubt in my mind that if in fact he had so constructed the land to increase the run off into public waters or into his neighbors' land, his conduct would amount to a tort under the standard rule of *Rylands v. Fletcher* that renders it wrongful to bring, keep, or collect water on his land responsible for its escape.[16] Indeed that last position was rightly affirmed by the

16. *See* Rylands v. Fletcher, L.R. 3 H.L. 330 (1868), *aff'g*, L. R. 1 Ex. 265 (1866). The case involves further complications in that the water was not fully collected but was only run off.

Supreme Court in *Dolan v. City of Tigard*,[17] in which Chief Justice William Rehnquist made it clear that the City had a legitimate interest to make sure that paving over open ground did not increase the flow of water into public waters.[18] That position is consistent with the view that landowners can be held liable in tort for redirecting rainwater over the land of their neighbors.[19]

As a general principle, whenever a private landowner or the government, as trustee of public waters, can hold private landowners responsible for harms after the fact, it is permissible to enjoin that wrongful conduct to prevent the harm from occurring in the first place. It was for just this reason that Koontz included the grading requirement and the water-pond system. Once those devices are sufficient to meet the peril, the rest of the development is Koontz's concern, not anyone else's. If his precautions fail, he of course is still liable for the harm that his new development has caused. The carryover of the common law rules against the government yields some cases in which it can enjoin as of right and yields others in which it must pay in order to acquire a benefit that it needs.

Putting the point in this fashion gives rise to the common objection that it is often difficult to tell the difference between two situations: withholding a benefit on the one hand and inflicting a harm on the other. That distinction is critical to the above analysis because the pollution case is inflicting harm, and the refusal to dedicate one's property as a wetland is withholding a benefit. If the distinction collapses, there is nothing left doctrinally to limit legislative discretion. Anything that the state does not like can be reclassified as either a public or a private nuisance so that its power to restrict without compensation is secured.

This all too fashionable line of argument received a qualified endorsement in some Supreme Court decisions, including by Justice Scalia in *Lucas v. South Carolina Coastal Council*.[20] There, Justice Scalia wrote:

> The transition from our early focus on control of "noxious" uses to our contemporary understanding of the broad realm within which

17. 512 U.S. 374 (1994).
18. *Id.* at 387.
19. Keys v. Romley, 412 P.2d 529 (Cal. 1966).
20. 505 U.S. 1003 (1992).

> government may regulate without compensation was an easy one, since the distinction between "harm-preventing" and "benefit-conferring" regulation is often in the eye of the beholder. It is quite possible, for example, to describe in *either* fashion the ecological, economic, and esthetic concerns that inspired the South Carolina Legislature in the present case. One could say that imposing a servitude on Lucas's land is necessary in order to prevent his use of it from "harming" South Carolina's ecological resources; or, instead, in order to achieve the "benefits" of an ecological preserve.[21]

Unfortunately, this passage is wrong in all its particulars. This contested distinction is *not* just in the eye of the beholder just because someone chooses to object to it. The easiest way to see why is to start outside the law of nuisance with ordinary interactions between people. Outside some supercharged legal dispute, is it proper to say that everyone in the world has benefited me because no one in the world has hit me? Similarly, is it possible to say that everyone in the world has simultaneously hurt me because they have not given me some money to improve my lot? Note that in either of these two worlds, the number of wrongs that cry out for redress is infinite and undefined, for everyone both benefits and harms everyone else simultaneously. But no one ever thinks or says that everyone is entitled to restitution for not hitting or is subject to tort liability for not giving, which is what the Scalia position entails.

In order to avoid that bizarre result in the takings contexts, we understand both phrases so that actions between strangers, whether for restitution or for tort, now become the rare exception and not the universal rule. I am responsible for hitting other people, which is prima facie tortious. That is not a universal condition but an event that happens only infrequently. Similarly I am responsible in restitution when I confer some tangible property or labor on another person, and then only in cases of necessity or mistake in which the other person is incapable of caring for himself. That too is a rare occasion. The number of claims shrinks from infinite to close to zero.

The choice of baselines would not matter in a zero transaction-costs world in which an infinite number of disputes could be resolved at zero cost in an infinitesimal period of time.[22] But once these

21. *Id.* at 1024.

22. *See generally* Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

transaction costs become positive, the choice of baseline can no longer be random, for it is now responsive to the concern that the legal system not drown the world in high transactions costs needed to remedy an endless stream of nonexistent wrongs. Even if by some miracle Scalia's alternative baseline were initially adopted—which has never been the case in the private law—the shift to the common law rules on tort and restitution would constitute a massive across-the-board Pareto improvement, with huge gains shared by all. The traditional harm/benefit distinction thus makes perfectly good sense. And that distinction connects without a hitch to the law of nuisance once it is understood to involve nontrespassory physical invasions, at least if that term is construed broadly enough to cover, as it should, the cases of the diversion of water. In essence, the proposals that Koontz offered did more than meet the requirements of the common law rules.

But once the distinction between conferring benefits and imposing harms disappears, it now becomes permissible for the Water District to say to Koontz that if he wants to exercise his development rights, he has to buy them back because of the public benefits from an ample supply of increasingly scarce wetlands. As an eminent domain proposition, the Water District compares the value of this plot as a wetland with its value for private use, and condemns only when the former is greater than the latter. That conclusion is most unlikely for this particular parcel. If the District wants to acquire other parcels, it can levy general taxes to raise the revenues, without distorting the acquisition process.

When the use of the eminent process is rejected, Koontz has to buy back his development rights, at which point a destructive bargaining cycle starts through the political process. There is no upper bound on what the water district can demand, so it will demand a great deal. But it is all cheap talk, because the District would never pay the landowner the sums needed to complete the deal. Just that happened in *Lucas*, for once the Coastal Counsel was ordered to pay $500,000 to prevent *Lucas* from building on either of its two plots, they abandoned the entire enterprise and sold both plots off for that sum with the development rights intact.[23] It turns out that there are

23. "After paying Lucas $850,000 in compensation for the two lots, South Carolina proceeded to sell the lots to private parties for development. Large homes now sit on both lots." WIKIPEDIA, LUCAS V. SOUTH CAROLINA COASTAL COUNCIL, http://en.wikipedia.org/wiki/Lucas_v._South_Carolina_Coastal_Council#Result (last visited Apr. 14, 2015).

a lot better ways for the Coastal Council to spend that money on beach maintenance.

The aftermath of the *Lucas* decision should be one of relief, not distress, for that is exactly the way in which the system of eminent domain should work—force some degree of monetization of the environmental interest in order to guide public policy on whether or not to take. At this point we now can state the secret of the doctrine of unconstitutional conditions: to the extent that the individual engages in something that would be a traditional tort against his neighbor, or against the public at large, the public can condition the permit on need to stop that behavior. With the legitimate end, the only question is whether the means chosen are overbroad or underinclusive. But, alternatively, to the extent that the government wishes to go beyond tort prevention—and remember this is now an intelligible concept—it must pay under the formula that the more it takes, the more it pays. By this test Mr. Koontz had got it right, and Justice Alito got it wrong by trying to figure out which conditions were permissible and which were not.

Now the important intellectual point is this: once the first step in the analysis is wrong, everything that follows is wrong as well. Hence much of the discussion of the unconstitutional conditions doctrine in *Koontz* is a distraction from the main event. It makes no difference for the analysis whether the conditions involved have to do with the restrictive covenant that is imposed on the same parcel of land that is to be developed or whether it requires a cash or kind contribution to fix up some culvert or ditch located elsewhere in the district. Neither are nuisance prevention.

Similarly, Justice Elena Kagan is way off base when she argues that this exaction should be treated as just another real estate tax even though it is levied on a particular transaction. The basic point about real estate taxes is they are based upon the market value of the property taxed. The revenues collected are to be spent on general public purposes so that the distribution of the tax is roughly proportionate to the distribution of the public goods that the tax supplies. The hope is that following this regime produces a Pareto improvement in that all persons benefit by an amount greater than the tax imposed, which means that public deliberations will seek common solutions rather than partisan gains, because nobody will vote for a tax that leaves them worse off than before, even after the benefits supplied are taken into account.

What the Water District program did was impose a set of special assessments to fund the creation of general public benefits. If this is allowed, then the entire structure of the tax system becomes indefinite; factions will seek programs that preserve benefits for their members while imposing costs on outsiders. Two or more factions can play that game, so the downward cycle continues as people squabble over liabilities that each group will happily impose on all the others.

So the basic normative rule is that selective impositions can never be used to fund general benefits. At this point, there is no reason *ever* to use any system of exaction in *Koontz*-like situations, because general real property taxes will always dominate exactions in funding the creation of public goods. It is for just this reason that the costs of making general repairs to beach installations should appear on the public budget to which Koontz has to contribute his pro rata share based on the increased value of his property. But it is a mistake to use exactions as a form of off-budget financing to pay for general benefits from a single landowner or group of landowners

So if this analysis is correct, it is not necessary for Justice Alito to send this case back to the Florida courts with complex instructions to decide whether, and if so why, this exaction does, or does not, pass muster. The rule remains as before: nuisance prevention by appropriate means is fine, but cost shifting for generalized public benefits is not. There is no holdout problem to overcome so long as public funds raised by general taxes are used to secure public benefits.

On this model all the second-tier issues raised in *Koontz* turn out to be irrelevant. It is no longer relevant to ask whether the exaction attaches to the same parcel of land over which development rights are claimed. The Supreme Court constantly refers to an "essential nexus" between the exaction imposed and the benefit supplied, but the term is a major intellectual distraction because it is not meant to echo the principle of proportionality just mentioned.[24] Nor does it matter whether the exaction is in cash or in kind. It is, of course, possible that any onsite restriction may be a nuisance control device. But it is surely impossible for the remote improvements to squeeze in under that rubric, so the same nuisance prevention formula is easier

24. "In [*Nollan* and *Dolan*] we held that a unit of government may not condition the approval of a land-use permit on the owner's relinquishment of a portion of his property unless there is a 'nexus' and 'rough proportionality' between the government's demand and the effects of the proposed land use." *Koontz,* 133 S. Ct. at 2586.

to apply in the case of onsite requirements than in the case of offsite requirements. Indeed if the nuisance problems are insuperable, it is a good thing for this development *not* to take place.

Oddly enough, under the current law it takes some analysis to figure out how bargaining takes place under the two rules. Start with the artificial rule that states that the exaction must be tied to the land on which the development takes place. That rule limits the demands the water district can make. But it need not kill the deal because the district might rather have the development even if it cannot get all the financial assistance it desires for other projects. After all, the in-kind exaction releases funds for other purposes. But of course, it can always bluff and insist that unless more is coming, the permit will not be granted, at which point the landowner has to decide whether to hold firm or to pay additional consideration to get the job done.

Overall, my guess is that the broader rule would give the water district more scope to insist on offsite improvements at the initial stage and would probably result in a distribution of benefits that is more favorable to the water district than the landowner. But again the distribution of surplus is not the key question here. Rather, that question is whether or not the restrictions should be imposed in the first place, at which point the simple eminent domain approach dominates both these alternatives.

The first point is that there is no longer a bargaining game, only the usual disputes over just compensation for a partial restrictions. The second point is that the price requirement on the government will weed out ill-advised acquisitions. Why move for complexity when simplicity will work better? The fundamental point is that no sound system of governance gives any political party the unbounded level of discretion that is created under the current law, which combines an imperfect understanding of the exaction game with a flawed definition of private rights.

The state should not be able to avoid its own budget constraints by declaring a new set of rights for itself that it then conveniently sells back to private parties in unprincipled and costly negotiations. Just that happens when permits are bundled with improper conditions, which is why, as a matter of first principle, the process has to stop.

In closing, it is worth noting yet again that virtually all of the intellectual confusion derives from the usual progressive mindset that assumes that social welfare is improved by weakening property rights

and entrusting an ever larger set of issues to government agencies whose disinterested experts are said to reason their way to the correct social end. That model has failed everywhere else it is tried, most conspicuously in general administrative law. Yet usually those failures lead to efforts to double down on the administrative state with more restrictions and penalties. This is the path of destruction, and the only path that will succeed is one towards market liberalization in which the Takings Clause is returned to its original function. Seen from a broad perspective, the exaction problem is yet another iteration of a failed intellectual model that has always outperformed the traditional classical liberal model of governance that is encapsulated in the standard account of Takings Clause—take and pay.

BEYOND BLACKSTONE: THE MODERN EMERGENCE OF CUSTOMARY LAW

DAVID L. CALLIES* & IAN WESLEY-SMITH**

INTRODUCTION

Modern laws are normally enacted by a legislature or developed by a judiciary. However, there has been another traditional source of social order throughout history—customs, which are "popular, normative pattern[s] that reflect the common understandings of valid, compulsory rights and obligations."[1] Although such customs and customary rights have long been part of the law applicable to land, water, and resources connected thereto, the Supreme Court of the United States' decision in *Lucas v. South Carolina Coastal Council*[2] has elevated the importance of custom by naming it as a potential defense to categorical takings claims.

A customary—or customary law—most broadly defined, is a practice or right of use exercised by a discrete and identifiable group of people (a tribe or native peoples, for example) over a particular area of land for a very long time and is recognized for certain purposes in a local court or tribunal. In most countries, the customary law may be modified or abolished by statute, ordinance, or rule enacted by government, generally through a legislative act. Thereafter, the precise definition and scope of custom as law usually depends upon the nature and history of the nation in which customary rights are claimed or exercised.

This Article summarizes the modern emergence of customary law in the United States and internationally. It discusses two distinct forms of customary law, the first being custom, as recognized in English common law and discussed by Blackstone and the second being "native customs" that are exercised by indigenous peoples. Section II discusses Blackstone's definition of custom and the importance of

* FAICP Benjamin A. Kudo Professor of Law. BA, Depauw University; JD, University of Michigan; LL.M., Nottingham University, Life Member, Clare Hall, Cambridge University.

** Articles Editor, University of Hawai'i Law Review.

1. Peter Orebech & Fred Bosselman, *Sustainable Development and Customary Law, in* THE ROLE OF CUSTOMARY DEVELOPMENT IN SUSTAINABLE DEVELOPMENT 43, 60 (Cambridge Univ. Press 2005).

2. 505 U.S. 1003 (1992).

custom in real property as a source of law in derogation of so-called common law. Section III explores native custom, with emphasis on the State of Hawai'i, which constitutionally protects the "traditional and customary" rights of Native Hawaiians, and on select foreign jurisdictions in which custom, often exercised by or in favor of indigenous peoples, plays a strong role in the law relating to land, water, natural resources, and self-government. Section IV analyzes the significance of custom within the United States as a background principle of a state's law of property, which gives state and local government a safe haven from liability under the categorical or total regulatory taking rules set out by the Supreme Court of the United States in *Lucas*. As this Article will demonstrate, poorly defined customary law runs the risk of intruding onto fundamental property rights such as the right to exclude. Judicial adherence to some form of the Blackstonian criteria for good customs would significantly ameliorate such dangers.

I. ENGLISH CUSTOM

A. Background

The most common and universal definition of custom finds its roots in the writings of the English legal scholar William Blackstone. It is described in his legendary *Commentaries on Laws of England*, many editions of which were published shortly after the middle of the eighteenth century.[3]

Blackstone wrote his commentaries, at least in part, as a polemic in favor of the common law and to buttress it against anything that might serve to weaken it. It is in this context that his commentaries on custom must be read. Indeed, Blackstone recognized three forms of customary law: common law ("general custom") by which he presumably meant common law as we view it today, court (procedural) custom of particular tribunals or courts, and "particular customs" practiced by and affecting the inhabitants of a defined geographical area. It is this third, or "particular," custom that Blackstone took care to carefully define and delimit, arguably because he viewed it as a threat to the common-law tradition that he espoused and for which he argues in the *Commentaries*.

3. Although not to the extent of another similar doctrine, the public trust doctrine.

Blackstone set out seven criteria that a customary right or practice must meet if it is to be a "good" custom—that is, one which is enforceable against a common-law principle or tradition, say, of exclusive possession of private land (a situation in which many of the disputes over custom arose). But Blackstone did not draw these seven principles from the air. Although he cited comparatively few cases, he was declaring the law pretty much as it had developed by the middle of the eighteenth century and, indeed, as it continued to develop well into the nineteenth century. To be valid, to be enforceable, to result in a right of an individual despite common-law principles to the contrary, a custom had to be immemorial, continuous, peaceable, reasonable, certain, compulsory, and consistent. Even today, the law of custom is hedged around by requirements, most of which derive directly from Blackstone's seven criteria.

Thus, for example, a recent volume of Halsbury's Laws of England[4] describes the essential attributes of custom as follows:

> To be valid, a custom must have four essential attributes: (1) it must be immemorial, (2) it must be reasonable, (3) it must be certain in its terms and in respect both of the locality where it is alleged to obtain and of the persons whom it is alleged to effect, (4) it must have continued as a right and without interruption since its immemorial origin. These characteristics serve as a practical purpose as rules of evidence when the existence of a custom is to be established or refuted.[5]

Even so practical a source as a standard reference book of law for local government councilors has the following entry:

> *Custom*
>
> If a right is given to or an obligation imposed upon all the Queen's subjects, it must be established by authority of the general law. A local custom can therefore never be general and a customary claim in the name of the general public will fail. Similarly a custom must be capable of definition, and so the courts will not

4. 12(1) HALSBURY'S LAWS OF ENGLAND (1998).

5. *Id.* ¶ 606, at 160. This entire section on custom is a superb explanation of custom today, prepared by one of the preeminent scholars in legal history, Professor J.H. Baker, Fellow of St. Catharine's College, Cambridge.

> uphold a claim on behalf of a class whose membership cannot be ascertained.[6]

It is the seven rules or criteria applicable to particular custom (not common law, not special court rules, but land rights in derogation of common law particular to a particular and limited jurisdiction and exercised by a small and definite population) which courts have dealt with, and which still form the basis for English discussion and categorization of customary law.[7] These are:

> 1. Immemoriality
>
> That is have been used so long, that the memory of man runneth not to the contrary. So that if any one can shew the beginning of it, it is no good custom. For which reason no custom can prevail against an express act of parliament, since the statute itself is a proof of a time when such a custom did not exist.[8]

For centuries, "time out of memory" had a fixed, well-defined, and accepted meaning. The phrase is a common one in setting up a custom as a defense against what would otherwise be an unlawful act.

> 2. Continuity
>
> It must have been continued. Any implementation would cause a temporary ceasing: the revival gives it a new beginning, which will be within time of memory, and thereupon the custom will be void. But this must be understood with regard to an interruption of the *possession* only, for ten or twenty years, will not destroy the custom. As if I have a right of way by custom over another's field, the custom is not destroyed, though I do not pass over it for ten years; it only becomes more difficult to prove: but if the *right* be any how discontinued for a day, the custom is quite at an end.[9]
>
> 3. Peacefulness
>
> It must have been peaceable, and acquiesced in; not subject to contention and dispute. For as customs owe their original to

---

6. CHARLES ARNOLD-BAKER, LOCAL COUNCIL ADMINISTRATION 35 (Butterworths, 4th ed.1994).

7. *See* HALSBURY'S, *supra* note 4.

8. 1 WILLIAM BLACKSTONE, COMMENTARIES *76–77.

9. *Id.* at *77.

> common consent, their being immemorially disputed either at law or otherwise is a proof that such consent was wanting.[10]
>
> 4. Reasonableness
>
> Customs must be reasonable; or rather, taken negatively, they must not be unreasonable. Which is always, as Sir Edward Coke says, to be understood of every unlearned man's reason. but of artificial and legal reason, warranted by authority of a law. Upon which account a custom may be good, though the particular reason of it cannot be assigned; for it sufficeth, if no good legal reason can be assigned against it. Thus, a custom in a parish, that no man shall put his beasts into the common till the third of October, would be good; and yet it would be hard to shew the reason why that day in particular is fixed upon, rather than the day before or after. But a custom that no cattle shall be put in till the lord of the manor first put in his, is unreasonable, and therefore bad: for peradventure the lord will never put in his; and then the tenants will lose all their profits.[11]

The early twentieth-century cases of *Mercer v. Denne*,[12] upholding custom of the inhabitants of a parish (fishermen) to use a piece of land covered with shingle to spread and dry their nets as in favor of navigation, permitted the exercise of the custom to change with the times so long as the burden on the landowner was not unreasonable:

> The tanning, clutching or oiling of nets [new] belonging to fishermen tend to preserve the nets and make them useful for a longer period, and the subsequent drying of nets seems to me to fall within the reasons thus assigned for the custom. It is laid down by Holt, J. in City of London v. Vanacore[13] [a late seventeenth-century case] that "general customs may be extended to new things which are within the reason of those customs." There is not, in my opinion, evidence from which it ought to be inferred that the practice of tanning or cutching has arisen within the time of legal memory. But it was said that, so far as related to the drying after oiling, the use has extended over a period of from twenty-five to thirty-five years only, and, moreover, that this user was

10. *Id.*
11. *Id.*
12. 2 Ch. 534 (1904); 2 Ch. 538 (C.A.) (1905).
13. 12 Mod 270, 271 (1699).

> more burdensome than the old user for drying after tanning or cutching. I think, however, that the law as laid down by Lord St. Leonards in Dyce v. Hay cited by Farwell J., applies, and that those who are entitled to the benefit of a custom ought not to be deprived of that benefit simply because they take advantage of modern inventions or new operations *so long as they do not thereby throw an unreasonable burden on the landowner*.[14]

Again, "[i]t must not be forgotten that the persons claiming under the custom are bound to exercise their rights reasonably and with due regard to the interest of the owner of the soil."[15]

> 5. Certainty
>
> Customs ought to be *certain*. A custom, that lands shall descend to the most worthy of the owner's blood, is void; for how shall this worth be determined? But a custom to descend to the next male of the blood, exclusive of females, is certain, and therefore good. A custom, to pay two pence an acre in lieu of tithes, is good; but to pay sometimes two pence and sometimes three pence, as the occupier of the land pleases, is bad for its uncertainty. Yet a custom, to pay a years improved value for a fine on a copyhold estate, is good: though the value is a thing uncertain. For the value may at any time be ascertained; and the maxim of the law is, *id certum est, quod certum reddi potest*.[16]
>
> (a) Certainty of Practice
>
> (b) Certainty of Locale
>
> (c) Certainty of Persons
>
> 6. Compulsory
>
> Customs, though established by consent, must be (when established) compulsory; and not left to the option of every man, whether he will use them or not. Therefore a custom, that all the inhabitants shall be rated toward the maintenance of a bridge, will be good; but a custom, that every many is to contribute thereto

14. 2 Ch. 538, 581 (1905) (emphasis added).
15. *Id.* at 584 (1905).
16. 1 WILLIAM BLACKSTONE, COMMENTARIES *78.

> at his own pleasure, is idle and absurd; and, indeed, no custom at all.[17]

The concept that a custom must be compulsory in order for it to be good is for the most part self-evident; a law is not a law if it is not obligatory to the parties. This issue is rarely addressed separately because most of the cases on custom assume that a custom is compulsory.

> 7. Consistency
>
> Lastly, customs must be *consistent* with each other: one custom cannot be set up in opposition to another. For, if both are really customs, then both are of equal antiquity, and both established by mutual consent: which to say of contradictory customs is absurd. Therefore, if one man prescribes that by custom he has a right to have windows looking into another's garden; the other cannot claim a right by custom to stop up or obstruct those windows: for these two contradictory customs cannot both be good, nor both stand together. He ought rather to deny the existence of the former custom.[18]

As with the compulsory requirement, the criterion of consistency is largely self-evident and does not appear often in the cases on customary law.

These, then, are Blackstone's seven criteria for "good" customs, as interpreted by both contemporaries and later courts in England. Since customary rights in land are in derogation of common-law rights in land—particularly the fundamental right to exclude others—it makes sense for such customary rights to be limited in their exercise. Blackstone's criteria present such reasonable limitations. Moreover, most courts cite Blackstone as authority for their customary law. It is not altogether apparent that they understand it, however.

B. The Current State of Customary Law in the United Kingdom and the Republic of Ireland

It is clear that courts within the United Kingdom—as well as within other countries directly influenced by English common law,

17. *Id.* (emphasis added).
18. *Id.* (emphasis added).

such as the Republic of Ireland—continue to give customary practices the force of law when applicable.

In *Spread Trustee Company Ltd. v Sarah Ann Hutcheson & Others*,[19] the Court of Appeals of Guernsey considered the issue of whether managers of a trustee were permitted to include a clause in the trust instrument that excluded liability for gross negligence.[20] In 1989, Guernsey had passed a trusts law ("The Trust Statute"), amended in 1990, which had prohibited the exclusion of liability for gross negligence in trust instruments.[21] However, the gross negligence at issue had occurred in transactions prior to 1989, before the Trust Statute and amendment were passed.[22] Therefore, the court undertook to discover the law regarding the exclusion of liability for gross negligence in trust instruments in Guernsey prior to 1989. The court noted that there were no prior Guernsey statutes regarding trusts and no court cases on point.[23] It therefore looked to Guernsey customary law.[24]

Both parties attempted to introduce favorable evidence about Guernsey customary law.[25] The court, after reviewing the common law of Guernsey, found that there was no reliable evidence on the customary law. It considered a letter that the Guernsey Finance Committee sent to the Guernsey President, which noted uncertainty regarding the law of trusts in Guernsey and stated that the Trust Statute was intended to replace Guernsey customary law on the subject.[26] The court concluded that the best evidence of Guernsey customary law on trusts prior to 1989 was the text of the Statute that replaced the customary law.[27] Accordingly, the court held that prior to the enactment of the Trust Statute, Guernsey customary law contained the same prohibition against including a term in the trust instrument that excluded liability for gross negligence.[28]

---

19. Spread Tr. Co. Ltd v. Hutcheson, [2011] UKPC 13 (Guernsey). Official Press Summary available at http://www.bailii.org/uk/cases/UKPC/2011/13.(image1).pdf.

20. *Id.* at [4].

21. *Id.* at [2].

22. *Id.* at [4].

23. *Id.* at [12].

24. *Id.* at [13]–[16].

25. *Id.*

26. *Id.* at [15].

27. *Id.* at [37].

28. *Id.*

Crown Estate Commissioners v. Roberts & Anor[29] provides another example of the contemporary use of customary law by courts within the United Kingdom. In 2002, the Pembrokeshire County Council applied to the Crown Estates Commissioners in order to register leasehold titles to a large part of the foreshore of the Pembrokeshire coastline, operating under the assumption that the foreshore and sea in the area belonged to the Crown.[30] Mr. Roberts, as successor in title to the Bishop of St. Davids, alleged that he had estate over the area as a result of a charter of 1115 AD.[31] In addition, Mr. Roberts argued that he had rights to the area as a result of ancient usage.[32] Mr. Roberts claimed the rights to the following: sea wrecks, wharfage, sporting, a private fishery, treasure trove, profits, estrays, and other rights.[33] The England and Wales High Court, Chancery Division, decided the case.

In assessing most of the rights, the court looked to the charter and other subsequent treaties and legislative acts.[34] However, the court considered Welsh customary law antedating the Norman conquest in evaluating Mr. Robert's asserted fishing, treasure trove, and estray rights. The court noted that Welsh customary laws survived in a collection of manuscripts known as the Hywel Dda.[35] The charter granting the land to the Bishop of St. Davids in 1115 AD had granted "any existing customary rights" to the Bishops. Mr. Roberts argued that existing customary rights granted by the charter included exclusive fishing rights to the sea.[36] After considering evidence of Welsh customary law, the court determined that ancient Welsh princes did not assert a right to a private ocean fishery, which meant that the Bishop of St. Davids, and by extension Mr. Roberts, possessed no such right.[37] In considering a customary right to treasure trove, the court found that customary law, in keeping with modern law, granted the right to treasure to the Crown.[38] However, the court did mention in

29. Crown Estate Comm'ners v. Roberts & Anor, [2008] EWHC 1302 (Ch), *available at* http://www.bailii.org/ew/cases/EWHC/Ch/2008/1302.html.

30. *Id.* at [3].

31. *Id.* at [4].

32. *Id.*

33. *Id.* at [5].

34. *Id.* at [39].

35. *Id.* at [85].

36. *Id.* at [84].

37. *Id.* at [90], [115].

38. *Id.* at [129].

dicta that it was willing to accept that Mr. Roberts had a customary right to estrays.[39]

Similarly, the Republic of Ireland continues to adhere to the common law tradition of recognizing customs as law. In *Walsh & Anor v. Sligo County Council*,[40] the High Court of Ireland considered a case in which the plaintiff bought an enormous property that included popular access paths. The plaintiff installed a gate across the paths, thus blocking out the general public, and filed suit seeking a declaration that no public right of way existed over his property.[41] In its counterclaim, the County Council argued that the plaintiff's predecessor in interest dedicated the paths to the public. However, in the alternative, the Council argued that the public had customary rights through long usage to pass over the property.[42] Although the court noted that the onus was on the defendants to prove the existence of any customary right,[43] it did not reach the issue of custom because it held that the path had been acquired by prescription.[44]

However, as noted in the introduction, the United Kingdom's legislature retains the power to alter or abolish a custom. For example, the United Kingdom has enacted statutes to regulate town and village greens ("TVGs"), an area traditionally governed by custom. According to the common law, TVGs were theoretically established by customary recreational usage since time immemorial.[45]

In 1965, the legislature enacted the Commons Registration Act, which brought TVGs under statutory protection.[46] Section 22(1) of the Commons Registration Act of 1965 contained a definition of a TVG as land "on which the inhabitants of any locality have a customary right to indulge in lawful sports or pastimes."[47] Despite this recognition, the Commons Registration Act explicitly ended the traditional

39. *Id.* at [92].

40. Walsh & Anor v. Sligo Cnty. Council [2010] IEHC 437 (Ire.), *available at* http://www.bailii.org/ie/cases/IEHC/2010/H437.html.

41. *Id.* at [6].

42. *Id.* at [7].

43. *Id.* at [31].

44. *Id.* at [299].

45. Oxfordshire CC v. Oxford City Council [2006] 2 WLR 1235 (Eng.) (describing the traditional legal status of a village green as an area "that by immemorial custom the inhabitants of the town, village, or parish should have acquired the right of playing lawful games thereon and enjoying it for purposes of recreation").

46. R v. Oxfordshire Cnty. Council *ex parte* Sunningwell Parish Council, [2000] 1 AC 335 (H.L.).

47. *Id.*

role of custom in the establishment of TVGs. Instead, the Commons Registration Act brought the creation of TVGs into a state regulatory framework by mandating that TVGs would not be legally recognized unless registered by a certain deadline.[48]

The Commons Act of 2006, which replaced the Commons Registration Act, was enacted by the legislature to "modernize the law on commons and town and village greens."[49] The Commons Act made, among other things, procedural changes to the process of registering TVGs established by prescription.[50] The Act did nothing to reintroduce the role of customary law in the establishment of TVGs and thus solidified the fact that statutory law exclusively governs TVGs.[51]

II. NATIVE CUSTOM

Fred Bosselman and Peter Orebech have argued that "[c]ustomary law exists whenever people act as if they were legally bound to accept customary rules . . . [and that no] endorsement by any legislative, judicial, or administrative body is needed to create customary law if people accept rules as the law."[52] In this sense, "native customary law" can be loosely defined as the complex networks of customs that ordered behavior, defined social norms, structured economics and politics, and regulated natural resources in many indigenous societies. In much of the world, colonization by Europeans replaced indigenous systems of customary law with Western-style positivistic law. However, many native groups continue to structure their lives and identities around traditional customary law, and some have begun to strive for formal legal recognition of that fact. The following selected case studies, from within the United States and abroad, explore the complexities that result when native customary law is resurrected in nations that are governed by modern common law and statutory frameworks.

---

48. *Id.* (explaining that the under the section 2(2) of the Act, "no land capable of being registered under the Act was to be deemed to be common land or a town or village green unless so registered . . . mean[ing] that unless they were registered within the prescribed time-limit, they could not be registered as such thereafter").

49. Alec Samuels, *The Commons Act 2006,* J. PLANNING & ENVTL L. 1652, 1652 (2006).

50. *Id.*

51. *Id.*

52. Fred Bosselman & Peter Orebech, *Conclusion: Customary Law in a Globalizing Culture*, *in* THE ROLE OF CUSTOMARY DEVELOPMENT IN SUSTAINABLE DEVELOPMENT 445, 445 (Cambridge Univ. Press 2005).

A. Hawai'i

Customary law in Hawai'i represents a harder and certainly more sweeping situation than is the case with the English custom discussed above. Hawai'i presents more difficulty because there is no question that some tradition of customary rights exists from the days of the various kingdoms, rights that include gathering, access, and religious customary practices. This tradition predates not only statehood but also territorial days and annexation towards the end of the nineteenth century. The size of applicable territory is usually broader and the class far larger than Blackstonian custom would tolerate, although, again, long-standing—if not ancient—practice is usually a prerequisite, and formal governmental action to the contrary generally takes precedence.

As explained in *A Treatise on Native Hawaiian Law*, "[a]n important foundation of law in Hawaii is the doctrine of custom."[53] Until the establishment of the Western-style kingdom of Hawai'i in 1839, Native Hawaiians lived in a traditionally organized society governed entirely by "ancient Hawaiian custom and usage."[54] Access rights from the mountains to the sea and along the coastline,[55] as well as religious, cultural, and subsistence-gathering practices, were important customs that sustained native tenants.[56] Even as Western influence radically transformed Native Hawaiian society, many traditional customary rights were codified in the first constitution and statutory compilations of the Kingdom of Hawai'i from 1839 to 1842.[57] Moreover, between 1845 and 1855, laws recognizing the customary rights of native tenants "were an integral part of the transformation of Hawaii's ancient communal land tenure system to a modern property regime incorporating Western concepts of private property rights. . . ."[58] Accordingly, although modern property law in Hawai'i is primarily based on Western common law, it also incorporates Hawaiian custom and usage.[59]

---

53. Susan K. Serrano & David M. Forman, *Traditional and Customary Access and Gathering Rights*, *in* A TREATISE ON NATIVE HAWAIIAN LAW *17 (MacKenzie, Serrano & Sproat, eds., Univ. of Hawai'i Press & Kamehameha Publishing, 2014).

54. *Id.* at *2.

55. *See id.* at *3.

56. *Id.*

57. *Id.* at *7–11.

58. *Id.* at *11.

59. *Id.* at *15.

Over the last thirty years, the Hawai'i Supreme Court has interpreted the state constitution and several state statutes to confer distinct legal status on Native Hawaiian customary practices, often to the detriment of Western-style absolute property rights. The court has recognized a specific right for Hawaiians to practice customary subsistence gathering of certain items,[60] as well as a broader right to exercise traditional and customary rights on undeveloped private property.[61]

1. Modern Legal Bases of Native Hawaiian Customary Rights

a. Section 7-1

In 1850, the Kingdom of Hawai'i enacted the Kuleana Act, which provided that Native Hawaiian tenants could acquire fee simple ownership over lands that they traditionally cultivated.[62] In order to ensure that native tenants could use their new lands sustainably, section 7 of the Kuleana Act granted such tenants the right to gather enumerated items such as firewood and house-building supplies from elsewhere within the *ahupua'a*[63] of his or her residence.[64] Section 7 is the sole provision of the Kuleana Act that remains in force in the modern statutory scheme, now codified as Haw. Rev. Stat. section 7-1.[65]

In the 1982 case of *Kalipi v. Hawaiian Trust Co.*,[66] the Hawai'i Supreme Court held that gathering rights could be exercised pursuant to section 7-1 if three conditions were satisfied. As explained by *A Treatise on Native Hawaiian Law*, the three conditions are as follows: (1) the tenant must physically reside within the ahupua'a from which the item is being gathered, (2) the right to gather can only be exercised on undeveloped lands within the ahupua'a, and (3) the right must be exercised for the purpose of practicing Native Hawaiian traditions and customs.[67] Section 7-1 is limited in scope; it only authorizes

60. *See infra* notes 61–64 and accompanying text.

61. *See infra* notes 66–85 and accompanying text.

62. *See* Serrano & Forman, *supra* note 53, at *17 n.72.

63. An ahupua'a is a traditional designation of land in Hawai'i, which usually runs from a mountain valley to the adjacent ocean.

64. *Id.* at *19.

65. *Id.* at *18–19.

66. 656 P.2d 745 (Haw. 1982).

67. *See id.* at 749–50; *see also* Serrano & Forman, *supra* note 53, at *24.

Native Hawaiian practitioners to gather the items enumerated within the statute and only within the ahupua'a of their residence.[68] Accordingly, it could be better characterized as a statutory provision protecting a few narrowly defined customary rights than as one establishing custom as an independent source of law.

b. Section 1-1

Section 1-1 of Hawai'i Revised Statutes offers a broader legal foundation for Native Hawaiian customary rights. Enacted in 1892, it adopts English common law as the law of Hawai'i, except as "otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or *established by Hawaiian Usage*."[69] Although section 1-1 does "not directly relate to traditional or customary gathering rights[,]"[70] it does explicitly codify customary Hawaiian usage as a source of law.[71] Accordingly, in recent years the Hawai'i Supreme Court has cited to it as the basis for extending formal legal status to customary gathering rights.[72]

In *Kalipi v. Hawaiian Trust Co*.,[73] the court interpreted Haw. Rev. Stat. section 1-1 broadly, holding that it "may be used as a vehicle for the continued existence of those customary rights which continue to be practiced and which worked no actual harm upon the recognized interests of others."[74] Whether a Hawaiian tradition would be legally recognized as a Hawaiian usage under section 1-1 depended on a case-by-case analysis into the practice of the custom in the particular area and a balancing of the "respective interests and harm. . . ."[75] If a Hawaiian usage had, "without harm to anyone, been continued . . . [section] 1-1 insure[d] [its] continuance for as long as no actual harm [was] done thereby."[76] However, the court found that the plaintiff,

68. *See* Serrano & Forman, *supra* note 53, at *34.
69. HAW. REV. STAT. § 1-1 (2013) (emphasis added).
70. *See* Serrano & Forman, *supra* note 53, at *17.
71. *Id.* at *18.
72. *Id.* at *17.
73. 656 P.2d 745 (Haw. 1982).
74. *See id.* at 751–52; *see also* Serrano & Forman, *supra* note 53, at *18.
75. *See* Kalipi v. Hawaiian Trust Co., 656 P.2d 745, 751–52 (Haw. 1982); *see also* Serrano & Forman, *supra* note 53, at *18.
76. *See Kalipi*, 656 P.2d at 751; *see also* Serrano & Forman, *supra* note 53, at *26.

Kalipi, could not take advantage of the section 1-1 because there was insufficient evidence to find that the traditional gathering rights that he asserted extended beyond the ahupua'a in which he lived.

In *Pele Defense Fund v. Paty*,[77] the court expanded the scope of Haw. Rev. Stat. section 1-1 by finding that customary and traditional gathering rights "may extend beyond the ahupua'a in which the Native Hawaiian practitioner resides. . . ."[78] The court held that gathering rights could be exercised for subsistence, cultural, or religious purposes outside of the practitioner's ahupua'a as long as "such rights have been customarily and traditionally exercised in [that] manner."[79] *Pele Defense Fund* was expressly reaffirmed in *Public Access Shoreline Hawaii v. Hawaii County Planning Commission ("PASH")*,[80] in which the court held that customary rights exercised pursuant to Haw. Rev. Stat. section 1-1 went beyond the "tenant's" gathering rights enumerated in Haw. Rev. Stat. section 7-1 and were "dependent on the particular circumstances of the case."[81] The court clarified that section 1-1 "represents the codification of custom as it applies [in Hawai'i]" and concluded that such custom renders the "western concept of exclusivity . . . not universally applicable" within the state.[82]

c. Article XII, Section 7 of the Hawai'i Constitution

Finally, traditional and customary rights are protected under Article XII, section 7 of the state constitution of 1978.[83] Article XII, section 7 was intended as a provision encompassing and reaffirming "all rights of native Hawaiian's such as access and gathering" but was not intended to "remove or eliminate any statutorily recognized rights . . . of native Hawaiians. . . ."[84] Importantly, the Hawai'i Supreme Court has held that section 7 imposes a constitutional

77. 837 P.2d 1247 (Haw. 1992), *cert. denied*, 507 U.S. 918 (1993).

78. *See* Serrano & Forman, *supra* note 53, at *26.

79. Pele Def. Fund v. Paty, 837 P.2d 1247, 1272 (Haw. 1992), *cert. denied*, 507 U.S. 918 (1993); *see also* Serrano & Forman, *supra* note 53, at *27.

80. 903 P.2d 1246 (Haw. 1995).

81. *See* Serrano & Forman, *supra* note 53, at *29 (citing Pub. Access Shoreline Hawaii v. Hawaii Cnty. Planning Comm'n, 903 P.2d 1246 (Haw. 1995)).

82. *Id.* at *29 (quoting *Pub. Access Shoreline Hawaii*, 903 P.2d at 1268).

83. *See* Serrano & Forman, *supra* note 53, at *16.

84. *Id.*

obligation on the state judiciary to preserve and enforce Hawaiian traditional rights.[85] The effect of this constitutional mandate is that "any argument for extinguishment of traditional rights based simply upon possible inconsistency . . . with our modern system of land tenure must fail."[86]

Courts have often invoked Article XII section 7 in conjunction with Haw. Rev. Stat. section 1-1. Thus, the court in *Pele Defense Fund* held that traditional and customary rights practiced for subsistence, cultural, and religious purposes on undeveloped lands were not only authorized by section 1-1 of the Hawai'i Revised Statutes but also protected by the constitution.[87] Similarly, in *PASH*, the court clarified that this constitutional obligation extended to protecting customary rights generally, beyond those "normally associated with tenancy in an ahupua'a."[88]

2. The Substance of Hawaiian Customary Gathering Rights—a Defense to Trespass

In sum, Native Hawaiian customary gathering practices have formal legal status in Hawai'i. Section 7-1 provides statutory authority for the continuance of certain customary gathering practices, although its scope is limited. Section 1-1 provides that Native Hawaiian customs and usage are a legitimate source of law in Hawai'i. Courts have interpreted section 1-1 to offer broader protection for the exercise of traditional rights beyond those enumerated in section 7-1. Finally, Article XII, section 7 of the Hawai'i Constitution obligates the state to protect "legitimate customary and traditional practices . . . to the extent feasible. . . ."[89]

The most striking effect of the Hawai'i Supreme Court's recognition of customary rights is on the property rights of landowners within the state. Because "Hawaii property law protects the exercise of traditional and customary rights and the concomitant limitation of the

85. *See* Kalipi v. Hawaiian Trust Co., 656 P.2d 745, 748 (Haw. 1982); *see also* Serrano & Forman, *supra* note 53, at *26.

86. *See Kalipi,* 656 P.2d at 748; *see also* Serrano & Forman, *supra* note 53, at *34.

87. *See* Pele Def. Fund v. Paty, 837 P.2d 1247, 1272 (Haw. 1992), *cert. denied*, 507 U.S. 918 (1993); *see also* Serrano & Forman, *supra* note 53, at *27.

88. *See* Pub. Access Shoreline Hawaii v. Hawaii Cnty. Planning Comm'n, 903 P.2d 1246, 1269 (Haw. 1995); *see also* Serrano & Forman, *supra* note 53, at *29.

89. *See Pub. Access Shoreline Hawaii*, 903 P.2d at 1272; *see also* Serrano & Forman, *supra* note 53, at *34.

owner's right of exclusion[,] . . . the owner of land in Hawaii acquires title that is uniquely subject to the rights of native tenants."[90] The custom-imposed limitation on the owner's right of exclusion is best exemplified by the fact that the Hawai'i Supreme Court has recognized that Native Hawaiian gathering rights can be asserted as a defense to trespass.

In the 1998 criminal case of *State v. Hanapi*,[91] the state charged Hanapi, a Native Hawaiian, with trespass after he repeatedly entered a neighbor's private property.[92] Hanapi, appearing *pro se*, asserted Native Hawaiian customary rights as a defense, arguing that he entered the property in order to "perform religious and traditional ceremonies to heal the land" following the neighbor's grading and filling of an area near two traditional fishponds.[93] Although the Hawai'i Supreme Court convicted Hanapi of trespass, it nonetheless recognized the viability of the customary rights defense. The court identified three elements that a defendant must meet to render a trespass constitutionally protected as a Native Hawaiian right.[94]

First, the defendant must qualify as a Native Hawaiian.[95] In *PASH*, the Supreme Court defined a Native Hawaiian as a descendant of Native Hawaiians who inhabited the islands prior to 1778, rejecting a definition based on blood quantum.[96] The *PASH* opinion did not reach the issue of whether non-Hawaiian family members of Native Hawaiians would qualify.[97]

Second, the defendant "must establish that his or her claimed right is constitutionally protected as a customary or traditional native Hawaiian practice. . . ."[98] The Supreme Court of Hawai'i has determined that a custom must have been established in practice by November 25, 1892.[99] In *Hanapi*, the court held that the custom or usage could be proven by *Kama'aina* witness testimony.[100]

---

90. *See id.* at *15.

91. 970 P.2d 485 (Haw 1998).

92. *See id.* at 492; *see also* Serrano & Forman, *supra* note 53, at *36.

93. *See* State v. Hanapi, 970 P.2d 485, 486, 488–89 (Haw. 1998)*; see also* Serrano & Forman, *supra* note 53, at *36.

94. *See Hanapi*, 970 P.2d at 493–94; *see also* Serrano & Forman, *supra* note 53, at *37.

95. *See* Serrano & Forman, *supra* note 53, at *37.

96. Pub. Access Shoreline Hawaii v. Hawaii Cnty. Planning Comm'n, 903 P.2d 1246, 1270 (Haw. 1995).

97. *See* Serrano & Forman, *supra* note 53, at *37.

98. *Id.* at *37–38 (quoting *Hanapi*, 970 P.2d at 494–95).

99. *Pub. Access Shoreline Hawaii*, 903 P.2d at 1272.

100. *Hanapi*, 970 P.2d at 494–95.

Finally, the defendant must prove that the right was exercised on undeveloped land. . . .[101] In *PASH*, the court explained that customary rights may be exercised on land that is undeveloped or "less than fully developed."[102] However, courts have not yet pinpointed the precise point in the development process at which land becomes "fully developed."[103]

More recently, in *State v. Pratt*,[104] the Hawai'i Intermediate Court of Appeals held that the three *Hanapi* elements are merely "the minimum a defendant has to show in support of a claim that his or her conduct was constitutionally protected [against trespass] as a native Hawaiian right."[105] The Supreme Court of Hawai'i affirmed and held that once the Hanapi elements are met, the court must apply a "totality of the circumstances test" to balance the competing interests of the practitioner and the state.[106]

3. Consistency with Blackstonian Custom

Custom has been "incorporated into Hawaii's statutory framework for over a century."[107] The *Kalipi* court, in holding that Haw. Rev. Stat. section 1-1 codified the Hawaiian usage exception to the common law, analogized to the English doctrine of custom, although it recognized that "[not] all the requisite elements of the doctrine of custom were necessarily incorporated. . . ."[108] More recently, *A Treatise on Native Hawaiian Law* has further explored the relationship between classic Blackstonian custom and customary law in Hawai'i.[109] The authors of that Treatise analyzed the Supreme Court of Hawai'i's opinion in *PASH* and discerned seven elements of Hawaiian customary law to

101. *See* Serrano & Forman, *supra* note 53, at *38 (citing *Hanapi*, 970 P.2d at 494–95).

102. *See Pub. Access Shoreline Hawaii*, 903 P.2d at 1272; *see also* Serrano & Forman, *supra* note 53, at *18.

103. *See Pub. Access Shoreline Hawaii*, 903 P.2d at 1272; *see also* Serrano & Forman, *supra* note 53, at *18.

104. 124 Haw. 329 (Ct. App. 2010).

105. *Id.* at 355.

106. State v. Pratt, 277 P.3d 300 (Haw. 2012).

107. *See* Serrano & Forman, *supra* note 53, at *18.

108. *See* Kalipi v. Hawaiian Trust Co., 656 P.2d 745, 750–51 (Haw. 1982); *see also* Serrano & Forman, *supra* note 53, at *25.

109. *See* Serrano & Forman, *supra* note 53, at *30–31.

be contrasted with the seven elements of Blackstonian custom. The seven elements of Native Hawaiian usage are as follows:

(1)"The date by which Hawaiian usage must have been established is fixed at November 25, 1892, rather than . . . time immemorial."[110]
(2)"The right of each ahupua'a tenant to exercise traditional and customary practices remains intact, notwithstanding arguable abandonment of a particular site . . . continuous exercise [of the right] is not required: the custom is not destroyed . . . it only becomes more difficult to prove."[111]
(3)The PASH court found that, at least in the context of Haw. Rev. Stat. section 7-1, there is no requirement that the practice be peaceable and free from dispute.[112]
(4)"[R]easonableness concerns the manner in which an otherwise valid customary right is exercised—in other words, even if an acceptable rationale cannot be assigned, the custom is still recognized as long as there is no good legal reason against it."[113]
(5)"[A] particular custom is certain if it is objectively defined and applied. . . ."[114]
(6)In Hawaii a usage need not necessarily be compulsory, because "[t]he state has the authority under article XII, section 7 of the Hawai'i Constitution to reconcile competing interests . . . once land has reached the point of 'full development' it may be inconsistent to allow or enforce the practice of traditional Hawaiian gathering rights . . . [however,] the State does not have unfettered discretion to regulate these rights . . . out of existence."[115]
(7)"Consistency is properly measured against other customs, not the spirit of present laws. . . ."[116]

---

110. *Id.* at *30 (discussing Pub. Access Shoreline Hawaii v. Hawaii Cnty. Planning Comm'n, 903 P.2d 1246, 1272 (Haw. 1995)).
111. *Id.* (quoting *Pub. Access Shoreline Hawaii*, 903 P.2d at 1262 n.26, 1272).
112. *Id.* at 31 (discussing *Pub. Access Shoreline Hawaii*, 903 P.2d at 1267).
113. *Id.* (quoting *Pub. Access Shoreline Hawaii*, 903 P.2d at 1268 n.39).
114. *Id.*
115. *Id.* (quoting *Pub. Access Shoreline Hawaii*, 903 P.2d at 1262 n.26, 1272).
116. *Id.* (quoting *Pub. Access Shoreline Hawaii*, 903 P.2d at 1268 n.39).

Notwithstanding the unquestionable legal and historical basis for some Native Hawaiian customary rights, these seven elements of Hawaiian usage clearly exceed the traditional bounds of Blackstonian custom. For example, the defined class and applicable territory of Native Hawaiian rights are both much broader than would be the case with customary rights as defined by Blackstone. However, there is some overlap as well; Native Hawaiian practices must be long standing and are subject to some reasonable government regulation.

Hawai'i is far from the only area experiencing a resurgence of native customary law. The following case studies demonstrate that the re-emergence of customary law is truly a worldwide phenomenon. Customary law in Norway and Greenland were thoroughly analyzed in the *Role of Customary Law in Sustainable Development*, which traces the history of customary law, assesses the continued viability of custom as a source of law in contemporary societies, and argues that customary law may play a valuable role in sustainable development. The following sections build off of that book by providing updates on the status of customary law in both Norway and Greenland and also introduce studies into the role of native customary law in South Africa and New Zealand.

B. Norway

1. Customary Law in Norway—Generally

Norwegian courts generally recognize local customs as law if the usage meets the general prerequisites of (1) longevity, (2) non-interruption, (3) freedom from dispute, and (4) reasonableness.[117] *The Resurrection of Customary Laws*, by Peter Orebech, provides a current and comprehensive analysis of recent applications of general customary law in Norway.[118] Additionally, the customary laws of the indigenous population of northern Norway, the Saami, have also received some recognition in recent years.

For example, in 2005, the Norwegian government enacted the Finnmark Act, which transferred ownership of 95% of the land of the

117. Peter Orebech, *How Custom Becomes Law in Norway*, *in* THE ROLE OF CUSTOMARY DEVELOPMENT IN SUSTAINABLE DEVELOPMENT 224, 240 (Cambridge Univ. Press 2005).

118. Peter Orebech, *Western Scandinavia: The Resurrection of Customary Laws,* 48 TEX. INT'L L.J. 405 (2013).

northern district of Finnmark from the state to a new legal entity called the Finnmark Estate.[119] Section Five of the Finnmark Act recognizes the customary basis for this transfer by stating "through prolonged use of land and water areas, the Sámi have collectively and individually acquired rights to land in Finnmark."[120] Similarly, Saami reindeer pastoral rights were affirmed by a 2001 court case on the basis of "immemorial usage."[121] Despite these and other successes, indigenous groups seeking to have their traditions recognized as law generally face an uphill battle, as the following case study of Saami fishing rights demonstrates.

2. Saami Fishing Rights as Customary Law

The indigenous coastal Saami of the northern district of Finnmark have traditionally practiced "open access" to the fisheries of that area.[122] In modern times, many Saami fishermen would like to have their tradition of open access to fisheries recognized as customary law[123] in order to overturn conservation quotas imposed in 1992.[124] Peter Orebech argues that the Saami practice of open access fishing can achieve the status of customary law based on the uniformity of fishing practices within the geographic region.[125] Moreover, he argues that the local fishing practices in Finnmark meet the formal Norwegian prerequisites for recognition as customary law.[126]

---

119. *See* Øyvind Ravna, *Sami Rights and Sami Law in Norway*, *in* THE POLAR LAW TEXTBOOK II 269–89, 288 (Natalia Loukacheva ed. 2013).

120. *Id.* at 276.

121. *Id.* at 280 (discussing the *Selbu* case).

122. David Callies, Peter Orebech & Hanne Petersen, *Case Studies: Hawaii, Norway and Greenland*, *in* THE ROLE OF CUSTOMARY DEVELOPMENT IN SUSTAINABLE DEVELOPMENT 43, 60 (Cambridge Univ. Press 2005). Under the open access doctrine, all local fishermen were afforded equal access to ocean resources. *Id.*

123. *Id.* at 57.

124. *Id.* The Saami feel that the fishing quotas exclude local small-scale fishermen in favor of large-scale commercial fishing, while the national government favors fishing quotas in order to protect dwindling fish populations. *Id.* at 58.

125. *See* Callies et al., *supra* note 122, at 60.

126. (1) The longevity requirement is met because the open access approach to fisheries can be proven to be at least over one hundred years old, (2) the non-interruption requirement is met because the fishermen of Finnmark repeatedly confirm steadfast joint usage and have engaged in open access practice annually without interruption, (3) the peaceable and free from dispute requirement is met because local fishermen who were interviewed universally regarded the ocean as open access, and (4) the reasonableness requirement is met because the practice would

However, Norwegian courts have yet to recognize the Saami tradition of open access to fisheries as customary law—in fact, there has been no notable jurisprudence on the subject.[127] Moreover, the Norwegian government has legislatively rejected the idea of special Saami rights to the fisheries of Finnmark.[128] In 2006, the Norwegian government appointed a joint Saami-Norwegian Coastal Fishing Commission ("The Commission") to investigate the marine fisheries rights of the Saami and other residents of Finnmark.[129] In 2008, the Commission unanimously drafted and proposed the Finnmark Fishery Act, which stated that all inhabitants of the geographic area of Finnmark, regardless of ethnicity, had equal rights to utilize the fisheries as well as priority over non-residents.[130] Interestingly, section thirteen of the Finnmark Fishery Act contained a reservation stating that it did not infringe upon existing individual or collective property rights to the sea established by custom or usage.[131]

However, the Norwegian government declined to enact the Finnmark Fishery Act.[132] In 2009, the Fisheries Minister spurned the central conclusion of the Commission by denying the existence of special fishing rights for the people of Finnmark.[133] In 2012, the Norwegian Parliament officially struck down the proposed Act by a vote of 106 to 34.[134] The government agreed to implement modest measures protecting Saami access to maritime resources but, unlike the Commission, rejected the idea of general customary rights to the fisheries.[135]

---

give fishing a stable and predictable framework. David Callies, Peter Orebech & Hanne Petersen, *The Case Studies Revisited*, *in* THE ROLE OF CUSTOMARY DEVELOPMENT IN SUSTAINABLE DEVELOPMENT 411, 417–20 (Cambridge Univ. Press 2005).

127. U.N. Econ. & Soc. Council, Permanent Forum on Indigenous Issues, *Report on Indigenous Fishing Rights in the Seas with Case Studies from Australia and Norway* 18 (2010), *available at* http://www.un.org/esa/socdev/unpfii/documents/E.C.19.2010.2EN.pdf.

128. *See supra*, note 127 and *infra* notes 129–30 and accompanying text.

129. Svein Jentoft, *Governing Tenure in Norwegian and Sami Small-Scale Fisheries: From Common Pool to Common Property?*, 1 LAND TENURE JOURNAL 91, 100 (2013), *available at* http://www.fao.org/nr/tenure/land-tenure-journal/index.php/LTJ/article/viewArticle/75.

130. *Id.* at 101–2. The right of the people of Finnmark to use such fisheries was "based on historical use and the rules of international law on indigenous peoples" as well as on a constitutional duty to protect Saami culture. *See Report on Indigenous Fishing Rights*, *supra* note 127.

131. Camilla Brattland, *Mapping Rights in Coastal Sami Seascapes*, 1 ARCTIC REV. ON LAW AND POL. 28, 35 (2010).

132. *See Report on Indigenous Fishing Rights*, *supra* note 127.

133. *See* Svein Jentoft, *supra* note 129, at 104.

134. *See id.* at 113.

135. *See id.* at 103–04.

The fate of customary law as a means of regulating Norwegian fisheries is uncertain. The Norwegian government, like most governments, would clearly rather approach Finnmark fisheries law from within the framework of state legislation and management than create room for customary law.[136] Even the Commission, which advocated for recognition of the traditional rights of local Finnmark fishermen, only discussed custom as a source of legal rights in one paragraph of the sixteen-part proposed Act.[137] Similarly, under the proposed Act, those claiming private or collective rights to fishing grounds were to direct claims to the Finnmark Commission[138] rather than to a court.[139] In sum, the Saami tradition of open access does not appear likely to achieve political recognition as customary law as long as the government continues to approach the issue through a state regulatory framework. Meanwhile, the role of Saami customary law in Norwegian courts remains undeveloped.[140]

Some Saami continue to work towards securing recognition of traditional fishing rights through the political process.[141] Others feel that the Norwegian courts should recognize fishing rights as customary law,[142] as advocated for by Peter Orebech.[143] Alternatively, the *UN International Labour Organization and Tribal Peoples Convention No. 169* and the *UN Declaration of the Rights of Indigenous Peoples* may provide an international law basis for recognition of customary fishing rights.[144]

---

136. *See* Svein Jentoft, *supra* note 129, at 110.

137. The Commission was pushing towards a "regionalized, co-management model" of fisheries governance. *See* Svein Jentoft, *supra* note 129, at 108.

138. The Finnmark Commission is a government entity established in 1995 to resolve Saami land rights issues. *See* Camilla Brattland, *supra* note 131, at 35.

139. *Id.*

140. "To date, the use of Sámi customary law as a source of law in the courts is still in its initial phase. It therefore remains difficult to draw robust conclusions on its ultimate legal significance. Thus far, case law points to the fact that Sámi law has faced significant problems in working harmoniously with Norwegian law." *See* Øyvind Ravna, *supra* note 119, at 288.

141. *See* Svein Jentoft, *supra* note 129, at 105.

142. *See* Svein Jentoft, *supra* note 129, at 106.

143. *See supra,* notes 126–27 and accompanying text.

144. Norway is a party to ILO Convention No. 169. *See Report on Indigenous Fishing Rights*, *supra* note 127. According to ILO Convention No. 169, Saami customs should have greater weight than Norwegian law in Saami rights questions. *See* Camilla Brattland, *supra* note 131, at 48. Despite international pressure to "finalize the process of clarifying Sami land and resource rights[,]" the Norwegian government regards its commitments as sufficiently fulfilled by the measures agreed to in 2011. *See* Svein Jentoft, *supra* note 129, at 110.

C. New Zealand

1. Background

On the other side of the world—in a situation somewhat similar to that of the Saami—the indigenous Maori of New Zealand are also fighting for recognition of their customary laws. Tikanga Maori, or the Maori system of customary laws,[145] is comprised of oral traditions, rituals, and practices rather than codified statutes.[146] Tikanga Maori is rooted in core values that define right from wrong and underlay the formal rules of traditional Maori society.[147] The Maori relied on tikanga Maori to inform decisions regarding leadership, social roles, access to resources, and to define various other rights, relationships, and practices.[148]

The Maori cite to a number of historic authorities in arguing that tikanga Maori is recognized as law by New Zealand.[149] First, the common law doctrine of Aboriginal Rights theoretically allows Maori customary law to be incorporated into the common law legal system.[150] Second, section II of the Treaty of Waitangi recognized the protected status of Maori customary law through the promise of "tino rangatiratanga."[151] By 1896, the Waitangi Tribunal interpreted this clause to require preservation of "all Maori valued customs and possessions," a mandate which arguably extends protection to tikanga Maori.[152] Third, tikanga Maori has been acknowledged, at

145. "Tikanga Maori and Maori customary law are terms (not necessarily interchangeable) that embody the values, standards, principles, or norms that indigenous Maori had developed to govern themselves." Linda Te Aho, *Tikanga Maori, Historical Context, and the Interface with Pakeha Law in Aotearoa/New Zealand,* 10 Y.B. N.Z. JURIS. 10, 10 (2007).

146. Robert Joseph, *Recreating Legal Space for the First Law of Aotearoa-New Zealand,* 17 WAIKATO L. REV. 74, 83 (2009).

147. *Id.* Although the values differ from tribe to tribe, the core values include "(1) the importance of genealogy, (2) authority over who might exercise certain rights, (3) reciprocity, (4) sacredness and secularity, and (5) stewardship." *See* Linda Te Aho, *supra* note 145, at 11.

148. Caren Fox, *Access to Customary Law: New Zealand Issues*, 13–14 Y.B. N.Z. JURIS. 224, 228 (2011).

149. *See* Robert Joseph, *supra* note 146, at 75–78.

150. The common law doctrine of Aboriginal rights recognizes the continuation of local native law following British annexation. "Elements of Aboriginal rights maintained were those not repugnant to common law and which did not interfere with or challenge the new sovereign." *Id.* at 75.

151. *Tino rangatiratanga* is translated into English as "the full exclusive and undisturbed possession of their . . . other properties." *Id.* at 76.

152. *Id.* at 75.

least peripherally, by various statutes.[153] Whether New Zealand will actually interpret these authorities in a manner that awards sweeping and formal legal status to tikanga Maori remains uncertain.[154]

Meanwhile, the common law of New Zealand has gradually conferred limited legal status on Maori customs and usage. As early as 1847, New Zealand courts recognized the validity of native title to land,[155] although the seminal 1877 case of *Wi Parata v. Bishop of Wellington* initially denied the existence of Maori customary law.[156] The legal status of Maori custom was revived in 1901 when the Privy Council recognized that Maori customary law could be used to prove land tenure.[157] Soon after, in 1908, *Public Trustee v. Loasby* held that Maori customs could be raised at common law if a three-element test was met.[158] Realistically, because New Zealand operates under a comprehensive system of codified laws, the second element of the *Loasby* test severely limits the application of tikanga Maori.[159] Despite these and other recognitions of Maori rights in the common law, mainstream courts generally disfavor recognition of these customs as law.[160]

Additionally, the New Zealand parliament has "struggled with the notion of customary law and has consistently legislated to nullify the impact of any court decisions that it believes threatens its sovereignty as the penultimate source of all law concerning Maori."[161] The enactment of the 2004 Seabed Act provides an example of the parliament proactively legislating to supersede Maori customary rights recognized by courts.[162] In *Ngati Apa v. Attorney General*, Maori

153. *Id.* at 64 (discussing the historic and contemporary statutes that recognize Maori customary law).

154. *See* Caren Fox, *supra* note 148, at 229.

155. The case of *R v. Symonds* recognized native title to land. *See* Linda Te Aho, *supra* note 145, at 12.

156. "Prendergast CJ found that the Maori had 'no settled system of law' and that an Act referring to the ancient custom of the Maori 'cannot call what is non-existent into being.'" *See id.*; *see also* Robert Joseph, *supra* note 146 (discussing in detail judicial denial of Maori custom).

157. *See* Linda Te Aho, *supra* note 145, at 12.

158. (1) Whether the custom could be factually proven by experts, (2) whether the custom was contrary to statute, and (3) whether the custom was reasonable from the judge's perspective. *Id.*

159. *Id.* at 13.

160. *See* Caren Fox, *supra* note 148, at 228.

161. *Id.* at 237.

162. *See* Linda Te Aho, *supra* note 145, at 14 (summarizing the court decision in *Ngati Apa v. Attorney General* and the subsequent Seabed Act 2004); *see also* R. P. Boast, *Foreshore and Seabed, Again,* 9 NZJPIL 271 (2011) (discussing in detail the Seabed Act and the 2011 Marine and Coastal Area Act that replaced it).

customary rights to the foreshore and seabed were found to exist, to have survived British sovereignty, and to have not been explicitly extinguished by legislation.[163] The parliament responded with the 2004 Seabed Act, which unambiguously extinguished the asserted Maori customary rights.[164]

The Waitangi Tribunal and the Maori Land Court are two legal institutions that currently attempt to integrate tikanga Maori into their operations.[165] The Waitangi Tribunal was established in 1975 to hear claims asserted by Maori regarding violations of the "principles of the Treaty of Waitangi."[166] The Waitangi Tribunal actively considers evidence of tikanga Maori when evaluating claims.[167] It also allows testimony in the Maori language, considers evidence of custom by traditional witnesses,[168] and "brings together a mix of historical, legal, and tikanga Maori experts who analyze early settler and official accounts with oral history."[169] Similarly, the Maori Land Court considers tikanga Maori when determining rights and interests in land[170] and is experimenting with new procedures and policies to further accommodate Maori values and practices.[171]

2. Customary Law in Sustainable Development

The role of tikanga Maori in the management of New Zealand's fisheries provides a perfect example of the importance that customary law can play in achieving goals of sustainable development, as explored by Valmaine Toki.[172] The Maori world-view inseparably links

163. *See* Linda Te Aho, *supra* note 145, at 14.

164. *Id.*

165. These are the "two legal systems most closely aligned to the revitalization of tikanga Maori." *See* Caren Fox, *supra* note 148, at 231.

166. *Id.* at 231.

167. *Id.* at 233.

168. This policy appears similar to the concept of the *kama'aina* witnesses in Hawai'i. *See supra* note 101 and accompanying text.

169. *See* Caren Fox, *supra* note 148, at 232.

170. Maori Tikanga has been applied "in relation to ascertaining rights and interests in land, including hearing evidence of Maori customary adoptions, Maori customary title, Maori succession practices, customary marriages, Maori genealogy, sacred sites, fishing grounds, and other places of importance." *Id.* at 234.

171. These measures include involving traditional experts in the court, appointing judges versed in tikanga Maori, and requiring judges to attend annual Maori language and educational seminars. *Id.* at 235.

172. Valmaine Toki, *Adopting a Maori Property Rights Approach to Fisheries*, 14 N.Z. J. ENVTL. L. 197 (2010).

humans and the natural environment in a unified cosmic order.[173] Therefore, many aspects of tikanga Maori emphasize the sustainable management of resources.[174] Under tikanga Maori, fisheries were collectively utilized, but access and use was regulated in order to protect the resource itself and to ensure its availability for future generations.[175]

In 1986, New Zealand enacted the Fisheries Amendment Act, which introduced a fishing quota in order to protect dwindling fish populations.[176] The Maori appealed the Fisheries Amendment Act to the Waitangi Tribunal and the courts, arguing that it violated their customary fishing rights.[177] The Waitangi Tribunal issued two reports that "recognized that customary Maori fishing rights had a commercial component and that such rights were capable of evolving as recognized commercial rights in fishing."[178] The Waitangi Tribunal further stated that the fishing quota had violated Maori customary rights and interfered with the Maori right to develop the fishery resource.[179] New Zealand courts adopted the findings of the Waitangi Tribunal.[180] In 1992, the Crown and the Maori entered into a settlement agreement that established both Maori commercial fishing rights and customary gathering rights.[181]

The Maori Fisheries Act was passed in 2004 to allocate commercial fishery assets to the Maori.[182] Each Maori tribe received shares in a Maori-owned fisheries company, cash, and fishing quotas.[183] Essentially, Maori customary rights to fisheries were converted into private property rights under Maori control.[184] Maori tribes and organizations, now endowed with commercial interests, are attempting to develop organizational models that can balance financial objectives with

---

173. *Id.* at 200.

174. *Id.*; *see also* Linda Te Aho, *supra* note 145, at 11.

175. *See* Valmaine Toki, *supra* note 172, at 200.

176. This quota created a transferable private property right in commercial fish species. *Id.* at 206.

177. *Id.* at 207.

178. *Id.*

179. *Id.*

180. *Id.*

181. *See id.* at 208 (discussing the settlement terms).

182. *Id.* at 207.

183. The Maori company, Aotearoa Fisheries Limited, in turn, was granted partial or full ownership in a number of other large fishing and processing companies. *Id.* at 209.

184. *Id.*

customary values and sustainable outcomes.[185] The Maori Fisheries Act mandated that Maori organizations receiving assets have parallel commercial and traditional structures and prohibited transfer of assets away from the tribe.[186] The Maori Fisheries Act also codified the protected status of Maori customary fishing and gathering.[187]

New Zealand's recognition of Maori customary rights to fisheries and the subsequent transfer of commercial assets to Maori organizations represent an interesting blend of traditional and modern considerations. This synthesis of customary and corporate values and organizations may provide a new framework for the sustainable development of resources.[188]

D. South Africa

Large segments of the South African population continue to live under customary law,[189] which is derived from oral tradition and emphasizes familial and communal values over individualism.[190] The goal of customary law is reconciliation between parties in conflict, and to that end, the law is non-specialized, often blending criminal and civil type cases.[191] Customary law was comprehensive before colonization but increasingly concerns only tort offense and family law.[192]

Customary practices become customary laws in one of two ways in South Africa. First, some traditional courts look to "living customary law."[193] Living customary law is derived from actual practices and usage in the community.[194] In this framework, customs and values are dynamic and are given the force of law because they are the true

185. *See* Linda Te Aho, *Corporate Governance: Balancing Tikanga Maori with Commercial Objectives,* 8 Y.B. N.Z. JURIS. 300 (2005) (discussing the role of tikanga Maori in Maori corporations); *see also* Valmaine Toki, *supra* note 172, at 210.

186. *See* Valmaine Toki, *supra* note 172, at 212.

187. *Id.*

188. *Id.*

189. Hallie Ludsin, *Cultural Denial: What South Africa's Treatment of Witchcraft Says for the Future of Its Customary Law*, 21 BERKELEY J. INT'L L. 63, 70 (2003).

190. *Id.*

191. *Id.*

192. *Id.*

193. Craig Bosch & Chuma Himonga, *The Application of African Customary Law Under the Constitution of South Africa: Problems Solved or Just Beginning?*, 117 S. AFRICAN L.J. 306, 338 (2000).

194. *Id.* at 319.

source of authority and organization in a community.[195] Scholars and activists often advocate for living customary law because it adapts to changing conditions, thus eliminating outdated practices and staying relevant.[196] This conception of custom as law is criticized because it is inherently flexible and inconsistent, as there is no requirement that the practice be ancient.[197] Accordingly, common law courts in the country, which favor customs that are certain and readily ascertainable, will not usually apply living customary law.[198]

Rather, South African common law courts apply what regional academics refer to as "official customary law."[199] Official customary law is determined by reference to customary practices that have been codified in court cases, secondary sources, anthropological reports, and government studies.[200] Critics feel that official customary law is Westernized, stagnant, and undemocratic.[201] However, official customary law is clearly favored by government authorities, as it is readily ascertainable and more in line with legal positivism.[202]

1. Treatment of Customary Law in Colonial South Africa

Colonial governments in the geographic area that is now South Africa often had difficulties with traditional customary law.[203] Colonial authorities sometimes recognized the right of traditional leaders to apply customary law yet at other times forced European legal systems onto indigenous populations.[204] When the British and Dutch settlers of the region did recognize local customs as law, it was for pragmatic reasons, as the settlers believed both that recognition was necessary to keep native populations complacent and that European law was too sophisticated to be applied to indigenous cultures.[205]

South Africa was unified into a single nation in 1910. In 1927, South Africa solidified and defined the position of traditional customary

195. *Id.*
196. *Id.*
197. *Id.* at 325.
198. *See* Ludsin, *supra* note 189, at 73.
199. *Id.* at 72.
200. *See* Bosch, *supra* note 193, at 329.
201. *Id.*
202. *Id.*
203. *Id.* at 307.
204. *See* Ludsin, *supra* note 189, at 66.
205. *Id.*

law with the passage of the Black Administration Act.[206] The Black Administration Act applied only to native Africans, and was "designed to be comprehensive in reach, regulating administrative, judicial, and substantive matters such as the appointment of chiefs, establishment of courts and jurisdiction, legal status, land tenure, marriages, and succession."[207] It created a parallel system of traditional courts that were authorized to apply customary law,[208] which was comprised of "Chief's and Headsman's Courts," with appeals heard by "Native Commissioner Courts."[209] The traditional courts only had jurisdiction in cases in which both parties were black and in civil and minor criminal cases.[210] The application of customary law was severely limited by the requirement that customary law could not be repugnant to "principles of public policy or natural justice."[211]

In 1988 South Africa passed the Evidence Amendment Act,[212] which obligated all courts in South Africa to recognize customary laws "when applicable[,]" even if a party was not black.[213] The application of customary law was made subject to two conditions: (1) it had to be proven with reasonable certainty, and (2) it could not be repugnant to principles of public policy or natural justice.[214] The Evidence Amendment Act reinforced the legal basis for indigenous custom as law.[215] However, the inclusion of the repugnancy clause ensured that customary law was relegated to a subordinate position.[216]

---

206. *See* Bosch, *supra* note 193, at 307.

207. Sanele Sibanda, *When is the Past Not the Past? Reflections on Customary Law Under South Africa's Constitutional Dispensation*, 3 HUMAN RIGHTS BRIEF 17 (2010).

208. Chuma Himonga & Rashid Manjoo, *The Challenges of Formalisation, Regulation, and Reform of Traditional Courts in South Africa*, 3 MALAWI L.J. 157, 161 (2009).

209. *See* Bosch, *supra* note 193, at 307.

210. *See* Ludsin, *supra* note 189, at 71.

211. *See* Bosch, *supra* note 193, at 308. "The Public Policy to which the courts would refer was an embodiment of the sentiments of the small, dominant, white population of South Africa." *Id.*

212. The Evidence Amendment Act states in relevant part:

> (1) Any court may take judicial notice of the law of a foreign state and of indigenous law in so far as such law can be ascertained readily and with sufficient certainty: Provided that indigenous law shall not be opposed to the principles of public policy or natural justice: Provided further that it shall not be lawful for any court to declare that the custom of lobola or bogadi or other similar custom is repugnant to such principles.

See Bosch, *supra* note 193, at 307.

213. *Id.*

214. *Id.* at 308.

215. *Id.* at 307.

216. *See* Ludsin, *supra* note 189, at 67.

In sum, during colonial and apartheid South Africa, customary law enjoyed official status. However, the jurisdiction of traditional courts applying customary laws was limited to cases in which customary law "was applicable."[217] In practice, customary law was usually applied in family- and tort-type cases and was restricted from regulating important areas of law such as land title or succession.[218] Additionally, the repugnancy requirements of the Black Administration Act and the Evidence Amendment Act prevented the application of customary law in areas where it conflicted with common law. For example, in the 1983 case of *Ismail v. Ismail*, a South African court struck down a traditional polygamous marriage performed under customary law as being against public policy.[219] Customary law and the traditional court system were arguably used as "instrument[s] for entrenching a uniform system of indirect rule in South Africa, whereby traditional leaders became state agents in administering the affairs over whom they were appointed to rule."[220]

2. Legal Bases in the 1996 Constitution of South Africa

With the fall of apartheid in South Africa, the crafters of the new government agreed to strengthen the status of customary law in South Africa.[221] The Interim Constitution of 1993 gave "relatively wide recognition to customary law and its institutions, thus ensuring a distinct elevation in its status in the national legal system."[222]

The Constitution of the Republic of South Africa Act 108 of 1996 ("Constitution") further formalized the position of customary law.[223] The Constitution's Chapter Twelve on Traditional Leaders implicitly and explicitly provides a legal basis for customary law in numerous sections.[224] First, sections fifteen, thirty, thirty-one, and thirty-two collectively provide for "a right to culture."[225] The right to culture

217. *See* Bosch, *supra* note 193, at 307.

218. T.W. Bennett & C.H. Powell, *Restoring Land: The Claims of Aboriginal Title, Customary Law, and the Right to Culture*, 16 STELLENBOSCH L. REV. 431, 440 (2005).

219. *See* Bosch, *supra* note 193, at 308.

220. *See* Sibanda, *supra* note 207, at 32.

221. *See* Ludsin, *supra* note 189, at 68.

222. *See* Bosch, *supra* note 193, at 309 (discussing the provisions of the Interim Constitution in great detail).

223. *See* Ludsin, *supra* note 189, at 68.

224. *Id.*

225. Section 31, for example, provides that "[e]very person shall have the right to use the

arguably includes the right to live by culturally based customary laws, because culture is often defined to include legal systems.[226] Second, sections 211(1) and (2) "recognize the institution, status, and role of traditional leadership, according to customary law[,]"[227] and allow traditional leadership to govern locally, "subject to custom and legislation."[228] Third, section 212 calls for future legislation to empower traditional leaders to deal with "customary law and the customs of communities observing a system of customary law."[229] Fourth, customary law and common law are mentioned as equals in Section 39(2) and (3).[230] In particular, section 39(3) allows for people to raise claims of rights conferred by customary law, although it does not grant an affirmative right to customary law.[231] Fifth, and most significantly, section 211(3) explicitly mandates that "the courts *must* apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law."[232] This mandatory duty imposed by section 211(3) distinguishes it from similar language in the Black Administration Act, which left the application of customary law to the court's discretion.[233]

However, the potential application of customary law under the Constitution is limited by several clauses. For example, section 211(3) provides for the mandatory application of customary law only "when applicable."[234] In many situations it is not clear whether customary or common law should apply, and there are few existing authoritative

---

language and to participate in the culture of his or her choice." *See* Bosch, *supra* note 193, at 310; *see also* Ludsin, *supra* note 189, at 68.

226. *See* Bosch, *supra* note 193, at 310.

227. *Id.* at 313.

228. *Id.*

229. *Id.*

230. *Id.*

> In terms of s *39(2)*: 'When interpreting any legislation, *and when developing the common law or customary law*, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.' Whereas in terms of s *39(3)*: 'The Bill of Rights does not deny the existence of any other rights or freedoms *that are recognized or conferred by common law, customary law or legislation*, to the extent that they are consistent with the Bill.'

Id. at 313 n.4. (emphasis in original).

231. *See* Ludsin, *supra* note 189, at 68.

232. *See* Bosch, *supra* note 193, at 313.

233. *See* Ludsin, *supra* note 189, at 68 n.28.

234. *See* Bosch, *supra* note 193, at 314.

guidelines.[235] Likewise, section 211(3) provides that customary law is applied subject to the Constitution, which includes the Bill of Rights. Proponents of customary law fear that aspects of customary law that run counter to principles of equality in the Bill of Rights may be struck entirely.[236] Such proponents advocate instead for the courts to "develop" customary laws until they are in line with the "spirit" of the Bill of Rights.[237] Similarly, Schedule 6, section 2 of the Constitution holds that all legislation adopted prior to the Constitution remains in force until repealed.[238] Thus, the repugnancy clause of the Evidence Amendment Act of 1988 may survive and further limit the application of customary law.[239] Finally, there is no explicitly stated affirmative right to be governed by customary law in the Constitution.[240]

3. Substantive Developments Since 1996

Despite its ambiguities, the Constitution has reinvigorated the standing of customary law in South Africa by forming the legal basis for contemporary developments and reforms of customary law.[241] However, the status of customary law, and the form that it should take, are still the subject of debate.[242]

South African Courts have struggled to apply customary law in a manner that is consistent with the Bill of Rights. The three cases discussed below demonstrate the complex legal landscape that courts must navigate when applying customary laws while at the same time attempting to uphold constitutionally protected gender equality rights.

The 1997 case of *Mthembu v. Letsela* considered the viability of the practice of primogeniture[243] as customary law.[244] The plaintiff was a widow with one daughter, while the defendant was the father of the

235. *Id.*
236. *Id.* at 317.
237. *Id.*
238. *See* Ludsin, *supra* note 189, at 68.
239. *Id.*
240. *Id.*
241. *See* Sibanda, *supra* note 207, at 32.
242. *Id.* at 34.
243. The customary practice male primogeniture mandates that the eldest male descendant inherits property "to the exclusion of female relatives and younger male relatives" in exchange for the obligation to provide for dependents. *Id.* at 33.
244. *See* Bosch, *supra* note 193, at 332.

plaintiff's deceased husband. The plaintiff had married her husband under customary law and did not dispute that customary rules of succession applied. However, the plaintiff argued that under the new Constitution the rule of primogeniture was gender discriminatory.[245] Accordingly, the plaintiff asked the Court to modify the customary law in order to allow her daughter, as the deceased's sole heir, to inherit the property.[246] The High Court, after considering evidence of customary practices in the form of archives and testimony from expert witnesses, determined that primogeniture was not gender discriminatory, because it required the male inheritor to provide for any widows and female descendants of the deceased.[247] The Court thus upheld primogeniture as customary law and applied the law accordingly. This decision was superseded by the decision of the Constitutional Court in *Bhe v. Magistrate Khayelitsha* and the "RCSA" of 2009.[248]

In 1997, a South African court considered the case of *Mabena v. Letsoalo*.[249] *Mabena* involved a dispute between a widow's family and the deceased husband's family over the validity of the customary law marriage between the couple.[250] The husband's family argued that the customary marriage was invalid because the mother of the bride had negotiated it, while traditionally the father performed such marriage negotiations.[251] The court noted that males traditionally arranged customary marriages, according to official records on customary law.[252] However, the court also considered evidence that in contemporary culture the custom had shifted to allow women to perform marriages.[253] The court upheld the validity of the marriage, thus modifying the customary law of marriage to comport with the Constitution and shifting community practices.[254]

The Constitutional Court recently modified the customary marriage practice of polygamy in the 2013 case of *Mayelane v. Ngwenyama*

245. *Id.*
246. *Id.*
247. *Id.*
248. *See* Himonga, *supra* note 208, at 179; *see also infra* notes 267–69 and accompanying text.
249. *See* Bosch, *supra* note 193, at 335.
250. *Id.*
251. *Id.*
252. *Id.*
253. *Id.*
254. *Id.* at 336.

and the Minister for Home Affairs.[255] The court invalidated a man's marriage to a second wife based on the finding that his first wife did not consent to the second marriage.[256] In doing so, the court held that the first wife's consent was necessary for a valid polygamous marriage.[257] The court considered this the best compromise in order to bring the customary law of polygamous marriage in line with the requirement of gender equality in the Reform of Customary Marriages Act and the Bill of Rights.[258]

Additionally, in the decades since the end of Apartheid and the passing of the Constitution, the South African legislature has considered, and sometimes passed, a number of bills specifically relating to customary law.

The Recognition of Customary Marriages Act of 1998 ("RCMA") extends official State recognition to traditional marriages performed under customary law.[259] The RCMA created a system of registration for customary marriages, including polygamous marriages, and applies to marriages entered into before and after passage of the Act.[260] The legislature brought the customary laws regarding traditional marriage in line with the Bill of Rights by making women equal partners in marriage and mandating that ownership of property be shared.[261] However, critics point out that beyond "idiosyncratic tinkering to accommodate polygyny . . . there is now little substantive or procedural difference from the common law when it comes to customary marriage."[262]

The Traditional Leadership and Governance Framework Act of 2003 ("TLGFA") lays out the powers and responsibilities of traditional leaders.[263] The TLGFA aims to restore the legitimacy of traditional leaders, stating that they should be appointed according to

255. Chuma Himonga, Mayelane v. Ngwenyama *and Minister for Home Affairs: A Reflection on Wider Implications*, CUSTOM CONTESTED (Jan. 25, 2015, 3:00 PM), http://www.customcontested.co.za/mayelane-v-ngwenyama-and-minister-for-home-affairs-a-reflection-on-wider-implications/.

256. *Id.*

257. *Id.*

258. *Id.*

259. *See* Sibanda, *supra* note 207, at 33.

260. *Id.*

261. *Id.*

262. *Id.*

263. *See* Himonga, *supra* note 208, at 162.

customary practices and should work to clarify and develop customary law.[264] The TLGFA attempts to bring traditional leaders in line with the Constitution by requiring gender equality and a one-third presence of women in traditional councils.[265]

The customary succession practice of male primogeniture, under which the eldest male descendant inherits property "to the exclusion of female relatives and younger male relatives" in exchange for the obligation to provide for dependents, was declared unconstitutional in the 2007 Constitutional Court case of *Bhe v. Magistrate Khayelitsha and Others*.[266] The Reform of Customary Law of Succession Act and Regulation of Related Matters Act of 2009 ("RCSA") codified the *Bhe* court's finding and statutorily overrode customary law by requiring that female and younger male relatives inherit their fair share.[267] It is argued that succession under customary law now mirrors its common law counterpart.[268]

The South African legislature has struggled to pass a bill that would redefine the role of traditional courts[269] applying customary law.[270] The South African Law Reform Commission ("The Commission") began investigating the role of customary law and traditional courts in 1996. The Commission did extensive research, consultations, and studies on how best to reform traditional courts and in 2003 submitted a report and draft bill to the South African Department of Justice. In 2005, the Legislature repealed the Black Amendment Act but temporarily extended provisions regulating traditional courts until replacement legislation was passed.[271] The Department of Justice did not introduce the Commission's draft bill to the Legislature and instead began its own review and drafting process in 2006.[272] In 2008,

264. B. Mmusinyane, *The Role of Traditional Authorities in Developing Customary Laws in Accordance With the Constitution: Shilubana and Others v Nwamitwa*, POTCHEFSTROOMSE ELEKTRONIESE REGSBLAD 161 (2009), *available at* http://www.saflii.org/za/journals/PER/2009/15.html.

265. *Id.*

266. *See* Sibanda, *supra* note 207, at 33.

267. *Id.*

268. *Id.*

269. As discussed above, traditional courts were established by the Black Administration Act of 1927 and are viewed by many as having been used as a tool of oppression. *See* Sibanda, *supra* note 207, at 162; *see also* Ludsin, *supra* note 189, at 71.

270. *See* Himonga, *supra* note 208, at 163.

271. *Id.*

272. *Id.* at 166.

the Department of Justice's Traditional Courts Bill was introduced into the legislature, in which it generated enormous and divisive controversy.[273] The Traditional Courts Bill failed to pass in 2009 and again floundered upon its reintroduction in 2011.[274] To date, the legislature has not passed the Traditional Courts Bill.[275]

The Legislature's difficulty with the Traditional Courts Bill highlights contemporary debates on the role of customary law in South Africa.[276] Almost all sides in the dispute agree that the Constitution recognizes traditional justice systems and customary laws. There is also a general consensus that the State should support customary law systems and work to bring customary laws in line with the Constitution.[277]

The devil is in the details. For example, stakeholders disagree about whether individuals should be able to opt out of the customary law system.[278] Likewise, they disagree on whether appeals from decisions of the traditional justice system should go to higher traditional courts or directly to common law courts.[279] The degree of female participation that should be required in traditional courts is at issue.[280] Whether legally trained attorneys or traditional individuals should staff courts is also a point of contention.[281] Additionally, some see the Traditional Courts Bill as an attempt to put the indigenous population under the control of broadly empowered traditional leaders.[282]

E. Greenland

Native populations do not always seek to elevate their traditional customs to formal law. For example, in Greenland, customary law has

273. *Id.* at 166.

274. *Traditional Courts Bill (TCB),* CUSTOM CONTESTED (July 18, 2014, 3:00 PM), http://www.customcontested.co.za/laws-and-policies/traditional-courts-bill-tcb/.

275. *Id.*

276. *See* Himonga, *supra* note 208, at 163.

277. *Id.* at 166.

278. *Id.* at 167.

279. *Id.* at 167.

280. *Id.* at 167. The current wording of the Traditional Courts Bill ensures that women may participate in court but does not ensure that they will be decision makers. *Id.* at 172.

281. *Id.* at 172. Currently, in traditional courts lawyers are barred, and the traditional leaders cross examine witnesses themselves. *See* Ludsin, *supra* note 189, at 71.

282. *See* Sibanda, *supra* note 207, at 34.

been largely abandoned even though the ruling government is almost entirely composed of indigenous persons. Much like in South Africa, the situation in Greenland provides a good example of the complex relationship between customary practices and modern realities among some indigenous populations.

In the first part of the twentieth century, customs largely defined life in Greenland.[283] In particular, hunting was closely linked with the customary way of living.[284] As Greenland has developed, customary ways of living have been replaced by more modern lifestyles, especially in the most populous parts of the island.[285] Although Greenland has a large indigenous population and has been under indigenous home rule since 1979,[286] the government of Greenland has neglected to implement custom as a source of law.[287] Custom has not been integrated into law due to foreign elements in the central government, the strongly local nature of customs, apathy towards customary life among young Greenlanders and women, and the fact that the government has no need to rely on customs in order to achieve legitimacy.[288] In particular, the transformation from hunting-based lifestyles to a modern society has revolutionized gender roles, which has had a negative effect on the continued viability of certain gender-based customs.

However, some Greenlandic customs survive as myths and watered-down traditions that have become integrated into modern ways

283. Custom largely determined ways of living within extended families, organization in communal activities such as hunting and sharing food, and defining gender roles. *See* Callies et al., *supra* note 122, at 72.

284. Greenlanders hunted seals, whales, and caribou. Hunting was seen as a means of survival, an important public activity, a cohesive way of structuring the community, and a source of identity. *See* Callies et al., *supra* note 122, at 70–72.

285. Under Danish rule, "a social democratic, modernized, industrial way of life" was introduced as a "political, economic, and legal model." *See* Callies et al., *supra* note 122, at 66.

286. Until 1953 Greenland was a Danish colony. From 1953 to 1957 Greenland was an equal part of the Danish realm. From 1979 to 2009 Greenland had home rule, under which a Greenlandic parliament and government were established while judiciary remained Danish. *See* Callies et al., *supra* note 122, at 66.

287. The Greenland government has adopted a Danish legal system because it is heavily dependent on imported academic staff from Denmark and looks to outside models of governance for guidance. *See* Callies et al., *supra* note 122, at 67.

288. *See* Callies et al., *supra* note 122, at 68–69. "Especially in the early years of home rule, the mere fact that representatives were Greenlandic, endowed them with a strong legitimacy, which probably did not need a strong underpinning through explicit and formal consideration of customs in home rules regulations." *Id.*

of living.[289] Greenlandic customs often emphasize dependence on nature and sustainable practices.[290] Curiously though, Greenlanders do not necessarily regard customary practices as superior in achieving sustainability.[291]

In 2009, Greenland achieved "Self-Rule," which replaced Home Rule.[292] The Self-Rule Act granted Greenland expanded power to exercise executive, legislative, and judicial power in a number of fields.[293] The Act also established procedures for the eventual independence of Greenland.[294] The expanded autonomy under Self-Rule, especially in the area of the courts, may allow for greater integration of customary law into Greenland governance.[295]

For example, customary law may play a role in the future of the Greenland judiciary. Greenland utilizes a Danish-style justice system and has not yet created a separate indigenous legal system.[296] However, local customs play an informal role in the justice system.[297] Under the judicial system created in 1956, Danish-style laws are administered, but lay assessors and lay judges administer local courts.[298] These lay judges informally incorporate customary laws into the judicial system by taking traditional ways of thinking into consideration when rendering discretionary decisions.[299] As of 2010, the courts remained under the control of Denmark but, under the provisions

289. *See* Callies et al., *supra* note 126, at 424.

290. *See* Callies et al., *supra* note 126, at 424.

291. In fact, many customary practices, such as hunting, may conflict with environmental regulations and a Western idea of sustainability, although such hunting practices were traditionally sustainable. *See* Callies et al., *supra* note 126, at 427.

292. This Act was passed by the Danish parliament following two Self-Rule Commissions and a referendum in Greenland. Mininnguaq Kleist, *Greenland's Self-Governance*, *in* THE POLAR LAW TEXTBOOK I 171, 171 (Natalia Loukacheva ed. 2010).

293. THE GREENLAND SELF-GOVERNMENT ARRANGEMENT, STATMINISTERIET, http://www.stm.dk/_a_2957.html (last visited June 1, 2015).

294. *Id.*

295. However, some academics doubt that true Inuit self-governance, in terms of customary law, can ever occur under the framework of a foreign, Western-style government. *See* NATALIA LOUKACHEVA, THE ARCTIC PROMISE: LEGAL AND POLITICAL AUTONOMY OF GREENLAND AND NUNAVUT 64 (Univ. of Toronto Press Inc. 2007).

296. *Id.* at 79. The Inuit possessed a legal framework that depended on myths, elders, shamans, traditional ceremonies, and self-restraint to maintain order. *Id.* at 85.

297. *Id.* at 91.

298. Lay assessors and lay judges have limited legal training but are recruited from the local population and speak Greenlandic. *Id.*

299. *Id.*

of the Self-Rule Act, will eventually be transferred to Greenland,[300] a transition that some academics hope will allow for greater incorporation of Inuit customary law into the court systems.[301]

The state of customary law in Greenland provides an interesting contrast to the other nations discussed in this section. Although Greenland's government is comprised of an Inuit majority that is sensitive to Inuit concerns and working towards autonomy,[302] native traditions, structures, and values continue to play a minimal role in the governance of Greenland.[303] Clearly there is a complex interplay between native customary law, formal Western-style government, and indigenous populations.

III. THE APPLICATION OF CUSTOM IN U.S. TAKINGS LAW: "BACKGROUND PRINCIPLES" SAFE HAVEN FOR GOVERNMENT IN TOTAL REGULATORY TAKINGS

A. Lucas *and "Background Principles"*

The most significant and far-reaching effect of customary law in the United States exists in the context of land use. In the 1992 case of *Lucas v. South Carolina Coastal Council*,[304] the United States Supreme Court created its now famous "categorical rule" for regulatory takings. Pursuant to the Fifth Amendment to the United States Constitution, the rule requires the government to provide just compensation whenever it denies a property owner all "economically beneficial use" of land.[305] Neither the purposes behind the denial nor the circumstances under which the land is acquired can diminish the government's liability.[306]

The *Lucas* Court did, however, establish two exceptions to the otherwise inflexible "categorical rule," declaring that the rule does not apply if, first, the challenged regulation prevents a nuisance or, second, the regulation is grounded in a state's background principles of

300. *See* Mininnguaq Kleist, *supra* note 292, at 184.
301. *See* NATALIA LOUKACHEVA, *supra* note 295, at 79.
302. *Id.* at 64.
303. *Id.* at 65.
304. 505 U.S. 1003 (1992).
305. *Id.* at 1019.
306. *See, e.g.*, Palm Beach Isles Assocs. v. United States, 231 F.3d 1354 (Fed. Cir. 2000).

property law.[307] Because the law of nuisance is full and comprehensive as well as comprehensible, the first exception presents little difficulty.[308] Leaving nothing to chance, the *Lucas* Court explained that the nuisance exception would allow the government to prohibit the construction of a power plant on an earthquake fault line or the filling of a lake-bed that was likely to result in flood damage to a neighbor without incurring takings liability.[309] By contrast, the Court was silent with respect to the meaning of the second exception of "background principles of state property law."[310]

A major and often unexplored question in takings law is the extent of the background principles exception. The subject is important for two distinct reasons. First, it is not always easy to discern what comprises such background principles. Second, once defined, the principles can, when subject to expansive interpretation, seriously erode the basic *Lucas* doctrine meant to provide compensation for regulatory takings that deprive an owner of all economically beneficial use of land. A related issue is the extent to which background principles analysis overlaps with the continuing discussion of the role of investment-backed expectations in *Lucas* situations (there should be none) and the so-called "notice" rule arguably raised by pre-existing state statutes in either total (*Lucas*) or partial (*Penn Central Transportation*) taking analyses.

Although *Lucas* failed to provide explicit guidance concerning the definition of the background principles exception, it noted that restrictions premised upon such principles "inhere in landowner's

307. *Lucas*, 505 U.S. at 1020–32.

308. *See, e.g.*, M&J Coal Co. v. United States, 47 F.3d 1148 (Fed. Cir. 1995) (holding that the coal company had no right to conduct nuisance-like activities while surface mining in West Virginia); Aztec Minerals Corp. v. Romer, 940 P.2d 1025 (Colo. Ct. App. 1996) (holding the same under Colorado nuisance law); *see also* Colo. Dep't of Health v. The Mill, 887 P.2d 993 (Colo. 1994) (en banc) (holding that federal statutes restricting the disposition of uranium mine tailings fell within the background principles exception so as to deny a landowner use of a sixty-one acre parcel, even though the applicable statutes were enacted after the landowner acquired the property). For a collection of recent exemption cases (and a summary of takings law generally), see ROBERT MELTZ ET AL., THE TAKINGS ISSUE 167–95 (1999); David L. Callies, *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from* Penn Central *to* Dolan*, and What State and Federal Courts Are Doing About It*, 28 STETSON L. REV. 523 (1999).

309. *Lucas*, 505 U.S. at 1029.

310. *Id.* at 1029–30.

title itself."[311] On the basis of this statement, governments[312] and commentators[313] have turned to state common law property doctrines to identify underlying title limitations and, thus, background principles. From this scrutiny, it is now clear that at least three sources of state property restrictions may qualify as background principles within the meaning of *Lucas*: statutory law existing prior to the acquisition of land,[314] custom,[315] and public trust.

B. The Oregon Cases on Custom

Several courts in the United States have declared public rights or rights of a huge class of strangers to cross private land based exclusively on some version of customary law. Perhaps the most famous of these is *State ex rel. Thornton v. Hay*,[316] in which plaintiffs sought to prevent the Hays from constructing improvements on the dry-sand beach portion of their lot between the high water line and the upland vegetation line. Rejecting the proffered bases of prescriptive rights and easements, the court decided in favor of the plaintiffs *sua*

311. *Id.* at 1029.

312. *See* Michael M. Berger, *Inverse Condemnation and Related Governmental Liability*, ALI-ABA Course of Study, Annual Update on Inverse Condemnation 11, 35 (Oct. 1996) (noting that "[s]ince *Lucas*, government agencies have been combing their archives in search of arcane matters that might be said to have been part of a property owners' title and that severely restricts the use of land").

313. *See* Hope M. Babcock, *Has the U.S. Supreme Court Finally Drained the Swamp of Takings Jurisprudence?: The Impact of* Lucas v. South Carolina Coastal Council *on Wetlands and Coastal Barrier Beaches*, 19 HARV. ENVTL. L. REV. 1 (1995) (arguing that the public trust is a "background principle" that allows regulation of barrier beaches without just compensation); Katherine E. Stone, *Sand Rights: A Legal System to Protect the "Shores of the Sea,"* 29 STETSON L. REV. 709 (2000) (arguing that the public trust doctrine can be expanded to restrict development on non-trust lands for the purposes of preserving public beaches without triggering a taking).

314. *See generally* R.S. Radford & J. David Breemer, *Great Expectations: Will* Palazzolo v. Rhode Island *Clarify the Murky Doctrine of Investment-Backed Expectations in Regulatory Takings Law?*, 9 N.Y.U. ENVTL. L.J. 449 (2001) (discussing the role of pre-existing statutes in regulatory takings analysis).

315. *See* David J. Bederman, *The Curious Resurrections of Custom: Beach Access and Judicial Takings*, 96 COLUM. L. REV. 1375 (1996); David L. Callies, *Custom and Public Trust: Background Principles of State Property Law?*, 30 ENVTL. L. REP. 10003 (2000); Paul M. Sullivan, *Customary Revolutions: The Law of Custom and the Conflict of Traditions in Hawai'i*, 20 U. HAW. L. REV. 99 (1999) (discussing the analysis of custom, including its application to takings).

316. 462 P.2d 671 (Or. 1969).

sponte, extending customary rights to virtually the entire population of Oregon along its entire coastline:

> Because many elements of prescription are present in this case, the state has relied upon the doctrine in support of the decree below. We believe, however, that there is a better legal basis for affirming the decree. The most cogent basis for the decision in this case is the English doctrine of custom. Strictly construed, prescription applies only to the specific tract of land before the court, and doubtful prescription cases could fill the courts for years with tract-by-tract litigation. An established custom, on the other hand, can be proven with reference to a larger region. Ocean-front lands from the northern to the southern border of the state ought to be treated uniformly.[317]

Lest the reach of custom be misunderstood in a *per se*, total regulatory takings context under *Lucas*, the same court in *Stevens v. City of Cannon Beach*[318] responded to a takings claim over the refusal of local government to grant a seawall permit on customary rights interference grounds and held that the customary law of Oregon preventing such construction was a background principle of state property law and therefore an exception to the categorical totals taking rule when a property owner was left with no economically beneficial use of his land.

CONCLUSION

Custom is rising Phoenix-like from the ashes of Blackstone's limitations on the English common law that forms the basis of common law in the United States. It arises both from renewed interest in the rights of Native Americans and from the background principles of state property law exception to the doctrine of regulatory taking.

In the first, custom can provide a means for guaranteeing certain rights of native peoples in lands owned (technically held in fee simple) by others. The argument that a true customary right survives transfer from one owner to another is strong, although, as the cases in the foregoing sections demonstrate, custom is always subject to control and destruction by legislative act. The growing recognition of native

317. *Id.* at 676.
318. 854 P.2d 449 (Or. 1993).

customary rights has assumed global proportions. However, as the above international case studies demonstrate, it can be difficult to integrate systems built around indigenous customary laws into modern statutory schemes.

In the second, custom can provide a basis for a local, state, or federal land use regulation that will survive constitutional challenge as a taking of property without compensation even if it leaves a landowner with no economically beneficial use of the land. Akin to its twin nuisance exception, such a background principle of a state's law of property is not a part of the landowner's bundle of ownership sticks to begin with, so that its "taking by regulation"—like the perpetration of a nuisance—is not protected by the Constitution's Fifth Amendment.

Property rights, however, and particularly private property rights, are hedged with restrictions governing rights in the land of another such as easements, profits, licenses, and covenants. One with no right to enter the land of another is a trespasser, as is demonstrated by a majority of land cases. This right to exclude is a critical part of American jurisprudence with respect to private property rights. As the American Law Institute noted in its *Restatement of the Law of Property:*

> A possessory interest in land exists in a person who has a physical relation to the land of a kind which gives a certain degree of physical control over the land, and an intent so to exercise such control as to exclude other members of society in general from any present occupation of the land.[319]

Another commentator describes the "notion of exclusive possession" as "implicit in the basic conception of private property."[320] The Supreme Court has many times made the same point. Thus, in *Kaiser Aetna v. United States*[321]:

> In this case, we hold that the "right to exclude," so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation. This is not a case in which the Government is

319. RESTATEMENT OF PROPERTY § 7 (1936).

320. RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 63 (1985).

321. 444 U.S. 164 (1979).

> exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioners' private property; rather, the imposition of the . . . servitude . . . will result in an actual physical invasion of the privately owned marina. And even if the Government physically invades only an easement in the property, it must nonetheless pay just compensation.[322]

Again, in *Loretto v. Teleprompter Manhattan CATV Corp.*[323]:

> Moreover, an owner suffer a special kind of injury when a stranger directly invades and occupies the owner's property. As [another part of the opinion] indicates, property law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property. To require, as well, that the owner permit another to exercise complete dominion literally adds insult to injury. Furthermore, such an occupation is qualitatively more severe than a regulation of the *use* of property, even a regulation that imposes affirmative duties on the owner, since the owner may have no control over the timing, extent or nature of the invasion.[324]

Indeed, the right to exclude has achieved international status with the 1999 opinion of the European Court of Human Rights in *Case of Chassagnou and Others v. France*.[325] Before the Court was the French *Loi Verdeille*[326] which provides for the statutory pooling of hunting grounds. The effect on the plaintiffs (three farmers) was to force them to become members of a municipal hunters' association and to transfer hunting rights to the association, with the result that all members of the association may enter their property for the purpose of hunting.[327] The government of France claimed that the interference with the applicants' property rights was minor since they had not been deprived of the right to use their property, and all they lost was the right to prevent other people from hunting on their land.

However, the Court found that while it was "undoubtedly in the general interest to avoid unregulated hunting and encourage the

322. *Id.* at 179–80 (citations omitted).
323. 458 U.S. 419 (1982).
324. *Id.* at 436 (citations omitted; emphasis included).
325. 3 Eur. Ct. H.R. 23 (1999)
326. Law No. 64-696 of July 10, 1964.
327. Chassagnou, 3 Eur. Ct. HR. 23, ¶ 13.

traditional management of game stocks,"[328] (clearly the purpose of the *Loi Verdeille)*, the interference with the applicants' fundamental right to peaceful enjoyment of their land was "disproportionate":

> [N]otwithstanding the legitimate aims of the *Loi Verdeille* when it was adopted, the Court place the applicants in a situation which upsets the fair balance to be struck between protection of the right of property and the requirements of the general interest. Compelling small landowners to transfer hunting rights over their land so that others can make use of them in a way which is totally incompatible with their beliefs imposes a disproportionate burden which is not justified.[329]

Such obvious intrusions on private property—in particular the well-documented right to exclude needs—must comply with certain restrictions and criteria common to the concept of custom. Blackstone provides such criteria not only as a matter of reason but also as a matter of law because he is almost always cited in the reported American cases on custom and customary law.

As the discussion in section IV of this Article demonstrates, American courts usually get it wrong. Of the seven criteria set out in the *Commentaries*, the most critical appear to be certainty, reasonableness, and continuity. Contrary to the language in the *Thornton* case from Oregon, reasonableness is not a matter of present use but of original legal unfairness at its inception. Customs that unduly burden property rights of the landowner or which favor unduly one group or person over others are unreasonable. If a custom is reasonable in these terms at its inception, then it is reasonable. Thus the court's statement that "reasonableness is satisfied by evidence that the public has always made use of the land in a manner appropriate to the land and to the usages of the community"[330] is beside the point and wrong.

The Blackstonian criterion of certainty goes to the clarity of the customary practice or right, the restrictive certainty as to locale (some legally recognized division like a county, a city, a town, or a village), and certainty as to a class of persons or section of the public. The

328. *Id.* ¶ 79.
329. *Id.* ¶ 85.
330. 462 P.2d 671, 677 (Or. 1969).

Thornton court's statement that "certainty is satisfied by the visible boundaries of the dry sand area and by the character of the land, which limits the use thereof to recreation uses connected with the foreshore"[331] is vague as to the first requirement, far too broad with respect to the second, and altogether fails to deal with the third.

As to continuity, the court says that a "customary right need not be exercised continuously, but it must be exercised without an interruption caused by anyone possessing a paramount right."[332] True for the first part, false for the second part. As Blackstone (and the cases) make abundantly clear, it is the *right* of use which must be continuous. The use itself goes to evidence of that continuity of right, but the use itself is otherwise irrelevant.

To sum up, American courts cite (appropriately) Blackstone when finding custom as a basis for permitting what would otherwise be a trespass on private land. Unfortunately, they usually get it so wrong that the basis in custom must certainly fail. Without another basis for justifying such invasive intrusions on private property, those exercising such rights are trespassing, and governments that permit (or require) such trespass are taking private property without compensation contrary to the Fifth Amendment of the Constitution.

Custom is amorphously defined somewhat differently when referring to customary practices of native and/or indigenous people. Native customs are usually defined as a usage or practice over time that is universally recognized as a rule governing behavior by most if not all people affected by it. Some add that the custom responds to specific societal needs over time. Others, like the expert and commentator Peter Orebech, would argue that the practice needs to be public, justified, reasonable, and morally well founded.[333] In Hawai'i such indigenous customs have been recognized as a defense to trespass, although they are subject to certain criteria and limitations.

It is clear that the proper role and scope of custom as a source of law will continue to be an important and controversial topic both in the United States and abroad well into the twenty-first century.

---

331. *Id.*

332. *Id.*

333. Peter Orebech, *How Custom Becomes Law in Norway*, *in* THE ROLE OF CUSTOMARY DEVELOPMENT IN SUSTAINABLE DEVELOPMENT 224, 233–40 (Cambridge Univ. Press 2005).

THE CONTRACT CLAUSE: ORIGINS AND EARLY DEVELOPMENT

JAMES W. ELY, JR.*

Forrest McDonald remarked that the adoption of the contract clause at the constitutional convention "is shrouded in mystery."[1] To unravel this mystery, one must start by considering the economic changes experienced by the American colonies during the eighteenth century. As the colonies grew and became more prosperous, they gradually rejected the doctrine of mercantilism inherited from Great Britain, with its emphasis upon governmental controls, in favor of an emerging market economy. Wage and price regulations, as well as the system of exclusive public markets, gradually atrophied.[2] Moreover, the law governing real property was revamped little by little to facilitate land transactions, thereby treating landed property increasingly as a market commodity.[3]

As price controls and regulated markets declined and land speculation quickened, contracts assumed a more prominent role in the growing commercial society of the eighteenth century. In an expanding economy merchants were more likely to trade with or extend credit to persons who were strangers. Under such circumstances, transactions could no longer be grounded in custom or trust. Hence, private bargains in an impersonal market were increasingly determined by written agreements. Parties became accustomed to making deals and

* Milton R. Underwood Professor of Law, Emeritus, and Professor of History, Emeritus, Vanderbilt University. This Article is drawn from a book manuscript examining the history of the contract clause. Earlier versions of this Article were presented at the Center of Law and History, Washington and Lee School of Law, April 8, 2005, and at the Darlington Foundation Originalism Works-in-Progress Conference, University of San Diego School of Law, February 20–22, 2015. I want to thank David J. Bodenhamer, Robert Mikos, and Herbert A. Johnson for their perceptive comments on an earlier draft of this Article. I also wish to acknowledge the skillful research assistance of Carolyn R. Hamilton of the Massey Law Library, Vanderbilt University.

1. FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 271 (Univ. Press of Kan. 1985).

2. James W. Ely, Jr., *Economic Liberties and the Original Meaning of the Constitution*, 45 SAN DIEGO L. REV. 677–87 (2008).

3. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 27 (3rd ed. 2005); GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 128 (New York: A.A. Knopf, 1992); Claire Priest, *Creating an American Property Law: Alienability and Its Limits*, 120 HARV. L. REV. 385, 408–58 (2006).

looking out for their own interests. Contracts provided a vehicle by which individuals could bargain for their own advantage.[4] The product of private negotiation, not governmental authority, contractual exchanges not only encouraged economic efficiency but also underscored the autonomy of individuals. To achieve these goals, the stability of contracts was essential. It was necessary that bargains be honored and not subject to subsequent legislative interference.

A careful study of Virginia bears out the waxing of contract law and a market economy. William E. Nelson found that "a vibrant market economy" based on tobacco sales developed as early as the mid-seventeenth century. This robust economy "gave rise to complex commercial transactions and commercial litigation." Nelson concluded that by the 1640s in Virginia, "the hallmark doctrine of market capitalism, that individuals should be free to enter into contracts which courts would then enforce, was firmly in place."[5]

I. POST-REVOLUTIONARY ERA

The troubled conditions of post-Revolutionary America, however, presented serious challenges to an economy based on private bargaining. Independence from Great Britain caused considerable economic dislocation. It ended the trade restrictions imposed by the British Navigation Acts but also brought about the loss of markets with Great Britain and its other colonies. In addition, the Revolution caused wholesale interference with private economic relationships by state legislatures. Reacting to the depressed economic climate in the wake of independence, state lawmakers enacted a variety of debt-relief laws to assist debtors at the expense of creditors. They passed laws staying the collection of debts, allowing the payment of debts in installments, and authorizing the payment of debts in commodities.[6] South

4. WOOD, *supra* note 3, at 162–64.

5. William E. Nelson, *Authority and the Rule of Law in Early Virginia*, 29 OHIO N.U. L. REV. 357–60 (2003); *see also* WILLIAM E. NELSON, THE COMMON LAW IN COLONIAL AMERICA, VOLUME 1: THE CHESAPEAKE AND NEW ENGLAND, 1607–1660, 35–36 (New York, Oxford Univ. Press 2008).

6. ALLAN NEVINS, THE AMERICAN STATES DURING AND AFTER THE REVOLUTION, 1775–1789, 404–5, 537, 571 (New York, Macmillan Co., 1924); JEROME J. NADELHAFT, THE DISORDERS OF WAR: THE REVOLUTION IN SOUTH CAROLINA 155–72 (Orono, Me., Univ. of Maine at Orno Press, 1981); Stuart Bruchey, *The Impact of Concern for the Security of Property Rights on the Legal System of the Early American Republic*, 1980 WIS. L. REV. 1135, 1138–40 (1980).

Carolina's Pine Barren Act of 1785 was a particularly egregious measure. Under this act debtors could tender distant property or worthless pineland to satisfy outstanding obligations.[7] State lawmakers also issued quantities of paper money and made such paper currency legal tender for the payment of debts. These measures not only hampered commerce by frustrating the enforcement of contracts but seemingly portended threats to the security of property generally. Creditors and merchants saw these laws as little more than a confiscation of their property interests.

Although popular in some quarters, legislative tampering with agreements aroused intense criticism. In 1786, for example, Noah Webster, later the author of a famous dictionary, declared:

> But remember that past contracts are sacred things; that Legislatures have no right to interfere with them; they have no right to say, a debt shall be paid at a discount, or in any manner which the parties never intended. It is the business of justice to fulfil the intention of parties in contracts, not to defeat them.[8]

Alexander Hamilton, while Secretary of the Treasury, pictured state legislative interference with contracts as rendering commerce uncertain and as weakening the security of property.[9] Likewise, Chief Justice John Marshall later recalled the deleterious impact of laws meddling with contracts on society in the newly independent United States:

> The power of changing the relative situation of debtor and creditor, of interfering with contracts, a power which comes home to every man, touches the interest of all, and controls the conduct of every individual in those things which he supposes to be proper for his own exclusive management, had been used to such an excess by the State legislatures, as to break in upon the ordinary intercourse of society, and destroy all confidence between man and man. The mischief had become so great, so alarming, as not only to impair commercial intercourse, and threaten the existence of credit, but to sap the morals of the people, and destroy the sanctity of private faith. To guard against the continuance of the evil was an object

7. James W. Ely, Jr., *American Independence and the Law: A Study of Post-Revolutionary South Carolina Legislation*, 26 VAND. L. REV. 939, 942–43 (1973).

8. Noah Webster, *The DEVIL is in you*, *in* COLLECTION OF ESSAYS 130 (Bos., 1790).

9. Letter from Alexander Hamilton to George Washington, May 28, 1790, *reprinted in* 6 THE PAPERS OF ALEXANDER HAMILTON 436 (Harold C. Syrett et al. eds., 1962).

> of deep interest with all the truly wise, as well as the virtuous, of this great community, and was one of the important benefits expected from the reform of the government.[10]

Legislative interference with contractual arrangements was not confined to debt-relief laws. Consider the controversy over the revocation of the charter of the Bank of North America. The first incorporated bank in the United States, the Bank of North America, received charters from the Continental Congress in 1781 and the Pennsylvania legislature the following year. Given doubts about the authority of Congress to grant charters of incorporation, the Bank was generally regarded as a Pennsylvania institution. In 1785 the Pennsylvania legislature, responding to pressure from radicals and agrarians, moved to annul the charter. Critics maintained that the Bank encouraged the accumulation of capital and hampered the issuance of paper money by the state. The repeal proposal triggered a bitter debate in the state.[11] James Wilson, a prominent lawyer and later a member of the constitutional convention and a Supreme Court justice, took the lead in defending the Bank. In a widely circulated pamphlet, *Considerations on the Bank of North America*, Wilson attacked repeal as economic folly. More important for our purposes, he argued that the act incorporating the Bank amounted to a contract between the state and the corporation that the legislature was bound to respect. Wilson insisted that "while the terms are observed on one side, the compact cannot, consistently with the rules of good faith, be departed from on the other." Noting the practical significance of corporate charters, he added: "To receive the legislative stamp of stability and permanency, acts of incorporation are applied for from the legislature. If these acts may be repealed without notice, without accusation, without hearing, without proof, without forfeiture; where is the stamp of their stability?"[12] In a nutshell, Wilson contended that a state was obligated to honor its own undertakings and that stability in regard to

10. Ogden v. Saunders, 27 U.S. 213, 354–55 (1827) (Marshall, C.J., dissenting).

11. JOSEPH STANCLIFFE DAVIS, ESSAYS IN THE EARLIER HISTORY OF AMERICAN CORPORATIONS: EIGHTEENTH BUSINESS CORPORATIONS IN THE UNITED STATES 310–13 (New York, Russell & Russell, 1965) (1917); F. Cyril James, *The Bank of North America and the Financial History of Philadelphia*, 64 PA. MAG. OF HIST. & BIOG. 62–66 (1940); Janet Wilson, *The Bank of North America and Pennsylvania Politics, 1781–1787*, 66 PA. MAG. OF HIST. & BIOG 3–13 (1942).

12. James Wilson, *Considerations on the Bank of North America* (1785), *in* 1 COLLECTED WORKS OF JAMES WILSON 71–72 (Kermit L. Hall & Mark David Hall, eds., Indianapolis, Liberty Fund, 2007).

corporate charters was essential for successful enterprise. As Jennifer Nedelsky pointed out: "Not only did [Wilson] think that upholding contracts was extremely important economically, he saw the obligation of contract as part of the fundamental obligations to fulfill promises which makes society possible."[13] Other legislators echoed Wilson, with one insisting that "charters are a species of property."[14] These arguments did not prevail in 1785. Defenders of the repeal law denied that a corporate charter should be treated as a contract and stressed the power of the legislature to revoke charters.[15] Although the charter was rescinded, Wilson had anticipated much constitutional jurisprudence. Indeed, one scholar has contended that the contract clause "was an outgrowth of the arguments about Pennsylvania's authority to breach its own contract."[16]

Wilson was not alone in advancing these views. In 1786 Pelatiah Webster, a Philadelphia merchant and author of several pamphlets on finance and government, reiterated the points stressed by Wilson. Maintaining that "[c]harters (or rights of individuals or companies, secured by the State) *have ever been considered as a kind of sacred things*," he denied that legislatures could repeal the grant and destroy the rights of the grantee. Webster even argued that "the sacred force of contracts *binds stronger in an act of state*, than in the *act of an individual*, because *the whole government is injured and weakened by a violation of the public faith. . . .*"[17]

As these comments indicate, state interference with the rights of creditors, when coupled with the revocation of an important corporate charter, bitterly disappointed many political leaders of the post-Revolutionary era. They became convinced that state protection of

---

13. JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY 299 n.141 (Univ. of Chicago Press, 1990).

14. As quoted in 2 JOHN STANCLIFFE DAVIS, ESSAYS IN THE EARLIER HISTORY OF AMERICAN CORPORATIONS 313 (Cambridge, Mass., 1917).

15. *Id.* at 312–15 (finding that state legislatures at the end of the eighteenth century asserted the power to alter or repeal corporate charters but rarely exercised such power).

16. William Ewald, *James Wilson and the Drafting of the Constitution*, 10 U. PA. J. CONST. L. 910 (2008).

17. Pelatiah Webster, *An Essay on Credit in Which the Doctrine of Banks is Considered* at 37–38 (Philadelphia, 1786). A similar argument was advanced by Noah Webster in 1788. He maintained that when a legislature "makes *grants* or *contracts* it act[s] as a party, and cannot take back its grant or change the nature of its contracts, without the consent of the other party. A state has no more right to neglect or refuse to fulfil its engagements, than an individual." Noah Webster, *Principles of Government and Commerce*, *in* COLLECTION OF ESSAYS . . . ON MORAL, HISTORICAL, POLITICAL AND LITERARY SUBJECTS 40–41 (Boston, 1790).

economic rights was inadequate. Historians generally agree that the establishment of safeguards for private property was one of the principal objectives of the Constitutional Convention of 1787. "Perhaps the most important value of the Founding Fathers of the American constitutional period," Stuart Bruchey has cogently pointed out, "was their belief in the necessity of securing property rights."[18] Delegates repeatedly stressed this theme during the convention. For instance, James Madison asserted at the Philadelphia convention that "the primary objects of civil society are the security of property and public safety."[19]

The first provision protective of contractual rights was part of the Northwest Ordinance of July 1787. Passed by the Confederation Congress while the Constitutional Convention was meeting in Philadelphia, the Ordinance established a framework for territorial governance in the Old Northwest. Articulating a number of fundamental principles, the Ordinance had much of the character of a constitutional document.[20] The Ordinance contained several important provisions regarding the rights of property owners, including one ensuring the sanctity of private contracts. Article 2 of the Ordinance stated:

> And, in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts, or engagements, bona fide, and without fraud previously formed.[21]

This language may have been inserted in response to Shays' Rebellion in Massachusetts, which sought to prevent the collection of debts. It has also been seen as part of a larger scheme to encourage commercial development in the largely unsettled territories. Viewed in this light, the protection of agreements was a crucial step in attracting eastern investors. The territorial government was prevented from

18. Bruchey, *supra* note 6, at 1136.

19. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 147 (Max Farrand, ed., Yale Univ. Press, 1937).

20. *See* Denis P. Duffey, *The Northwest Ordinance as a Constitutional Document*, 95 COLUM. L. REV. 929–68 (1995).

21. An Ordinance for the Government of the Territory of the United States North-West of the River Ohio, July 13, 1787, *in* 32 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789 340 (Roscoe R. Hill, ed., 1936). The Ordinance was reenacted in 1789 by the first Congress under the Constitution. 1 Stat. 50 (Aug. 7, 1789).

abridging private economic deals, which created a hospitable climate for outside capital.[22] The contract clause in the Northwest Ordinance was the first prescient step in forging a constitutional guarantee of existing contracts.

II. CONSTITUTIONAL CONVENTION

Given the concern shared by many delegates to the Constitutional Convention that state governments were invading property and contractual rights and hampering commerce, it is hardly a surprise that the new Constitution contained a cluster of provisions designed to rectify the abuses at the state level. Thus, the Constitution prevented the states from enacting bills of attainder and from making anything but gold or silver legal tender for the payment of debts.

A provision barring the states from impairing contracts was added late in the convention's deliberations and with surprisingly little debate, given its subsequent significance in American constitutionalism. On August 28, 1787, the delegates were considering constitutional limitations upon the authority of the states. Rufus King of Massachusetts moved to insert into the Constitution language "in the words used in the Ordinance of Cong[ress] establishing new States, a prohibition on the States to interfere in private contracts."[23] King's proposal faced a cool reception. Gouverneur Morris declared his opposition, observing:

> This would be going too far. There are a thousand laws relating to bringing actions—limitations of actions & which affect contracts—The Judicial power of the US—will be a protection in cases within their jurisdiction; and within the State itself a majority must rule, whatever may be the mischief done among themselves.[24]

James Wilson supported King's motion. James Madison was somewhat ambivalent but was generally favorable. He "admitted that

22. Matthew J. Festa, *Property and Republicanism in the Northwest Ordinance*, 45 ARIZ. ST. L.J. 409, 448–52 (2013); John M. Morrison, *The Legislative History of the Ordinance of 1787*, *in* 5 PROCEEDINGS OF THE AMERICAN ANTIQUARIAN SOCIETY 331–32 (1889); Andrew R.L. Cayton, *The Northwest Ordinance from the Perspective of the Frontier*, *in* THE NORTHWEST ORDINANCE 1787: A BICENTENNIAL HANDBOOK 21 (Robert M. Taylor, Jr., ed., Indianapolis: Ind. Historical Society, 1987); Duffey, *supra* note 20, at 938, 960.

23. Farrand, *Records*, *supra* note 19, at 439.

24. *Id.* at 439.

inconvenience might arise from such a prohibition but thought on the whole it would be overbalanced by the utility of it." Anticipating later issues, Madison added: "Evasions might and would be devised by the ingenuity of the legislatures."[25] George Mason joined Morris in resisting King's proposal. He stated:

> This is carrying the restraint too far. Cases will happen that can not be foreseen, where some kind of interference will be proper & essential—He mentioned the case of limiting the period for bringing actions on account—that of bonds after a certain (lapse of time,)—asking whether it was proper to tie the hands of the States from making provision in such cases?[26]

In response, Wilson argued that only retrospective interferences with contracts would be prohibited by the proposed ban. This comment interjected a note of confusion into the deliberations. It prompted Madison to ask: "Is not that already done by the prohibition of ex post facto laws, which will oblige the Judges to declare such interferences null & void." [27]John Rutledge moved to substitute for King's motion the words "nor pass bills of attainder nor ex post facto laws." This motion carried by a vote of seven to three, and the suggested contract clause was shelved.[28]

A day later John Dickinson declared that he had examined William Blackstone's *Commentaries* and had "found that the terms 'ex post facto' related to criminal cases only; that they would not consequently restrain the States from retrospective laws in civil cases, and that some further provision for this purpose would be requisite."[29] But the convention never debated the question of a contract clause again. Nonetheless, the Committee of Style and Arrangement, charged with preparing a final document, placed a differently worded contract clause into Article I, section 10, which contained various restrictions on state power. The proposed language barred the states from "altering or impairing the obligation of contracts." The convention deleted the words "altering or" without recorded discussion, and the contract

25. *Id.* at 440.
26. *Id.*
27. *Id.*
28. *Id.* Connecticut, Massachusetts, and Virginia voted against the motion.
29. *Id.* at 448–49.

clause was adopted as part of the Constitution.[30] The clause could be seen as an extension of the ban on ex post facto laws to measures involving contracts.[31]

Authorship of the clause is uncertain. The committee was composed of Alexander Hamilton, William S. Johnson, King, Madison, and Morris. Only Morris had spoken in opposition to a provision protecting contractual rights. King had initially proposed a qualified clause limited to private contracts, and Madison had offered a guarded endorsement. Neither, however, seems a likely source for a broad restriction on state power over contracts.[32] McDonald persuasively speculates that Hamilton, with his modern understanding of contracts, was the probable author.[33] Other scholars have suggested that Wilson, who was not a committee member but who was a close friend of Hamilton, may have proposed the final wording.[34] Thus, Jennifer Nedelsky has concluded that "it seems entirely likely that Wilson would have inserted such a clause."[35]

In any event, the convention as a whole did not revisit this issue. Elbridge Gerry of Massachusetts warmly endorsed the principle behind the contract clause. He "entered into observations inculcating

30. *Id.* at 619.

31. As adopted, Article I, section 10 provides in part: "No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bills of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or any Title of Nobility." U.S. CONST. art I, § 10.

32. *But see* ROBERT ERNST, RUFUS KING: AMERICAN FEDERALIST 111–12 (Univ. of N.C. Press, 1968) (discussing King's role in the adoption of the contract clause, and concluding the King was "persistent and persuasive" and may have convinced other members of the Committee of Style to include the provision).

33. McDonald, *supra* note 1, at 272–73; *see also* RICHARD B. MORRIS, WITNESSES AT THE CREATION: HAMILTON, MADISON, JAY, AND THE CONSTITUTION 221–22 (New York, Holt, Rinehart & Winston, 1985) (asserting "it is most probable the Hamilton persuaded his colleagues on the Committee of Style to add" the contract clause).

34. WARREN B. HUNTING, THE OBLIGATION OF CONTRACTS CLAUSE OF THE UNITED STATES CONSTITUTION 115–16 (Johns Hopkins Univ. Press, 1919); MAX M. MINTZ, GOUVERNEUR MORRIS AND THE AMERICAN REVOLUTION 201 (Univ. of Okla. Press, 1970); *See also* PAGE SMITH, JAMES WILSON: FOUNDING FATHER, 1742–1798 247–48 (Univ. of N.C. Press, 1956) (noting that Wilson has been credited with authorship of the contract clause, but concluding: "While there is no evidence definitely disproving Wilson's authorship, certainly no evidence exists to prove it."); MARK DAVID HALL, THE POLITICAL AND LEGAL PHILOSOPHY OF JAMES WILSON, 1724–1798 137 (Univ. of Mo. Press, 1997) (finding "little solid evidence" that Wilson was the author, but stressing that Wilson "believed that legislatures should not violate the sanctity of contracts").

35. Nedelsky, *supra* note 13, at 299 n.141.

the importance of public faith, and the propriety of the restraint put on the States from impairing the obligation of contracts." Gerry sought to apply the contract clause to the new federal government, but his motion to this effect failed for lack of a second.[36] This underscores the fact that the ban on contractual interference was deliberately applied just to the states.[37] The framers seemingly realized that laws violative of contracts might be necessary in some circumstances but felt that such measures should only be enacted by Congress. To that end, Congress was empowered to "establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." Congress, it was felt, could better assess public need and was less likely to be influenced by local considerations and particular interest groups. Moreover, it is striking that, despite its circuitous path into the Constitution, the framers thought a specific ban on state impairment of contracts was sufficiently vital to include at the very time they were arguing that a bill of rights was unnecessary.[38]

The contract clause fit comfortably into the larger scheme of the Federalists to foster a commercial society. "Federalists proposed, in sum," two scholars have concluded, "to place the new land in the mainstream of acquisitive capitalism."[39] As we have seen, by the late eighteenth century contracts played a critical role in a growing market economy. The reliability of agreements was essential. Lawrence M. Friedman has pointed out that "business had to be able to rely on the stability of arrangements legally made, at least in the short and middle run."[40] The contract clause was designed to provide that stability. Analyzing the purpose of the contract clause, Charles A. Beard tellingly observed: "Contracts are to be safe, and whoever engages in a

36. Farrand, *Records*, *supra* note 19, at 619.

37. For an exploration of why the contract clause was applied only to state governments, see Michael W. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 CALIF. L. REV. 267–95 (1988).

38. Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 537 (1989) ("This was the Federalist effort to link the eighteenth century's affirmation of individual liberty with the rhetoric of contract and private property. Thus, the Federalists valued market 'freedom' so highly that they forbade the states from 'impairing the obligation of Contract' in the original 1787 Constitution, at a time when they believed an elaborate Bill of Rights unnecessary.").

39. KERMIT L. HALL & PETER KARSTEN, THE MAGIC MIRROR: LAW IN AMERICAN SOCIETY 72 (2d ed., Oxford Univ. Press, 2009).

40. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 203 (3d ed., New York, Touchstone, 2005).

financial operation, public or private, may know that state legislatures cannot destroy overnight the rules by which the game is played."[41]

III. RATIFICATION DEBATES

Consistent with republican theory that political authority rested on popular consent, the framers submitted the proposed Constitution for ratification by popularly elected state conventions. During the ensuing ratification debates, the proponents of the Constitution termed themselves Federalists and dubbed critics of the Constitution as Anti-Federalists. The ratification debates primarily turned upon far-ranging political and constitutional issues, in which the contract clause did not figure prominently. The Federalists tended to be commercially minded individuals, such as merchants and planters producing crops for export, who looked with favor on the contract clause. A writer in the *New Hampshire Spy* in November of 1787 expressed the Federalist viewpoint, observing the Constitution "also expressly prohibits those destructive laws in the several states which alter or impair the obligation of contracts; so that in future anyone may be certain of an exact fulfilment of any contract that may be entered into or the penalty that may be stipulated for in case of failure."[42]

It is useful to review the arguments of both proponents and critics of the Constitution as they pertain to the contract clause. The various restrictions on state power contained in Article I, section 10, including the contract clause as well as the prohibition of paper money and ex post facto laws, were often linked together for the purposes of debate. Leading Federalists pictured this cluster of restrictions as essential for preserving credit and encouraging commerce. Writing in the Federalist, Hamilton assailed state infringement of contracts as "atrocious breaches of moral obligation and social justice." Still, he focused on the dire implications for trade among the states posed by laws abridging agreements. "Laws in violation of private contracts," Hamilton

41. CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 179 (New York, Macmillan Co., 1913); *see also* Paul G. Kauper, *What Is A "Contract" Under the Contracts Clause of the Federal Constitution?*, 31 MICH. L. REV. 187, 193 (1932) ("The framers of the Constitution were practical-minded men, most of them of the creditor class; one of their chief objects in establishing a federal government and placing limitations on state action was to insure stability in commercial and mercantile transactions by providing against legislative interference dictated by whim, caprice, or class prejudice.").

42. THE NEW HAMPSHIRE SPY, Nov. 3, 1787.

warned, "as they amount to aggressions on the rights of those states, whose citizens are injured by them, may be considered as another probable source of hostility."[43] He expressed concern that such contractual infringements would invite retaliation by other states, undercutting the goal of a commercial union. Similarly, Charles Pinckney of South Carolina, also a delegate to the constitutional convention, characterized Article I, section 10, as "the soul of the Constitution" at the South Carolina ratifying convention. Echoing Hamilton, Pinckney explained: "Henceforth, the citizens of the states may trade with each other without fear of tender-laws or laws impairing the nature of contracts." Moreover, he anticipated that these limitations on the states would restore American credit in foreign markets. "No more shall paper money, no more shall tender-laws," Pinckney declared, "drive their commerce from our shores, and darken the American name in every country where it is known."[44] Wilson, addressing the Pennsylvania ratifying convention, likewise emphasized the interstate dimensions of contracts. He insisted that Article I, section 10, alone "would be worth our adoption."[45]

Other prominent Federalists saw Article I, section 10, as a vehicle to bar state debt-relief legislation. David Ramsay of South Carolina, for example, observed that this provision "will doubtless bear hard on debtors who wish to defraud their creditors, but it will be a real service to the honest part of the community."[46] Likewise, William R. Davie of North Carolina, who had served in the military during the Revolutionary War and represented North Carolina at the Constitutional Convention, championed the contract clause as a curb on irresponsible state relief measures. Picturing the provision as essential for the interests of both agriculture and commerce, he warned that South Carolina

> might in the future, as they have already done make pine barren acts to discharge their debts. They might say that our citizens shall be paid in sterile, inarable lands, at an extravagant price.

---

43. THE FEDERALIST NO. 7 (Alexander Hamilton).

44. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 333–36 (2d ed., Jonathan Elliott, ed., Salem, N.J., Ayer 1987) (1836–59) [hereinafter ELLIOT'S DEBATES].

45. *Id.* at 486.

46. David Ramsay, *An Address to the Freeman of South Carolina on the Federal Constitution* (Charleston, 1788), *in* PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 379–80 (Paul Leicester Ford, ed., New York, Da Capo Press, 1968) (1888).

> They might pass the most iniquitous installment laws, procrastinating the payment of debts due from their citizens for years, nay, for ages.[47]

James Madison in the *Federalist* defended Article I, section 10, in different terms, stressing broad considerations of justice. He pictured bills of attainder, ex post facto laws, and laws abridging contracts as "contrary to the first principles of the social compact, and to every principle of sound legislation." Madison described the restrictions in this section as a "constitutional bulwark in favor of personal security and private rights." With the contract clause evidently in mind, he added:

> The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and with indignation, that sudden changes, and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators; and snares to the more industrious and less informed part of the community. They have seen too, that one legislative interference is but the first link of a long chain of repetitions; every subsequent interference being naturally produced by the effects of the preceding.[48]

This sketchy record makes clear that leading Federalists, despite differing explanations of the contract clause, saw the provision to be of crucial importance. At the same time, their brief and ambiguous comments give little guidance as to the intended scope of the clause. Indeed, there was a range of opinion about the meaning of the contract clause, and the framers did not all share a common understanding. "The clause meant different things to different men in 1787–1788," Steven R. Boyd aptly concluded, "and throughout the early national period."[49]

Several proponents of the Constitution expressed the opinion that the limitations on state authority found in Article I, section 10, generated much of the opposition to ratification.[50] There is little evidence,

47. ELLIOT'S DEBATES, *supra* note 44, at 157.

48. THE FEDERALIST NO. 44 (James Madison).

49. Steven R. Boyd, *The Contract Clause and the Evolution of American Federalism, 1789–1815*, 44 WM. & MARY Q. 531 (1987).

50. Letter from James Madison to Thomas Jefferson, Oct. 17, 1788, *in* 11 THE PAPERS OF JAMES MADISON 297 (Robert A. Rutland et al., eds., Univ. of Va. Press, 1977) (attributing much of the opposition to the proposed Constitution to the articles on paper money and contracts).

however, to support this position with respect to the contract clause. Anti-Federalists rarely focused on the clause in urging rejection of the proposed new government. In fact, several Anti-Federalists admitted that the states had often acted irresponsibility regarding contracts. Thus, in February of 1788, James Winthrop of Massachusetts suggested amendments as a basis for accepting the Constitution. One proposal declared: "It shall be left to every state to make and execute its own laws, except laws impairing contracts, which shall not be made at all."[51] Another Anti-Federalist endorsed the restraints of Article I, section 10: "These prohibitions give the most perfect security against those attacks upon property which I am sorry to say some of the states have but too wantonly made, by passing laws sanctioning fraud in the debtor against his creditor."[52] His concern was not with the contract clause itself but with the means of enforcement. This writer insisted that state, not federal, courts should be trusted with deciding cases arising under this section.

Although discussion of the contract clause by those opposed to the Constitution was infrequent, one prominent Anti-Federalist, Luther Martin of Maryland, vigorously attacked the denial of state power to interfere with contracts. Speaking before the Maryland House of Delegates in November of 1787, Martin recognized that the contract clause might have a broad reach. In often quoted language, he asserted:

> I considered, Sir, that there might be times of such great public *calamities* and *distress* and of such *extreme scarcity of specie*, as should render it the *duty* of a government, for the *preservation* of even *the most valuable part* of its citizens, in some measure to interfere in their favor, by passing laws *totally or partially stopping* the courts of justice, or authorizing the debtor to pay by installments, or delivering up his property to his creditors at a *reasonable* and *honest* valuation. The times have been such as to render regulations of this kind necessary in most or all of the States, to prevent the *wealthy creditor* and the *monied* man from *totally* destroying the *poor* though even industrious debtor. *Such times*

51. Agrippa, *Letter XVI*, Feb. 5, 1788 (James Winthrop), *in* THE ESSENTIAL ANTIFEDERALIST 56 (2d ed., W.B. Allen & Gordon Lloyd, eds., Lanham, Md., Rowman & Littlefield Publishers, 2002).

52. Brutus, *Letter XIV*, Mar. 6, 1788, *in* THE DEBATE ON THE CONSTITUTION, PART TWO: DEBATES IN THE PRESS AND IN PRIVATE CORRESPONDENCE 265 (Bernard Bailyn, ed., New York, Lib. of Am., 1993).

> may *again* arise. I therefore voted against depriving the States of this power, a power which I am decided they ought to possess, but which, I admit, ought only to be exercised on very important and urgent occasions.[53]

Focusing on debtor-creditor relationships, Martin stressed his belief that the states should retain the power to abridge contracts in periods of economic emergency. This view, of course, was squarely opposed to that of the Federalists.

IV. SCOPE OF THE CONTRACT CLAUSE

With the ratification of the Constitution, debate over the contract clause shifted to ascertaining the scope of its ban on state contractual impairments. No doubt the immediate impetus for the inclusion of the clause was to curtail state debt-relief measures, which weakened the security of private agreements. This has caused some scholars to reach the dubious conclusion that the framers expected the contract clause to be confined to debtor-creditor relationships.[54] One cannot infer the extent of the contract clause, however, solely from the necessities of the moment. There is no evidence that the clause was directed solely at creditor-debtor legislation. It is phrased in general terms and appears calculated to safeguard all contractual rights from legislative interference.[55]

Perhaps the most vexing question for historians is whether the contract clause was expected to reach contracts made by the states, as well as agreements among private parties. Starting in the 1870s a number of commentators expressed doubt that the framers anticipated inclusion of public contracts within the ambit of the clause. As

---

53. Luther Martin, *Genuine Information*, Nov. 29, 1787; Farrand, *Records*, *supra* note 19, at 214–15.

54. EDWARD S. CORWIN, JOHN MARSHALL AND THE CONSTITUTION: A CHRONICLE OF THE SUPREME COURT 167–68 (Yale Univ. Press, 1919).

55. Douglas W. Kmiec & John O. McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 HASTINGS CONST. L.Q. 525, 533–34 (1987). The Supreme Court has repeatedly rejected the argument that the contract clause was aimed solely at debt-relief laws. *See* Sturges v. Crowninshield, 17 U.S. 122, 205–6 (1919) (Marshall, C.J.) ("The Convention appears to have intended to establish a great principle, that contracts should be inviolable."); Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 245 n.16 (1978) (Stewart, J.) ("The even narrower view that the clause is limited in its application to state laws relieving debtors of obligations to their creditors is . . . completely at odds with this Court's decisions.").

a corollary, these scholars maintained that the Supreme Court under the leadership of Chief Justice John Marshall expanded the scope of the contract clause beyond the limited objectives of the framers to safeguard private arrangements.[56] In a 1919 study, for example, Warren B. Hunting reviewed some of the evidence pertaining to the meaning of the clause and concluded without explanation that the convention "had in mind only the contracts of private individuals."[57] There was a growing tendency during the Gilded Age to question the application of the contract clause to public agreements.

This narrow interpretation of the contract clause, which gradually gained currency, was endorsed by Benjamin F. Wright in his leading study, *The Contract Clause of the Constitution* (1938). "[T]he men of 1787–1788," he declared, "discussed the clause only in relation to private contracts, i.e., contracts between individuals." Wright added: "A careful search has failed to unearth any other statements even suggesting that the contract clause was intended to apply to other than private contracts."[58] Writing at a time when New Deal constitutionalism was gathering strength, Wright reflected the tradition of the Progressive historians who were deeply skeptical about the traditional role of the federal judiciary as a safeguard of the rights of property owners and who celebrated the growth of governmental powers over the economy. "Surely it is significant," Wallace Mendelson cogently noted, "that he produced *The Contract Clause* during the Great Depression . . . when the Progressive Movement's disdain for 'government by judges' was still a rampant force in liberal circles."[59] It became an article of faith that Marshall took an expansive view of the contract clause in order to protect vested property interests. This Progressive attitude may have led Wright to downplay contrary evidence. Nonetheless, Wright's work has been highly influential. Although his interpretation has been increasingly called into question,

---

56. *See, e.g.*, Clement H. Hill, *The Dartmouth College Case*, 8 AM. L. REV. 189, 196 (1874). For the shift in scholarly interpretation of the contract clause during the 1870s and 1880s, as well as increased criticism of Marshall's view that public agreements were covered, see Robert L. Clinton, *The Obligation Clause of the United States Constitution: Public and/or Private Contracts*, 11 U. ARK. LITTLE ROCK J. 353–57 (1988).

57. Hunting, *supra* note 34, at 120.

58. BENJAMIN F. WRIGHT, THE CONTRACT CLAUSE OF THE CONSTITUTION 15, 16 (Harvard Univ. Press, 1938).

59. Wallace Mendelson, *B.F. Wright on the Contract Clause: A Progressive Misreading of the Marshall-Taney Era*, 38 W. POL. Q. 263 (1985).

it is still common for scholars to assert that the framers expected the contract clause to cover only private agreements.[60]

I wish to challenge this conventional wisdom and to propose a contrary thesis—that the contract clause could fairly be construed to safeguard both private and public contracts from state abridgement and that the contract clause decisions of the Marshall Court were well grounded. As we have seen, the framers of the Constitution and the delegates to the state ratifying conventions did not focus to any great extent on the nature of the prohibition contained in the clause. Given the sketchy record, I recognize that it is difficult to establish with certainty what the contract clause was expected to accomplish. Further, it is unlikely that all who supported the clause had the same anticipation as to its impact. Still, I contend that a conscientious review of the admittedly fragmentary evidence fails to support the frequent statement that the contract clause was confined to private agreements.

We should start by examining the wording of the contract clause. Wright and others appear to proceed on the problematic assumption that the clause was simply intended to replicate the earlier provision in the Northwest Ordinance. But King's motion to that effect was defeated, and the Committee of Style markedly changed the wording of the clause as finally adopted. Specifically, the committee deleted the words "private" as well as "bona fide, and without fraud previously formed," which appear in the Northwest Ordinance. Wright never really comes to grips with this changed wording, which on its face gives the contract clause a much broader scope. It is curious, to say the least, to maintain that the language as adopted was the equivalent of wording that was explicitly rejected. Instead of this reasoning, I submit that the best evidence of what the framers intended is what was written and adopted. We should be skeptical about the notion that the unqualified language of the contract clause was somehow thought to reach only a limited range of contracts. As Mendelson has pointed out, "[i]f the Constitutional Convention had wanted the clause to cover

60. *See, e.g.*, Thomas W. Merrill, *Public Contracts, Private Contracts, and the Transformation of the Constitutional Order*, 37 CASE W. RES. L. REV. 600 (1987) ("[A] fairly strong case can be made that . . . the clause was *not* thought to impose a general duty on state governments to honor their own obligations."); Bruchey, *supra* note 6, at 1144; *See also* CHARLES F. HOBSON, THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW 73 (Univ. Press of Kan., 1996) ("The prevailing view of Marshall's contract clause jurisprudence is that he substantially enlarged the meaning of the clause beyond the intention of the framers.").

only private contracts, it could have easily said so." [61]The model of the Northwest Ordinance was immediately before the convention. Instead of following the private-contract approach of the Northwest Ordinance, the framers adopted more general wording. This significant change went unchallenged by any delegate, strongly indicating that it reflected the sense of the convention. As Robert L. Clinton has cogently observed, "the proceedings at Philadelphia offer no basis for believing that the Founders intended to make a sharp distinction between public and private contracts."[62]

The debates at the state ratifying conventions lend little support for confining the protective reach of the contract clause to private agreements. Only one Federalist unequivocally affirmed that the contract clause would apply solely to private obligations. At the first North Carolina ratifying convention, held in July of 1788, Anti-Federalists warned that the various provisions in Article I, section 10, and particularly the contract clause, would compel the state to redeem its depreciated securities at face value. William R. Davie responded:

> Mr. Chairman, I believe neither the 10th section, cited by the gentleman, nor any other part of the Constitution, has vested the general government with power to interfere with the public securities of any state. I will venture to say that the last thing which the general government will attempt to do will be this. They have nothing to do with it. The clause merely refers to contracts between individuals. That section is the best in the Constitution. It is founded on the strongest principles of justice.[63]

It goes without saying that a single statement, made in the course of a debate, is a slender basis for generalizations about the thoughts of the framers regarding the scope of the contract clause.

Other infrequent references to the contract clause by Federalists are too discursive to cast light on the subject. Discussing the monetary clauses of Article I, section 10, Charles Pinckney told the South Carolina ratifying convention that the states should not be "intrusted with the power of emitting money, or interfering with private contracts; or, by means of tender-laws, impairing the obligation of contracts."[64]

---

61. Mendelson, *supra* note 59, at 265.
62. Clinton, *supra* note 56, at 345.
63. ELLIOT'S DEBATES, *supra* note 44, at 191.
64. *Id.* vol. 4, at 334.

This observation tells us little, because the contracts impacted by debt-relief laws were invariably private. Moreover, Pinckney does not purport to be addressing the meaning of the contract clause.

More telling is the exchange between Patrick Henry, a leading Anti-Federalist, and Governor Edmund Randolph, who had served as a delegate to the constitutional convention. At the Virginia ratifying convention Henry insisted that the clause would require states to redeem paper money at face value.

> How will this thing operate, when ten or twenty millions are demanded as the quota of this state? You will cry out that speculators have got it at one for a thousand, and they ought to be paid so. Will you then have recourse, for relief, to legislative interference? They cannot relieve you, because of that clause. The expression includes public contracts, as well as private contracts between individuals. Notwithstanding the sagacity of the gentleman, he cannot prove its exclusive relation to private contracts.[65]

Henry clearly saw the potential sweep of the contract clause. Equally revealing is the response by Randolph. He correctly maintained that Congress, which had issued a good deal of paper money, was not bound by the contract clause. Randolph continued:

> I am still a warm friend to the prohibition, because it must be promotive of virtue and justice, and preventive of injustice and fraud. If we take a review of the calamities which have befallen our reputation as a people, we shall find they have been produced by frequent interferences of the state legislatures with private contracts. If you inspect the great corner-stone of republicanism, you will find It to be justice and fairness.[66]

Although Randolph indeed mentioned state interference with private contracts as a particular mischief, he does not contradict Henry or in any way suggest that the protection of the clause was restricted to private agreements.[67]

---

65. *Id.* vol. 3, at 474.

66. *Id.* at 478.

67. Hunting, *supra* note 34, at 113 ("It will be noticed that Randolph nowhere denies Henry's contention that the 'contracts clause' refers to the contracts of States as well as to those between individuals.").

The observations of other participants in the ratification debates do not draw a distinction between public and private contracts. Martin flatly opposed any limitation on state authority over contracts and consequently had no reason to address the issue. In the *Federalist*, Madison defended the clause in terms of the unfairness of violating agreements. Since he invoked "principles of the social contract" and was anxious to safeguard "personal security and private rights," it seems unlikely that he thought states were free under the contract clause to dishonor their own obligations.[68] It bears emphasis that in most situations, state impairment of public contracts would negatively affect the very "private rights" that Madison sought to protect.

Lastly, the views of Wilson and Hamilton deserve particular attention, as both have been identified as probable authors of the contract clause. Wilson, it will be recalled, was already on record as believing that state legislatures could not abridge their own agreements. It therefore seems highly likely that Wilson fully expected the contract clause to reach public contracts. Likewise, Hamilton was a strong supporter of a comprehensive reading of the provision, a point discussed further later in this chapter.

My purpose is not to demonstrate that the collective intent of the framers was to embrace both public and private contracts within the constitutional ban on impairment. The fragmentary nature of the extant evidence makes it impossible to establish conclusively the thinking of the various framers, who may well have harbored somewhat different ideas as to the extent of protection afforded agreements. But historians have leaped too quickly to the conclusion that the clause was meant to govern only private agreement, virtually ignoring a good deal of contrary evidence. There is certainly room to doubt that the framers drew a bright line between public and private contracts.

V. Initial Interpretations

Courts, legislators, and interested parties early grappled with the meaning of the contract clause. Despite the apparent clarity of its language, the contract clause posed a number of interpretative issues. When did the clause take effect? Did it apply to already existing agreements? What agreements amounted to a contract for purposes of protection under the clause? Did the clause prevent state lawmakers

68. The Federalist No. 44 (James Madison).

from making any adjustments to the rights and obligations of contracting parties?

As would be expected, the initial invocation of the provision concerned a debt-relief measure. In November of 1788, just months after ratification of the Constitution but before the new government was organized, the South Carolina legislature passed a revised installment law allowing debtors to pay their obligations over five years. Several South Carolinians protested that the statute was an unconstitutional impairment of contract. Despite some expressed reservations, most legislators felt that laws enacted before the effective date of government under the Constitution were not affected by the clause.[69] This position was eventually ratified by the Supreme Court.[70]

The first-known federal court decision invalidating a state statute was grounded on the contract clause. At issue in *Champion and Dickason v. Casey* (1792) was a 1791 Rhode Island private act extending for three years the time in which the debtor Silas Casey could settle his accounts with his creditors. The act also exempted Casey from all arrests and attachments for three years. Casey was a prominent Rhode Island merchant who suffered business reversals during the War of the American Revolution. He used his political connections to win passage of the stay law. Two British merchants brought suit in the United States Circuit Court for Rhode Island against Casey to recover unpaid debts of nearly $20,000. In defense, Casey raised the Rhode Island act as a bar to the suit.[71] The case was heard by Chief Justice John Jay, Justice William Cushing, and District Judge Henry Marchant. They sustained a demurrer to Casey's plead in abatement. Although the decision was never officially reported, newspaper accounts explained the outcome:

> The Judges were unanimously of Opinion, that, as by the Constitution of the United States, the individual states are prohibited

69. Boyd, *supra* note 49, at 535. For the legislative debates, see CITY GAZETTE, or THE DAILY ADVERTISER (Charleston), Oct. 24, 27, & 28, 1788.

70. Owings v. Speed, 18 U.S. 420 (1820) (Marshall, C.J.) (holding that Constitution did not take effect until March 1789 and that contract clause did not apply to state law enacted before that date).

71. Patrick T. Conley, Jr., *The First Judicial Review of State Legislation: An Analysis of the Rhode Island Case of* Champion and Dickason v. Casey *(1792)*, *in* LIBERTY AND JUSTICE: A HISTORY OF LAW AND LAWYERS IN RHODE ISLAND, 1636–1998 218–23 (Patrick T. Conley, Jr., ed., Providence, R.I. Pub. Soc'y, 1998); D. KURT GRAHAM, TO BRING LAW HOME: THE FEDERAL JUDICIARY IN EARLY NATIONAL RHODE ISLAND 128–29 (DeKalb, N. Ill. Univ. Press, 2010).

> from making laws which shall impair the Obligation of Contracts, and as the resolution in question, if operative would impair the Obligation of the Contract in question, therefore it could not be admitted to bar the action.[72]

Most of the historical assessment of this case has emphasized its importance in the emergence of federal judicial review. Yet the opinion also demonstrates the high standing of the contract clause in the law of the Early Republic and the willingness of federal judges to enforce it. Not only did the decision arouse no opposition, but the Rhode Island legislature adopted a resolution that it would not grant any more individual exemptions for private debts.

These early harbingers of a muscular contract clause doctrine did not address the scope of the clause. Two members of the Supreme Court, as well as other leading commentators, however, squarely took the position that a state could not repudiate its own agreements. Wilson advanced this view in his separate opinion in *Chisholm v. Georgia* (1793).[73] At issue was the authority of the federal judiciary to hear suits brought against states without their consent. In *Chisholm*, a citizen of South Carolina, acting as the executor of a deceased creditor, instituted a suit against Georgia to recover for supplies delivered during the Revolution. The Supreme Court asserted the right of the federal courts to adjudicate this claim, igniting a political firestorm that resulted in the adoption of the Eleventh Amendment.[74] In his separate opinion, Wilson analyzed the nature of sovereignty and the federal union. Turning to the contract clause, Wilson made his interpretation plain:

> Another declared object is, "to establish justice." This points, in a particular manner, to the *Judicial* authority. And when we view this object in conjunction with the declaration, "that no State shall

72. UNITED STATES CHRONICLE, June 14, 1792; *See also* PROVIDENCE GAZETTE, June 16, 1792. Curiously, it appears that no judgment was entered at the June term of the Circuit Court. At the November term Justice James Wilson, Justice James Iredell, and District Judge Marchant adopted the conclusions of the previous panel and entered final judgment. Conley, *supra* note 71, at 222.

73. Chisholm v. Georgia, 2 U.S. 419 (1793).

74. For the controversy aroused by the *Chisholm* decision, see ALFRED H. KELLY, WINFRED A. HARBISON, & HERMAN BELZ, THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT (7th ed., New York, Norton, 1991); MELVIN I. UROFSKY & PAUL FINKELMAN, A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES (3d ed., Oxford Univ. Press, 2011).

> pass a law impairing the obligation of contracts;" we shall probably think, that this object points, in a particular manner, to the jurisdiction of the Court over the several States. What good purpose could this Constitutional provision secure, if a State might pass a law impairing the obligation of *its own* contracts; and be amenable, for such a violation of right, as to no controlling judiciary power? We have seen, that on the principles of general jurisprudence, a State, for the breach of a contract, may be liable for damages.[75]

In this language Wilson emphatically linked his view, first suggested in his remarks on the repeal of the Bank of North America charter, that a state could not abridge its own obligations to the contract clause.

Going a step further, Justice William Paterson, in the well-known case of *Vanhorne's Lessee v. Dorrance* (1795), ruled that a Pennsylvania statute that sought to resolve conflicting land claims in the Wyoming Valley of the Susquehanna River by vesting title in one group of settlers impaired the state's contract.[76] The conflict originated in an inter-state dispute over the settlement of these territories. During the colonial era a group of settlers from Connecticut acquired title to the disputed tract from Connecticut and from Indians rather than from the proprietors of Pennsylvania. The heirs of the proprietors, however, sold the land in question to Pennsylvania speculators and farmers. This gave rise to a bitter dispute as Pennsylvania and Connecticut settlers both claimed the same land. In the mid-1780s some of the settlers from Connecticut talked of creating a separate state, which could resolve any question as to the validity of their land titles. In order to secure the allegiance of the Connecticut settlers, the Pennsylvania legislature in 1787 enacted a law confirming the title to all land actually settled.[77] Under the statute, the Pennsylvania claimants were to receive other vacant land by way of compensation for being divested of their property. But a year later the Pennsylvania

---

75. *Chisholm*, 2 U.S. at 465. Justice William Cushing, concurring, mentioned that the contract clause and other constitutional provisions designed "to establish some fundamental uniform principles of justice" curtailed state sovereignty. *Id.* at 468.

76. Vanhorne's Lessee v. Dorrance, 2 U.S. 304 (Cir. Ct. Penn. 1795).

77. *See generally* Christopher Collier, *Article III, Section 2, and the Bloody Background of* Van Horne's Lessee v. Dorrance, *in* CONSTITUTION DAY 157–81 (Patrick T. Conley, ed., Providence, R.I. Pub. Soc'y, 2010); J.P. Boyd, *Connecticut's Experiment in Expansion: The Susquehanna Company, 1753–1803*, 4 J. ECON. & BUS. HIST. 36 (1931–32).

legislature suspended the confirming act and repealed it in 1790. The validity of the confirming act was challenged in a test case. The plaintiff, who grounded his claim on a chain of title from proprietors of Pennsylvania, brought an ejectment action to, in effect, quiet title to the land. The defendant sought to demonstrate a superior title. His claim rested upon the 1787 confirming act, which purported to vest title in the settlers from Connecticut.

Paterson had been a leading member of the constitutional convention and later a Senator before being named to the Supreme Court.[78] He played a key role in a number of the important decisions of the 1790s and emerged as a champion of judicial review. In *Vanhorne's Lessee*, he presided with Judge Richard Peters in the United States Circuit Court for Pennsylvania. In his extensive charge to the jury, which has the character of a philosophical address on the nature of constitutional government, Paterson found infirmities with the confirming act. First, he asserted that the measure amounted to an unconstitutional taking of property because it failed to provide just compensation. Constitutional principles, he insisted, required that just compensation must be in money. Second, and more important for our purposes, Paterson determined that the confirming act ran afoul of the contract clause. Although he recognized that the confirming act and the suspending act were enacted prior to adoption of the United States Constitution and were not affected by it, Paterson evidently reasoned that the 1790 repealing act was subject to the new Constitution and thus afforded him an opportunity to consider the larger issue of state legislative authority over land grants. With respect to the confirming act, Paterson told the jury:

> It impairs the obligation of a contract, and is therefore void. . . . But if the confirming act be a contract between the Legislature of *Pennsylvania* and the Connecticut settlers, it must be regulated by the rules and principles, which pervade and govern all cases of contracts; and if so, it is clearly void, because it tends, in its operation and consequences, to defraud the *Pennsylvania* claimants,

78. *See* Daniel A. Degnan, *William Paterson: Small States' Nationalist*, *in* SERIATIM: THE SUPREME COURT BEFORE JOHN MARSHALL (Scott Douglas Gerber ed., N.Y. Univ. Press, 1998); Julian P. Boyd, *William Paterson: Forerunner of John Marshall*, *in* THE LIVES OF EIGHTEEN FROM PRINCETON 1–23 (Willard Thorp, ed., Princeton Univ. Press, 1946); Leonard Boyne Rosenberg, Ph.D. dissertation, The Political Thought of William Paterson (New Sch. for Soc. Research, 1967).

> who are third persons, of their just rights; rights ascertained, protected, and secured by the Constitution and known laws of the land. The plaintiff's title to the land in question, is legally derived from *Pennsylvania*; how then, on the principles of contract, could *Pennsylvania* lawfully dispose of it to another? As a contract, it could convey no right, with the owner's consent; without that, it was fraudulent and void.[79]

In this jury charge, Paterson treated a land grant as a type of contract and maintained that Pennsylvania could not abrogate its first disposition of land to the Pennsylvania claimants. Not surprisingly given this instruction, the jury returned a verdict for the plaintiff.[80]

Other historical evidence is also consistent with an interpretation of the contract clause as protective of both private and public agreements. The 1795 sale by Georgia of vast western public lands, known as the Yazoo, to four land companies set the stage for the most famous pre-Marshall explication of the contract clause. The Yazoo land grants constituted a large part of the present states of Alabama and Mississippi. Amid allegations of widespread fraud and bribery, anti-Yazoo forces gained control of the legislature in November of that year. They promptly enacted a law nullifying the Yazoo land sale. By this time, however, much of the land had been resold by the original grantees to parties who claimed to be bona fide purchasers. For example, millions of acres were acquired by a group of Boston investors organized as the New England Mississippi Land Company. This tangled situation raised the fundamental issue of whether the Georgia legislature could legally declare its prior action void and annul the land titles under the 1795 grant. The investors sought compensation for the land they had purchased, and a protracted controversy ensued over the validity of Georgia's actions. It eventually gave rise to the first Supreme Court decision pertaining to the contract clause, *Fletcher v. Peck* (1810). Our focus at this point, however, is on the earlier stages of the dispute.[81]

---

79. *Vanhorne's Lessee*, 2 U.S. at 320.

80. The Paterson jury charge was printed in pamphlet form and widely circulated in 1796, two years before its publication by Alexander Dallas in volume 2 of the United States Reports. *See* THE CHARGE OF JUDGE PATERSON TO THE JURY IN THE CASE OF VANHORNE'S LESSEE AGAINST DORRANCE (Philadelphia, 1796).

81. For the background of the Georgia land controversy and the persistent efforts of the Yazoo claimants to secure compensation, see C. PETER MAGRATH, YAZOO: LAW AND POLITICS IN THE NEW REPUBLIC 1–49 (Brown Univ. Press, 1966).

William Constable, a New York merchant and land speculator, sought a legal opinion from Hamilton, who was then practicing law in New York City, concerning the title of the grantees and their assigns.[82] In a famous opinion, dated March 25, 1796, Hamilton argued that the Georgia rescinding act was unconstitutional. He reasoned:

> In addition to these general considerations, placing the revocation in a very unfavorable light, the constitution of the United States, article first, section tenth, declares that no state shall pass a law impairing the obligation of contract. This must be the equivalent to saying, no state shall pass a law revoking, invalidating, or altering a contract. Every grant from one to another, whether the grantor shall be a state or an individual, is virtually a contract that the grantee shall hold and enjoy the thing granted against the grantor, and his representatives. It, therefore, appears to me, that taking the terms of the constitution in their large sense, and giving them effect according to the general spirit and policy of the provisions, the revocation of the grant by the legislature of Georgia, may justly be considered as contrary to the constitution of the United States, and, therefore, null; and that the courts of the United States, in cases within their jurisdiction, will be likely to pronounce it so.[83]

For Hamilton, then, the contract clause covered agreements to which a state was a party. Moreover, grants of land by a state constituted a contract with the original grantees. Hamilton's opinion letter was incorporated into a pamphlet and widely circulated, providing valuable ammunition for defenders of the Yazoo claimants.[84]

Similarly, in August of 1796 Robert Goodloe Harper, a prominent South Carolina attorney and then a member of the House of Representatives, rendered a formal opinion declaring that the attempted nullification of the land sale by the Georgia legislature was void. He emphasized the contractual nature of the transaction, observing the following:

> These sales moreover were contracts, made with the utmost solemnity, for a valuable consideration, and carried deliberately

82. 4 THE LAW PRACTICE OF ALEXANDER HAMILTON 382–84 (Julius Gobel, Jr. & Joseph H. Smith, eds., Columbia Univ. Press, 1980).

83. *Id.* at 430–31.

84. *Id.* at 384.

> into execution. It is an invariable maxim of law, and of natural justice, that one of the parties to a contract cannot by his own act, exempt himself, from its obligations. A contrary principle would break down all the ramparts of right, dissolve the bonds of property, and render good faith, to enforce the observance of which, is the great object of civil institutions, subservient to the partiality, the selfishness, and unjust caprices of every individual. There is no reason why governments, more than private persons, should be exempt from the operation of this maxim; nor are they considered as exempt by our constitution or our laws. The state of Georgia, being a party to this contract, could no more relieve itself from the obligation, by any act of its own, than an individual, who had signed a bond, could relieve himself from the necessity of payment.[85]

Thus, Harper joined Hamilton in concluding both that the Yazoo land grant amounted to a contract and that the Constitution barred abrogation by a state of its obligations.

The precepts of natural law also informed the emerging contract clause jurisprudence. Belief in the existence of fundamental rights derived from natural law philosophy was widely shared by late eighteenth-century jurists. Under natural rights theory certain rights were deemed so basic as to be beyond the reach of governmental authority. Written constitutions, state or federal, did not encompass the full range of individual liberties. In the famous case of *Calder v. Bull* (1798), Justice Samuel Chase famously invoked natural law: "There are certain vital principles in our free republican governments, which, will determine and overrule an apparent and flagrant abuse of legislative power." Giving examples of prohibited legislative actions, he maintained that state legislatures could not "violate the right of an antecedent lawful private contract; or the right of private property."[86] Chase explained that lawmakers could not abridge agreements even if there had been no explicit provision barring such interference in the Constitution. In other words, he saw the contract clause as an additional guarantee of the rights of contracting parties, which deserved protection under natural law. Indeed, in the early nineteenth century, the Supreme Court looked to natural law concepts as a basis to interpret or supplement the protection afforded by the contract clause.

---

85. Robert Goodloe Harper, *The Yazoo Question*, 5 AM. L.J. 395 (1814).
86. Calder v. Bull, 3 U.S. 386, 388 (1798).

VI. STATE DEVELOPMENTS

Developments at the state level also attested to the importance of contractual rights in the constitutional order. As they revised their own fundamental laws, many states included a contract clause based on the federal model. In 1790, for example, Pennsylvania and South Carolina added a contract clause to their new constitutions. The Pennsylvania Constitution stated: "That no ex post facto law, nor any law impairing contracts, shall be made." The newer states typically followed suit. The Kentucky Constitution of 1792, the Tennessee Constitution of 1796, the Mississippi Constitution of 1817, and the Illinois Constitution of 1818 each contained a contract clause. Such widespread adoption of constitutional provisions supporting contractual rights at the state level strongly indicates broad acceptance of the principle of contractual stability in the face of legislative interference. It also meant that state constitutions could serve as an independent basis on which to challenge infringements of agreements. Further, it is noteworthy that no state differentiated between private and public contracts in framing its ban. Clearly state constitution makers were not sufficiently concerned about the Wilson-Hamilton-Harper interpretation of the federal contract clause to make a move to limit the range of protection afforded by similar state provisions.

Moreover, in 1799 the Supreme Judicial Court of Massachusetts became the first state court to invalidate a state law as a violation of the Federal Constitution. The case, involving a suit to enforce a promissory note, arose from the 1795 Yazoo grant discussed above. In a decision that anticipated the jurisprudence of John Marshall, the Massachusetts Court ruled that the Georgia repeal act was void as an infringement of the obligation of contract under Article 1, section 10. It found that title to the land was legally conveyed by the Georgia grant.[87]

The failure of Congress to enact a permanent bankruptcy law until 1898 gave rise to constitutional problems. The absence of federal legislation left open questions as to the authority of the states to pass bankruptcy or other debt-relief measures without running afoul of the contract clause. Notwithstanding early federal and state court decisions enforcing the contract clause, state legislatures initially

87. *Derby v. Blake* (1799), *reprinted* 226 Mass. 618–25.

did much to define the scope of the provision in the late eighteenth century. They compiled a mixed record. A number of states, such as South Carolina, continued to enforce debt-relief measures adopted before the effective date of the Constitution. In addition, some states, including New York and Maryland, experimented with bankruptcy laws. Moreover, a number of jurisdictions gradually curtailed imprisonment for debt.[88] All of this legislation potentially weakened the rights of creditors under existing contracts.

Of greater long-term significance, some legislators and commentators took the position that legislatures remained free to alter the means of enforcing contracts without impairing the underlying obligations. For example, Joseph Jones, a Virginia legislator and judge who also was also a member of the state ratifying convention, wrote Madison in December of 1787 that the legislature was considering a debt-relief measure that would postpone execution sales for a year unless the property was to be sold at three fourths of its value. To gain this relief the debtor was required to post a bond to secure payment at the end of the one year. Jones explained that the execution law was seen as "calculated to give some relief to Debtors, without any direct interference with private contracts."[89] This elusive distinction between contractual rights and remedies found expression in other states and would vex contract clause jurisprudence for more than a century.

Nonetheless, the contract clause apparently had some immediate impact on legislative behavior. State lawmakers interfered with contracts less frequently and in more restrained ways than before adoption of the Constitution.[90]

VII. PROSPECTS FOR A ROBUST CONTRACT CLAUSE

Uncertainty over the protection given contractual arrangements under the contract clause was widespread in the years immediately following the adoption of the Constitution. Clearly the provision was not generally understood as barring any state legislation affecting

88. PETER J. COLEMAN, DEBTORS AND CREDITORS IN AMERICA: INSOLVENCY, IMPRISONMENT FOR DEBT, AND BANKRUPTCY, 1607–1900 286 (1974) ("By the end of the eighteenth century, imprisonment for debt commonly lasted only until the defaulter qualified for relief.").

89. Letter from Joseph Jones to James Madison, Dec. 18, 1787, *in* 10 THE PAPERS OF JAMES MADISON 329–30 (Robert A. Rutland et al., eds., 1977).

90. Boyd, *supra* note 49, at 548.

contracts. Probably few would have anticipated the emergence of the contract clause into one of the most important provisions of the Constitution during the nineteenth century.

At the same time, the potential for a muscular reading of the contract clause was established well before the Supreme Court first addressed the question in 1810. The very inclusion of the contract clause in the Constitution demonstrated the commitment of the framers to contractual stability. As J. Willard Hurst observed, the contract clause represented "a striking intervention of national law into fields of policy that would ordinarily be the domain of the states."[91] Moreover, not only had federal courts invoked the clause to strike down state laws infringing contracts, but key figures had endorsed a far-ranging application of the provision as a shield for agreements. Changes in the economy also underscored the pivotal place of contracts and, consequently, for the contract clause. The principal engine of economic growth was the expanding national market. The constitutional text protecting agreements from legislative adjustment by the states harmonized easily with a public policy promotive of national economic development. The language of the contract clause thus proved a base for the courts to safeguard the rights of contracting parties as a means of encouraging the ascendancy of market forces.[92]

91. JAMES WILLARD HURST, LAW AND MARKETS IN UNITED STATES HISTORY: DIFFERENT MODES OF BARGAINING AMONG INTERESTS 12 (1982).

92. JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 63–67 (3d ed. 2008).

PANEL 3 Q&A: DISCUSSION ON BALANCING PRIVATE PROPERTY AND COMMUNITY RIGHTS

PANELISTS
James S. Burling, *Director of Litigation, Pacific Legal Foundation*
Steven J. Eagle, *Professor of Law, George Mason University School of Law*
Richard A. Epstein, *Laurence A. Tisch Professor of Law, New York University School of Law*
Marc Poirier, *Professor of Law & Martha Traylor Research Scholar, Seton Hall University School of Law*

COMMENTATORS
Dana Berliner, *Litigation Director, Institute for Justice*
Gideon Kanner, *Professor of Law, Emeritus, Loyola Law School*
James E. Krier, *Earl Warren DeLano Professor of Law, The University of Michigan Law School*
Thomas W. Merrill, *Charles Evans Hughes Professor of Law, Columbia Law School*

EPSTEIN. I want to make some observations about what Marc said about the relationship of process to property rights. One of the key consequences of his position is that the just compensation element simply disappears from the equation. We are thus left with a pure administrative state model in which a broad class of stakeholders each seeks to gain the largest share of a pie that shrinks with each additional move. Historically, we know very well that when those games get played, the transaction costs consume most of the potential gains. It is therefore not uncommon to find cases like *Monterey v. Del Monte Dunes at Monterey, Ltd.*,[1] where essentially disputed development applications can run on nearly twenty-year cycles without any clear agreement precisely because these bargaining games have no unique solution. With each breakdown in negotiation, the cycle starts again. The antidevelopment forces surely have the upper hand.

1. 526 U.S. 687 (1999).

Yet keep the social objective in mind: the object of this exercise is not to maximize transaction costs; it's to minimize transaction costs along the path to mutually beneficial solutions. Open-ended negotiations in a system of weak and indefinite property rights move matters in the wrong direction. Nor is the problem made any easier because of disagreements as to how to treat exactions. One of the great mistakes of Justice Kennedy's concurring opinion in *Eastern Enterprises v. Apfel*[2] is that the basic analysis somehow changes when the analysis moves from the Takings Clause to the Due Process Clause on the view that an exaction of money does not count as a taking of private property.

But this is, again, an odd and unproductive distinction to say the least. Just think of the way in which the process works. Suppose it turns out that the coal companies decide not to pay the money into the fund. Well, what's the government going to do? It's going to impose a tax lien on the property in order to collect it. A tax lien is in fact a form of property of the government. Now, we know from cases like *Armstrong v. United States*[3] that the government takes property when it manipulates or destroys liens on property without just cause. The people whose liens get demoted or dissolved are entitled to get full compensation for the consequent loss in value.

The great danger in this area is to fragment property rights into obscure subclasses in order to avoid the consequences of having to decide cases in accordance with a general theory. Vagueness, which is to some people a nice word, is in fact one of the most costly words in the English language. Another term for it is uncertainty. What that uncertainty does is create an endless cycle of delay and bargaining costs. The correct rules on compensation minimize the cost of these negotiations by reducing them to disputes over the value of the partial interests taken to obtain some environmental benefit. The task here is not to maximize political participation; it is to minimize stress and confusion.

---

2. 524 U.S. 498, 540 (1998). In his opinion, Justice Kennedy wrote:
   Our cases do not support the plurality's conclusion that the Coal Act takes property. The Coal Act imposes a staggering financial burden on the petitioner, Eastern Enterprises, but it regulates the former mine owner without regard to property. It does not operate upon or alter an identified property interest, and it is not applicable to or measured by a property interest.
3. 364 U.S. 40 (1960).

Now, there still remains a serious area for political deliberation, for the government has to determine collectively the value of the interest, as with the lateral easement in *Nollan v. California Coastal Commission*.[4] One reason why it is so difficult for governments to get their act together is that they possess, under current law, well-nigh complete discretion in choosing how to structure their tax regime. Since the political process is corrupt on the taxation side, collective deliberations do not necessarily yield reliable signals to regulated parties. But it is never wise to try to counteract the political breakdown on one side of the process by creating an equal breakdown on the other side of the process. What is needed is a return to first principles on taxation to develop a system that corrects the mistakes in the taxing system, which requires creating a regime that allows the government to achieve any desired revenue level with a minimum of political discord. Solving that problem raises the same issues that occur with takings.

And how do we accomplish that? The best way is to take a leaf from Justice O'Connor's fine First Amendment opinion in *Minneapolis Star Tribune Co. v. Minnesota Commissioner of Revenue*.[5] She's as sound on that issue as she is shaky on property law.[6] She basically required a flat tax in speech cases in order to avoid abuse without limiting revenue constraints. Well, the law should follow her lead and avoid dangerous ad hocery with other property taxes with the host of special exemptions and multiple rates that increase political drag without raising revenues.

The moral is clear. It is not possible to cure the problems in public deliberations of taxation by messing up takings law. It is necessary to fix both problems. Two wrongs only make things worse. The second wrong never corrects the first.

EAGLE. The whole purpose of property rights is to have clear, definitive, defined, advance assignments of who owns what, so people can then exchange things to their mutual benefit. When you start with

4. 483 U.S. 825 (1987).

5. 460 U.S. 575 (1983).

6. *See* Richard A. Epstein, *The Property Rights Decisions of Justice Sandra Day O'Connor: When Pragmatic Balancing is Not Enough*, 1 BRIGHAM-KANNER PROPERTY RIGHTS CONF. J. 177 (2012).

Penn Central and you start creating prongs and subprongs and start creating Ptolemaic epicycles on the nature of property, then it gets so confusing that of course we seek recourse in the kind of administrative process that Marc's talking about. But as my mentor, Myres McDougal, once said: to rearrange the piles in the Augean stables is not to cleanse them. What we really have to do if we're talking about redistributive elements is to go to the top level possible, which is, namely to say, what kind of tax system we want, as Richard just said. Once you figure that out, you find a way of empowering other people, and then people can negotiate freely over particular entitlements.

POIRIER. Just a thought on the question of uncertainty. Clearly with regard to environmental matters and I think with regard to land use, there is often an unavoidable uncertainty. It's not clear what's going to happen when people do stuff. The people who make decisions, if you rely on pure property rights, may not be informed, or they may not care, and afterwards there are lots of costs, and it's hard to undo the decisions. And when you try, you get transaction costs that may be greater than including people in negotiations up front.

I also want to suggest again, because my view is that many natural resources (often including land) have many stakeholders, that there is an important communitarian element to facilitating negotiations. It's messy. It's not perfect. But I think the alternative can in many cases be worth it.

EPSTEIN. No. Strong Disagreement. What you're doing is you're playing the uncertainty card, but you're playing it in the wrong way. That is, we often have private disputes with respect to land use between neighbors where there are uncertain consequences. There are two ways in which the law can try and solve that. One is that it can adhere to the common law rule that says to let the owner go ahead and develop in whatever fashion he or she wants, but the moment that development causes actual or imminent harm, the law will shut it down with an injunction, no questions asked, until the problem is fixed. Knowing that this remedy is available creates powerful incentives for developers to cleanse their stables before they pollute their neighbor's. In consequence, very few harmful interactions arise.

What you're proposing is, in the alternative, a system in which, before anybody does anything, everybody else gets to review everything. And the difference in legal regimes is that yours shuts out not only the bad, but also the good. Your program imposes costs in 1,000 cases instead of one. The process of legitimate development can be slowed to a crawl.

There are better ways to handle uncertainty without relying on an endless permit process, which completely deviates from all the private rules that have been used for centuries in issuing injunctions. The private law approach is far superior to the modern permit system. It is a dangerous form of mistake to posit that some set of community values mystically alters the equation under direct regulation. That conclusion is wrong.

The way to protect the community is through a strong injunction, which allows all people to organize their lives in peace. The permit system is not about protection but about aggression in the effort to intervene so early on in the process that property owners will be stopped by government officials unless they buy those officials off. Uncertainty, in effect, is a strong argument for the common law rules, not for the administrative process.

MERRILL. Hi, I'm sorry to play lawyer here, but the theory of *Nollan* and *Dolan*, I thought, was rather clearly anchored to a concept of the eminent domain power and the idea that what was happening in those cases was that the government was engaging in a taking of property that would ordinarily require just compensation but was doing so in the guise of this quid pro quo exaction. The Takings Clause is applicable in those cases, I think, because the underlying exchange involved something that would ordinarily be governed by eminent domain and require just compensation.

When you get to *Koontz*, the one thing that all the Justices seem to agree upon is that ordinary taxes are not going to be subject to the Takings Clause. But Richard and Steven want to take *Koontz* and build on top of it this sort of ideal taxation regime which is going to coincide with the sort of principles that the Takings Clause reflects.

EPSTEIN. That's correct.

MERRILL. Unfortunately, the thing the Justices all agreed upon is that they're not going to go down that path. They're not going to create an ideal—

EPSTEIN. Shame on them.

MERRILL. —tax regime under the Takings Clause.

EPSTEIN. There's no question that these guys resist generalization and serious theories. Our job as law professors is not to give excuses for their wretched intellectual performance. It's to decide whether they're right or wrong. In these cases, they are dead wrong. That's the lawyer's answer.

MERRILL. Maybe in some ideal universe they're wrong, but—

EPSTEIN. Well, that's what the justices have to do. They have to think from first principles instead of deciding cases based on their own twisted precedents. Once they do that, they will basically take a rather different view of the world if they do it—

MERRILL. That's your vision of how things ought to work.

EPSTEIN. Yeah.

MERRILL. I'm sort of stuck in the world where things are going to work the way they're going to work, and maybe you can nudge them one way or another. For better or for worse, the Court is not going to subject taxation to the Takings Clause or to any kind of takings analysis. And so, what you're really talking about is sort of reforming the law of equal protection as it applies to taxes or something like that, which is a project that has hardly been started.

I think the real battleground in *Koontz* is going to be over whether or not *Koontz* is limited to in lieu exactions, which are exactions of money that are offered as a substitute for a specific real property transfer, or whether somehow it's going to break free of the unconstitutional conditions moorings in the context of eminent domain and become some kind of free-standing intermediate scrutiny doctrine

for financial exactions. My prediction would be that it's going to be limited to in lieu exactions because that is the thing that is anchored to the theory that underlies *Nollan* and *Dolan*, which is what this is all about—evasions of the power of eminent domain.

EPSTEIN. Property rights also include restrictive covenants, right? And indeed, the modern law says that restrictive covenants and easements—one possessory, one non-possessory—are servitudes covered by the same private law principles. So now, under your theory, what's going to happen when somebody says that the requirement of a setback is in fact the state-imposed restrictive covenant? May the state now demand a lateral easement in order to remove that restriction? Does the law now exempt every zoning law from scrutiny, or it does subject them to a property analysis based on the simple proposition that the state has taken a restrictive covenant under a zoning law? I think you'd have to say that the exemption of zoning laws is total. But in principle the answer is that there are no strong grounds for distinction.

So I agree with you on the prediction that zoning laws will routinely prevail. But I don't understand where the normative case for that proposition comes from.

EAGLE. I have problems with the in lieu concept here as well. Years ago, Gideon wrote an article called *Tennis, Anyone?*. It was a nice article about *Ehrlich v. City of Culver City*[7] and the notion that either you put artwork in your new building or you have to pay a city a 2% fee in lieu of putting artwork in your new building.

Gideon asked, quite correctly, "Does this mean that if I put up a building, I'm limiting the space in the city where artwork could otherwise be displayed?" I mean, that was a silly concept to begin with. And attaching it as an in lieu fee doesn't make it any more coherent.

EPSTEIN. Look, I'm going to put it another way. There's no way to do takings law right on a partial equilibrium basis. What happens is private property is our most comprehensive and systematic legal conception. Takings and taxes are not categorically distinct. So what happens is all these efforts to develop these artificial subcategories,

7. 911P.2d 429 (1996).

which make the judges feel comfortable with themselves, don't work to organize the field. It is interesting to compare with this First Amendment law where the justices actually care about what's going on. There magically all these supposed distinctions between taxes, regulations, and liability rules disappear. The justices don't have one set of rules for takings, another set of rules for regulations, one set of rules for injunctions, and another set of rules for fines. What they do is they have a consistent theory, which is why their performance is much better there than in the takings area.

And so what's happened is that with property rights, the justices celebrate this endless ad hocery, which is the legacy of *Penn* Central, right? Ad hoc solutions are in fact the fundamental source of the current judicial error.

. . . .

AUDIENCE. You also said that the power of eminent domain exists to overcome holdout problems. You also said there is no holdout problem in. . . .

EPSTEIN. But I also said that takings law was designed to deal with the problem of indefinite rights. The holdout problem arises when everybody tries to impose the liability for public expenses on everybody else. Essentially there is no unique solution to that game. It's a common pool problem with respect to liabilities, and we have eminent domain solutions for oil and gas that stabilize rights and increase production. We need to have similar rules for taxation and regulation. If we don't do it, then perhaps incremental changes will produce moderate amelioration, but we'll never get maximum improvement. That was the point of my takings book. That's what you, Tom, disagreed with when you reviewed it. You wanted to do theory on a part-time basis, which I resisted. Once we start down the road with a coherent theory, we should take it all the way. First Amendment law does a better job of that even if it is not perfect. Takings law never tried. What you have to fear in the end is becoming a *Penn Central* ad hoc basis guy if you continue to push down this line of argument

MERRILL. You have a principled theory on the Takings Clause. You said it implies when the government takes unrecognized property—

EPSTEIN. No, because all these things are property. Money is not property, so if the government announces Mr. Merrill, we are now charging you $100,000—

. . . .

EPSTEIN. Well, I mean, if they take all your money in your banking account, that's not property? Sure it is.

MERRILL. I just—I see it differently. I think the hardest part is to see the mess. And it sets the minimum standards. Why aren't you railing at Congress instead of at the United States Supreme Court?

EPSTEIN. I do. I'm not selective. I'll rail at both branches of government. I mean, I think the Congress is often bankrupt as well on these issues. The point here is this: just because the Courts are inept doesn't excuse Congress from being inept and vice versa. All of them work according to the same ad hoc theory. That approach is bad no matter who relies on it. So I think that we should attack both branches with equal vigor and for the same reason.

MERRILL. You know that, that is a quixotic pursuit.

EPSTEIN. All intellectual work is quixotic.

MERRILL. No, all intellectual work is not quixotic.

EPSTEIN. It essentially—what happens is—

MERRILL. Sometimes you can't travel down certain roads.

EPSTEIN. What happens is you see major system difficulties taking place in this country, and your response is to patch this little hole and let this other one get larger. And my view is that—

KRIER. We've been living with this same structure since *Pumpelly* and *Mahon*.

EPSTEIN. No.

KRIER. If you look over the cases, essentially the system has been stable. Most of the things that have happened since *Mahon*, though exactions are an interesting side case, have just been logical—purely logical—extensions of *Mahon*.

EPSTEIN. No. I think that's just dead wrong.

KRIER. I disagree.

EPSTEIN. I do. *Euclid* is a massive extension that goes beyond either *Pumpelly* or *Mahon*. Period.

KRIER. *Euclid* was not framed as a takings case.

EPSTEIN. But it is a takings case. I mean, the fact that somebody doesn't call it that—that's what the trial judge did down below. He called it a takings case.

AUDIENCE. But the opposite strategy doesn't work either, Richard. Not everything is a takings case.

EPSTEIN. All the world's a taking, some of which are justified and some of which have implicit compensation—that's the point about being systematic. When you modify the property rights for your advantage, you've taken them.

BURLING. To interject here just a little bit, because I hear these arguments, and they're wonderful arguments, but when I go to court—

EPSTEIN. We don't care about that—

BURLING. I have to deal with judges who don't get any of this. We have to explain in the simplest terms possible. And of course, I'd love to have Richard as my expert witness, but it ain't going to happen. It ain't going to work.

So my challenge is to take these ideas or these words and to try to get a court to have a basic understanding, and that is very tough, because the judges are basically illiterate about property law, property

rights, and they're certainly totally illiterate about what any of the professors have talked about today.

BERLINER. So, Jim, my question is directed to you, although obviously other people may have a view on it. But it's about what's going to happen with legislative exactions. Where do you think that's going? And then also, I was wondering whether legislative exactions actually sound in due process in addition to takings. Let's say you have an exaction that has no mooring at all. You want to build something, and whatever that something is, you've got to pay $100,000 to a local charity. The requirement has no relationship to what you are building, to the property, to anything. So, it doesn't have nexus. It doesn't have proportionality. You can analyze it as a property question, but isn't it a substantive due process problem as well? So, I have two linked questions about legislative exactions.

BURLING. The first part of the question is, where is this likely to go? I think if the courts look at this seriously and intellectually properly, they'll go back to the dissent, to the denial of cert in the *Georgia Parking Authority* case where Justices Thomas and O'Connor said that there is really no intellectual difference between an exaction that's imposed adjudicatively or legislatively. Despite the fact that in the *Ehrlich v. Culver City* case, the California Supreme Court said that legislative exactions were open to the full air of sunlight, and therefore, you're not going to have the oppression animating *Nollan* and *Dolan*—that's just nonsense. You have just as much oppression from legislative bodies with a majoritarian impulse as you do from adjudicative bodies.

So when you're talking about an exaction that's totally unhinged from anything, you can look at it in the context of either takings or due process. My problem with due process is that due process in 2014 is rational basis, meaning no review at all if you can come up with any idiotic excuse for this at all. And I was telling Robert Thomas earlier today, during my first trip to Honolulu I opened the newspaper, and the mayor was quoted saying, "I think for every golf course we should demand $100 million in exactions."

So it's exactly your situation. No connection whatsoever. I think I'd much rather look at that in the takings context, because they're taking your underlying right to develop that golf course, your development

of that right of that property. And that's where the taking stems from. If you start only looking at it in due process terms, looking at whether there's a rational basis for stealing $100 million dollars—of course there's a rational basis for stealing $100 million. I could do a lot of good things for everybody here if I had $100 million. Trust me. I would.

EPSTEIN. That's why the Kennedy due process opinion in *Eastern Enterprise* means it's five justices against a strong stand on retroactivity as opposed to five justices for. When he made the case turn due process, every subsequent challenge has failed.

EAGLE. You know, you can talk about legislative versus administrative exactions, or you could try to split the difference by talking about giving credence to comprehensive rezoning but not giving credence to small-scale rezoning. But the essential difference between exactions and taxes is that taxes should be broad based. And if they're broad based, they'll be voted by the people only if in fact you get this kind of welfare-improving move that Richard was talking about earlier. When the *Euclid* case was decided, you know that George Sutherland was a believer in substantive due process. But he had this notion of mobs and contagion and revolutions about which he was so concerned. In a kind of Hobbesian move, he was willing to give power to the government to arbitrarily divide the cities into districts to prevent foment, and that, I think, is still the basis of a large part of the judicial mentality here, which is that if we go back to this notion of looking at property rights instead of the notion of looking at stakeholder interests, people are going to rebel, and we're going to be in trouble.

KANNER. This is wonderful, and I'm informed and enlightened and amused, but there's one thing that you guys slid over a little too quickly. And I hear the same story from New York. The great majority of judges are former prosecutors. I scan the legal papers to see who gets appointed, and we're talking about something like twelve, fourteen—eleven to one. There was one guy who was in private practice, and everyone else is a former deputy this and assistant that and what not.

Now, these are people who don't know a thing in a great majority of cases, because the sure ticket to election to court in California,

which is a semi—it's really an appointed thing, but it has an elective element—is to identify yourself as being a prosecutor. So if you pick up your ballot when you get home, Jim, you'll find that every one of these bozos identifies himself as a criminal gang prosecutor. Because that's the road to wherever they want to get.

BURLING. The developers and criminal gangs are no different.

KANNER. That's right. You anticipate my next point. There's a tendency on the part of these guys almost involuntarily to believe that the people who are litigating against the government are really bad people, because if they weren't, they wouldn't be disagreeing with the good government that wants to govern them.

So, the bottom line of what I'm suggesting is that whatever wonderful system you come up with, it is going to have to take the form of and be reduced to a system of rules that is capable of being rationally administered by—pardon the expression—those Herman Wouk's idiots who sit on the bench and who have never seen a case like that in their career.

EPSTEIN. We are doomed. If that's true, then we're doomed.

KANNER. We are doomed.

EPSTEIN. To a steady rate of decline. Mediocrity will become the new American exceptionalism.

KANNER. Look, you can easily collect cases which contain some of the most outlandish absurdities. And if you were a practicing lawyer, since they don't fit into the grand scheme of things, you know about them, whereas the professors—pardon me—don't know about them.

AUDIENCE. We all want the same thing. . . .

KANNER. I will give you only one example, and I'm not making it up. There's a rule in eminent domain law that says that business losses, loss of goodwill, are noncompensable. If you trace it back to its origin, you'll find that it comes from Justice Oliver Wendell Holmes Jr.—the

very one—while he was still on the Massachusetts Supreme Court. And he justified it by saying that "business is so uncertain in its vicissitudes" that it plumb can't be valued. That's why we don't do it.

EPSTEIN. On the other hand, it's bought and sold every day.

KANNER. It's bought and sold every day, it's taxed, it's divided in divorces, it's valued in torts cases, and nevertheless, that is the black letter of the law. So you are out. Oliver Wendell Holmes was no dummy. He was very smart. But it is common among these guys to search for something to offer some rational-sounding reason for ruling this way or that way, and it's become a judicial culture in this field that they sometimes reach for absurdities. So whatever system you come up with will have to be relatively easy to administer if it is to retain its rationality.

EAGLE. But Holmes was cynical, and he wrote in a letter to his friend Pollock that—the question at the end was, who's going to be the grabber and who's going to be the grabbee?

EPSTEIN. And on that principled note, we end.