THE FUTURE OF REGULATORY TAKINGS
October 12–13, 2017

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BRIGHAM-KANNER PROPERTY RIGHTS PRIZE WINNERS
James W. Ely Jr.
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PANELISTS
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Eric Alston & John Stafford
Stuart Banner
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Robert H. Thomas

A PUBLICATION OF THE PROPERTY RIGHTS PROJECT OF
WILLIAM & MARY LAW SCHOOL
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: mtrivette@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.

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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: Ali Trivette, Assistant Editor, Brigham-Kanner Property Rights Conference Journal, William & Mary Law School, College of William & Mary, Post Office Box 8795, Williamsburg, Virginia 23187-8795.
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THE FUTURE OF REGULATORY TAKINGS  
OCTOBER 12–13, 2017

FOURTEENTH ANNUAL BRIGHAM-KANNER PRIZE PRESENTATION  
DINNER AWARD RECIPIENT SPEECH

David L. Callies 1

PANEL 1: THE FUTURE OF LAND USE REGULATION: A TRIBUTE TO CALLIES

OPENING REMARKS: THE FUTURE OF LAND USE REGULATION
David L. Callies 11

RUMINATIONS ON TAKINGS LAW IN HONOR OF DAVID CALLIES
Michael M. Berger 17

DAVID CALLIES AND THE FUTURE OF LAND USE REGULATIONS
James W. Ely Jr. 63

EXACTIONS AND IMPACT FEES
Shelley Ross Saxer 77

BACK TO THE FUTURE OF LAND USE REGULATION
Robert H. Thomas 109

A BRIEF REBUTTAL FROM CALLIES
David L. Callies 127

PANEL 3: PROPERTY RIGHTS IN WATER

WATER AND PROPERTY RIGHTS IN AN ERA OF HYDROCLIMATE INSTABILITY

Robert Haskell Abrams 129
MUDDYING THE WATERS: SIXTY-ONE YEARS OF DOCTRINAL UNCERTAINTY IN MONTANA WATER LAW

Eric Alston
John Stafford 155

PANEL 4: THE DENOMINATOR PROBLEM AND OTHER EMERGING ISSUES IN THE REGULATORY TAKINGS FIELD

MURR AND MERGER

Stuart Banner 185

PROPERTY RIGHTS AND TAKINGS BURDENS

Steven J. Eagle 199
FOURTEENTH ANNUAL BRIGHAM-KANNER PRIZE PRESENTATION DINNER
AWARD RECIPIENT SPEECH

AWARD RECIPIENT
David L. Callies, FAICP, Benjamin A. Kudo Professor of Law, William S. Richardson School of Law, University of Hawai‘i at Mānoa

INTRODUCTION
Lynda L. Butler, Chancellor Professor of Law and Director, Property Rights Project, William & Mary Law School

BUTLER. Each year, the Brigham-Kanner Prize is awarded to someone who has made significant contributions to our understanding of property and its role in our society, to someone who has thought deeply about property’s relationship to the human condition. Prior recipients have included some of our nation’s leading property scholars, a Supreme Court Justice, a very accomplished practitioner, and a Peruvian economist.

This year’s recipient, David Callies, is one of the most prolific scholars we have recognized. He began his scholarly career as a graduate student with a prophetic thesis on positive planning law in England, while he was getting his degree—his LL.M. degree—from the University of Nottingham in England. He then burst onto the American scene with the publication of The Quiet Revolution in Land Use Control, written with Fred Bosselman, for the U.S. Council on Environmental Quality. I remember noticing that publication when I first started teaching. He has subsequently revisited that text for a number of reasons.

Before he entered the legal academy, David practiced law in cold Chicago. The Chicago winters must have convinced David to move to paradise and join the law faculty at the University of Hawai‘i; and in Hawai‘i, he met his wife.

Scholars and practitioners noticed David’s early work and were looking forward to more. David has not disappointed them.

His some twenty books have included casebooks on property and on land use, and a variety of books on eminent domain topics. He

has also written more than ninety articles. Two hallmarks of his scholarship are its accessibility—both to practitioners and to professors—and the timely relevance of the topics that he writes about. These qualities, as well as his commitment to advancing society’s understanding of property, have already been recognized by a number of prestigious professional organizations. They include the American Law Institute and the American College of Real Estate Lawyers, among other organizations.

David, one of the best barometers of the wisdom of a decision is the reaction of your peers. I can tell you that I have received countless messages—from the right, the left, and the in-between—applauding our choice of you as the next Brigham-Kanner recipient. We are deeply honored that you are here to receive the prize. Please come forward.

CALLIES. President Reveley, Dean Douglas, Dean Soifer, colleagues, co-conspirators, and friends:

When one starts like this, there’s a danger of a very, very long after-dinner speech. I should point out that the average class session in Hawai‘i is one hour and fifteen minutes. Unless I am mistaken, Professor Butler can’t quite get to me in time, and as opposed to the Academy Awards, there’s no music that will signal that my time is up and it’s time to leave. But I will definitely attempt to be brief.

Thank you very much for this singular honor. It was, as my wife Laurie will tell you, most unexpected and most appreciated. I thank William & Mary and the committee that was kind enough to bestow this honor on me.

I have a couple of points I would like to make. Judging from the talks that I’ve heard before and, in particular, the one that I was privileged to witness that Mike Berger gave just a few years ago—I should talk a little bit about how I got here; about property and property law; and about what we owe as property lawyers in the current economy, the current state of the nation, and the current state of law schools today. After I make these three points, of course I would expect a spontaneous explosion of wild applause. In part because my remarks will hopefully be brief. So the sooner you clap, the quicker I will leave and that will get everyone home at an appropriate time.

(Audience claps.)
I should have seen that coming, shouldn’t I? A good trial lawyer would have, which tells you a little about what I don’t do.

It’s a truism to say that one owes a great deal to one’s parents, and I’m not going to dwell on it. I certainly do owe a lot to my parents. Among other things, I would not be here except for them, and that’s an unarguable proposition. But there are people both here and absent that really affected my going into law and the way I treat it.

I am indebted to my economics professor Fred Silander at DePauw University who encouraged all of us to think in terms of a combination of what is now called behavioral economics and traditional economics: that every action and every decision has a consequence, and you can choose to accept it or you can choose not to accept it. Whether you accept it or not, it doesn’t affect the fact that you have made a choice, and there are consequences. My family has suffered from my tendency, for decades, to convert everything to that economic equation, and I thank them for their patience. That often makes me less than easy to live with on a day-to-day basis. Thank you to my family, for that.

Austin Fleming is a name that may be familiar to some of the older practitioners in the area of wills and trusts. He wrote largely in the field of trusts and estates. He was extremely good at what he did. For upward of fifty years, he was general counsel at Northern Trust Company in Chicago. He was a very blunt-spoken individual, and he and his daughter were neighbors of mine. After he visited his daughter at Stanford—where he did some work while he was visiting her—he wrote a scathing letter to Stanford, something to the effect of: You call yourself a law school. Here are the treatises you don’t have in your library. Very truly yours, Austin Fleming. He persuaded me (and my parents, who paid the bills) to go to DePauw University not Stanford and to Michigan not Harvard or Yale. He perceived, very well, that for a Midwestern, second-generation American lad, those schools would probably chew me up alive. I owe a great debt to Austin Fleming for seeing that, perceiving it, guiding me toward the law, and guiding me in those two areas. It was extremely helpful, and I would not be here today without Austin’s guidance.

When I was at law school, Paul Carrington was an iconoclastic, maverick attorney, who disappointed his father hugely by going into the teaching of law rather than the practicing of law. I was his
research assistant, and he showed up regularly in either a red vest or a yellow vest under a grey suit. He was an interesting person, articulate in his beliefs, and I owe him a great deal as well.

I also owe a great deal to a Professor from Japan named Tsuyoshi Kotaka. For ten years Kotaka and I undertook a study in Asia having to do with takings and, in particular, eminent domain. Professor Kotaka tried to teach me and gave me a great deal to think about, not only in regard to respecting folks no matter where they’re from and what their culture is but also, a samurai down to his toes, when to keep quiet and when to listen. A lesson that I unfortunately never learned, as you can see tonight. But that was not because Professor Kotaka did not try.

Then there are those, here in this room, that have been extremely helpful to me.

To Jim Ely, who exemplified how to be an enthusiastic and gracious gentleman in areas having to do with practice and property: I thank you for that, Jim, and for my time in Vanderbilt when you were so gracious.

To Gideon Kanner and Mike Berger, who taught me the limits of advocacy: there aren’t any. You dig in. You fight. You stay professional.

I will try to sprinkle some of these remarks with an anecdote or two. And I must, must, absolutely must, relate this one that has to do with Gideon. I met Gideon for the first time in about 1973. The sequel to The Quiet Revolution and Land Use Control came out, called the Taking Issue (a little bit more about that later). I was tasked with bearding the lion in his den—going and seeing Gideon Kanner after having just written, having co-authored something that stood for the opposite of virtually everything that Gideon has spent his life doing. And Gideon made that quite clear at the time. He said, you have no idea what you’ve done. You have no idea what you have affected. What were you thinking? By the way, it’s about noon, do you want to grab some lunch?

I learned a lot from that experience. I learned that one could make statements to take a strong point and do it apparently with a great

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2. See generally The Quiet Revolution, supra note 1.
I also learned never to drive with Gideon again. He is the only person that I know today who, when he changes lanes, doesn’t go forward. We went directly into the next lane without any forward motion at all. I don’t think that Le Mans drivers could do that as well, Gideon, and it certainly did make me less interested in lunch by the time we got there.

There are folks like my colleagues from Hawai‘i that I wish to thank.

The first is Dean Aviam Soifer, who kindly enough came down, but not all the way from Hawai‘i this time. He is on what apparently administrators and deans do. You can’t give them a sabbatical because they’re not teaching (he teaches, but it doesn’t count that way). So he’s on administrative leave and has come in from New York. I want to thank Dean Soifer, who pretty much lets me do what I want and occasionally listens to my suggestions about running the law school—which I have no interest in doing.

Thank you to Ron Brown, my colleague for almost forty years at the William S. Richardson School of Law, who came all the way from Hawai‘i.

My thanks continues to former students (and now colleagues) like Rob Thomas, who, you all know, has done many wonderful things so far in pushing the limits of property law that we all hold dear; and speaking, writing, and holding and co-chairing conferences.

And it extends to Justice Sabrina McKenna. At that time she was a second year law student at the University of Hawai‘i and what we call a Hapa Haole—half Japanese, half Caucasian, and fluent in both languages. After eighteen years in Japan, she came to the University of Hawai‘i, played varsity basketball, and then came to the Law School. She won me over forever when she came up to me in the pouring rain after graduation. Everything was dripping wet, and—which took guts as a first-year student—she put her arms around me, gave me a hug, and said, it’s okay, Professor Callies, tomorrow will be sunny. Those are the kinds of things that one remembers later on.

I also wish to thank David Breemer, whom I think many of you know from the Pacific Legal Foundation and who was probably one
of the two brightest research assistants that I’ve ever had. He walked into my office seeking a job as a research assistant with a baseball cap reversed on his head, flip-flops, board shorts, and a tank top. And he said, hey dude, I understand you’re looking for someone to work. Some of you who know David might be reminded of that. He’s certainly been doing wonderful things for the Pacific Legal Foundation ever since.

I also wouldn’t be here today without my late father-in-law, Norvin Garrett, who was a Duke and Citadel graduate and served on Nimitz’s staff in World War II. He taught me, a northern Yankee from the Midwest, about the gracious side of the South, and about what it meant to grow up and work in the South as he had done for eighty years. I owe him a great deal for the time that he spent with me. I still remember sitting on the banks of the Chowan River in his gazebo, drinking more bourbon than is good for me, and listening to him speak.

And of course, I wish to thank my family. I am ever so lucky, fortunate, to have as my life’s partner someone who lets me do pretty much whatever I want to do—or at least that’s what she makes me think. I suspect there are things that are controlling me that I have no knowledge of and probably never will. To my dear wife Laurie. And my thanks for the huge surprise today from my stepson, Lindsey, who came all the way from Los Angeles (well, not actually Los Angeles but El Segundo), who came to surprise me, and that was awfully, awfully nice of you, Lindsey. I just kept sitting, sneakily eating granola, when Lindsey walked in. I couldn’t believe that he was here. Thank you for that.

This brings me to the end of where I think I have come from, and how I got to where I am today.

Now I want to turn to property and property law. To paraphrase Winston Churchill, I think, property rights can be messy, until one considers the alternative: a regulatory state (which is what we are in, an administrative-regulatory state). I learned today not to follow the folks who spoke before me. It is really hard, and all my best anecdotes have already been taken. So this will be shorter as a result, because of the comments that you’ve already heard. But to paraphrase Jim Ely who writes so eloquently, it is a property right that
is so very fundamental and important, and affects every other right.  

We defend property rights—sometimes it is daunting, often thankless, and always time-consuming.

It is not enough.

We need to share property rights. We need to broaden their appeal. Not only because it’s the right thing to do but also because it’s the practical thing to do. Such rights are more and more available to fewer and fewer—not only the poor but also the young middle class—who are increasingly divorced from such rights, who prefer or are forced into foregoing them, or who find them out of reach. Those with access to these rights are increasingly outnumbered: a perilous thing in what is left of our democracy.

We need to change that. The poor, the oppressed, the disadvantaged—whatever class and race—must be provided with a stake or the means to achieve it, less we breed generations with no stake and no appreciation of property and all the benefits it accrues. The holding sector, we must increase. We must attack discrimination when we see it. We must attempt to provide funds in the way of cheap loans or something of that sort and provide a stepping-stone—which the popular press is beginning to pick up on. Shelter is sometimes nothing more than a ten-by-ten house on a mini-lot, which in many of our jurisdictions is forbidden. We have old case law that finds these kinds of shelter fundamentally unsafe, but they are no longer deemed unsafe but a necessary part of what we need to provide. And so with the bully pulpit that I have up here, I charge us all, as property rights attorneys, property rights practitioners, and property rights scholars, to do more to broaden the access to property rights to those that don’t have it at this time.

Lastly, I want to talk about the practice of law, again taking advantage of the bully pulpit that I have. I neither liked nor enjoyed law school. And I sometimes wonder about my students who say they do both; I wonder if they have a screw loose. Law school is many things, but enjoyable and fun? I don’t think so. It is superb for teaching analytical skills that are useful not only in the practice and the teaching of law but in the world generally: digging out relevant facts,

problem solving, developing alternative solutions and scenarios, and predicting outcomes.

And so, I want to make suggestions to what I see as my two sets of colleagues here. For my younger colleagues, I have three suggestions gleaned from fifty years in learning about law and property. One, keep an open mind. Back off, look at all sides (top, bottom, and above), and listen (a lesson that I have still not learned). Two, visit the site. After all, property is always site related in some fashion. Things are rarely what you’re told. Something new, something wrong, something different—there is always something to be learned from a visit. Three (which I expect will strike some as a little bit different, maybe anathema), as you go through with your open mind and visit the site, drain passion and emotion. Reason clinically. If your intent is to change the world, whether through property or something else, set it aside on a case-by-case basis. Again, something that I learned from my advocate colleagues, Berger and Kanner: there is a place for emotion. If it’s in court, it should be something used, not felt, to make a point. Give me an emotionally addicted opponent, and I will guarantee you I will win every time.

Finally, for my contemporary, older colleagues, those on the other side of twenty nine, I have this advice: forget about your legacy. It won’t survive long anyway. Rather, recall those who lent you a helping hand along the way. Befriend not only a young colleague but also a young adversary.

Many years ago, I was sent to argue a motion before a federal judge in Chicago, and I lost miserably. I was figuratively torn limb from limb. The judge was a former law partner of Mayor Richard Daley in Chicago. The advocate on the other side was his right-hand man, Tom Keane. At the time, the Democratic Party in Chicago ran the city because the mayor held three positions, or at least controlled them. He was not only the mayor of Chicago but chairman of the Cook County Democratic Organization, appointed the assessor, and appointed the corporation counsel—and therefore had a ball park with all the balls, all the bats, all the bases.

Keane took me aside, took me to lunch, and told me how things worked in the city. He told me:
You can do it “this” way if you like. You can stick with just the law. I won’t really care one way or the other; you’re far too young for me to bother respecting you. But if you want to succeed, and you want the power, you need to take it from us, the Irish. We took it from the Germans. The Germans, and others tried to take it from us. That’s the way it works.

So, put in a good word. Recommend to a learned society or a professional organization not only your young colleagues but your young opponents. It will go a long way in making a difference. Thank you very much.
OPENING REMARKS: THE FUTURE OF LAND USE REGULATION

PANELIST
David L. Callies, FAICP, Benjamin A. Kudo Professor of Law, William S. Richardson School of Law, University of Hawai‘i at Mānoa

INTRODUCTION
Lynda L. Butler, Chancellor Professor of Law and Director, Property Rights Project, William & Mary Law School

BUTLER. Good morning. Welcome to the Fourteenth Annual Brigham-Kanner Property Rights Conference. We are going to begin our first panel by focusing on the work of David Callies, our recipient of the Brigham-Kanner Prize. We will use his scholarship as a springboard to discuss issues concerning the future of land use regulation. David will speak first, and then each panelist will speak for about fifteen minutes. At the end, we will have about fifteen minutes for questions and answers. Panelists, if you see me waving, that means it’s time to move on so the next person has time. Now let’s welcome David.

CALLIES. I understand I have about an hour and a quarter to speak, so relax—that’s class time in Hawai‘i, which is what I’m used to speaking at.

I want to reserve two minutes for rebuttal just in case my colleagues take the opportunity to say something they think I’m not going to be able to respond to; I’ll do my best.

Thank you all for coming. I thank the William & Mary Law School, Lynda Butler, and everybody for the invitation and for the wonderful award last night. It was a wonderful evening for me, and I hope everyone else enjoyed it as well.

I have spent a lot of time in the area of regulatory takings, almost accidentally. This, of course, is the odd sort of theory that Justice Holmes sprung on the legal world in Pennsylvania Coal Co. v. Mahon.¹ Before that case, eminent domain and physical takings were protected by the Fifth Amendment and were never connected to the

exercise of police power. And after that, the theory of regulatory takings was born.

The Supreme Court then abandoned the field for about fifty years, leading my former partner, the late Fred Bosselman, and I to write something with a gentleman named John Banta called *The Taking Issue*. At that time, I was representing mainly governmental interests, and the truth of the matter was that since the Supreme Court hadn’t said anything about regulatory takings in fifty years, we had a suggestion: Let’s do away with regulatory takings. The Supreme Court hasn’t said anything about it, so why don’t we just do away with it?

Well, of course, the Supreme Court did say something thereafter—in a sort of ridiculous April Fools’ decision that dealt with a bunch of students who were turfing the area around their residence and with the city that passed an ordinance that provided no more than three people, unrelated by blood or marriage, could live in the same house. That provoked a sort of odd decision on April Fools’ Day, and everybody thought it was very appropriate that this decision came down then, because it was very foolish. The Supreme Court then went on from that case to decide a trilogy of cases: lots of things about regulatory takings, total takings under *Lucas*, partial takings under *Penn Central*, and then land-development conditions in the cases that came after. So we do have regulatory takings. It’s a matter of its reach and what it does.

I would like to share a quick anecdote. My former partner, Fred Bosselman, was invited to Harvard to speak. By the way, *The Taking Issue* got its name because John Banta and I could not come up with a name after two days, despite the fact that Fred Bosselman was asking us to. So he said, “Okay, I’ll fix you guys. It’s going to be ‘The Taking Issue.’” And there we have it.

So, Fred shows up on campus to give his lecture at Harvard. The posters read that the famous alum Fred Bosselman was coming back

to give a speech, and listed the title of his book. The book was sort
of reddish and tannish, and “The Taking Issue” was in modest print
at the bottom of the front cover. The Constitution was prominently
displayed on the front of that cover, commencing as it does, in very
large script, “We the People of the United States.” So all the posters
read that everyone should come and see the wonderful lecture by
Fred Bosselman, author of “We the People.” You think people know
what you’re going to talk about, and then out it comes. And people
really have no idea, and it’s not all that important.

So, to some extent, that’s why I’m here. I hope it’s at least reason-
ably articulate this morning.

I have a couple of remarks. A number of years ago I took the lib-
erty—having been in the law business at that point close to fifty years
(now, it’s an even fifty years)—I suggested ten things were going to
happen with respect to takings7:

(1) I said that land development conditions would continue to
come under even more scrutiny for nexus and proportionality. Then we had the City of San Jose case from California,8
where the Court does not seem to appreciate the difference
between regulation of land use and rules that make land-
owners produce something. Then Koontz came along.9 So
we certainly do have more security about land develop-
ment conditions.

(2) Of course, we’ll continued to be confused by the difference
between legislative and administrative/quasi-judicial ex-
actions.10 The court still hasn’t dealt with that, and it’s
probably one of the last unresolved issues in the regula-
tory taking area.

(3) There will be more use of consensual tools like development
agreements.11 It’s happening in California, but it’s not hap-
nening in a whole lot of other places. There are hundreds

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10. Callies, Through a Glass, supra note 7, at 44.
11. Id. at 45.
and hundreds of agreements (as Mike Berger will confirm, I'm sure) with respect to communities getting together with commercial enterprises and developers, and working on development agreements. Hawai‘i has had a statute like California’s in place for thirty-five years, and so far we’ve had two development agreements. So, as Larry Tribe once observed, those of us that use crystal balls may have to get used to eating ground glass.12

(4) The Supreme Court continues to reexamine its decisions with respect to Kelo.13 That hasn’t happened either. We haven’t had a recent eminent domain case, and I thought there would be at least one coming up.

(5) The courts will continue to wrestle with exceptions to per se government takings, and the public trust doctrine will be an issue.14 That’s coming up more and more as exceptions to Lucas, safe havens for total takings under Lucas.15

(6) If a government is passing a regulation that is essentially abating a nuisance or has got to do with the background principles of common law property, custom and the public trust doctrine seem to be safe havens for government when it enacts a total-taking regulation.16 And the public trust threatens to do a lot that way. In Hawai‘i we have a pending case where the argument is that the summit of a mountain is subject to the public trust doctrine.17 It’s the farthest out attempt to recognize how far the public trust doctrine can be extended. Our Supreme Court will be dealing with that in the next year, and lots of folks are watching it outside of Hawai‘i.

(7) The Court will cut back the application of the ripeness rule.18 That’s been happening in many circuits around the

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13. Callies, Through a Glass, supra note 7, at 45.
14. Id. at 45.
18. Indeed, the Court has accepted Knick v. Township of Scott, 862 F.3d 310 (3d Cir. 2017), cert. granted, 138 S. Ct. 1262 (Mar. 5, 2018) (No. 17-647), for decision this term.
country, much thanks to some of the work being done by the Pacific Legal Foundation. And I suspect that it will increase.

(8) Partial takings cases will be decided more on the merits but with mixed results.\footnote{See Callies, \textit{Through a Glass}, supra note 7, at 45.} We’re not getting a lot of partial takings cases, even though ripeness is, again, not as important as it used to be.

(10) And finally, the Court needs to and will resolve the so-called “relevant parcel” or denominator issue, both with respect to partial and total regulatory takings.\footnote{\textit{Id}.} We all know by now, with all the webinars and conferences dealing with it, the Supreme Court has decided the \textit{Murr} case.\footnote{See \textit{Murr v. Wisconsin}, 137 S. Ct. 1933 (2017).} You’ve got to watch what you wish for. We do have rules—sort of—and they are very strange. In the course of his opinion, Justice Kennedy managed to nearly drive a stake into the whole area of property rights, and I’m sure my colleagues will be talking about that at some length.\footnote{\textit{Id}. at 1939–50.}

So, thank you for your kind attention. It’s a pleasure to be here. I have reserved two minutes for rebuttal.
Scholar? Lawyer? Teacher? Dave Callies has been—indeed, continues to be—all of these and more. With a career closing in on a half century, it is time the profession honored him for his contributions to property law—and particularly to land use and takings law. But what is there for one of us to say amidst this compendium of honori-}

ifies? He has educated us on so many aspects of these topics for so long that it is difficult to pin down a subject to write about that would do him justice. Just by way of illustration, consider that Callies was part of the team that produced two ground-breaking and highly influential books at the beginning of the modern takings era, under the auspices of the Council on Environmental Quality: The Quiet Revolution in Land Use Control in 1971 and The Taking Issue in 1973. From those early days (seen as dark days by those of us who generally represent property owners) when his interests appeared to be pointing toward restricting the rights of property owners, David’s scholarship has matured.3

3. And thankfully so. The Taking Issue itself was openly peddled as a screed to evade constitutional precepts that favored property owners: “If this book seems technical and detailed, it is because it is designed to assist government officials and attorneys who seek to fashion solutions to environmental problems.” Id. at iii (emphasis added). The idea was “to cast doubt on the theory of regulatory taking in any form.” (David L. Callies, Fred Bosselman and the Taking Issue, 30 Touro L. Rev. 255, 259 (2014)). For critical discussion of the whole idea of the government using its influence to seek “to screw its citizens out of their constitutional
A review of the vast array of Callies's works over the decades reveals a thread that connects the disparate, individual subjects that have animated each of his articles or books. David is a ruminator. And a damned fine one. In some of his earliest works, for example, he mused about how government should react to the cosmically Delphic statement in *Pennsylvania Coal Co. v. Mahon* that “if regulation goes too far[,] it will be recognized as a taking.” David and his co-authors viewed rigorous enforcement of that concept to be the “weak link” in the government’s ability to solve environmental problems through regulation, and pondered ways to strengthen or avoid that link. Their possible solutions ranged from disregarding the use of regulations altogether to seeking to convince the Supreme Court to overrule *Mahon* and thereby eliminate the “myth of the taking clause” as a strong protector of the rights of property owners.

Subsequently, however, the Callies view of constitutionalism has acknowledged that, although the case law reported in his two early books gutted Fifth Amendment protections to such an extent as to render them “virtually moribund” if not “nearly . . . meaningless,” the U.S. Supreme Court’s output since then has “added exponentially” to the protection afforded property owners. Thus in David’s "rights," see Gideon Kanner, *Helping the Bear, Or "The Taking Issue" Was a Failed Propaganda Screed. So Why Is It Being Celebrated?*, GIDEON'S TRUMPET (Sept. 8, 2013), http://gideonstrumpet.info/2013/09/helping-the-bear-or-the-taking-issue-was-a-failed-propaganda-screed-so-why-is-it-being-celebrated/.

4. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). In its most recent takings decision, the Supreme Court confessed that “[i]n the near century since *Mahon*, the Court for the most part has refrained from elaborating this principle through definitive rules.” *Murr v. Wisconsin*, 137 S. Ct. 1933, 1942 (2017). After nearly a century of trying, we remain in the dark, with the cryptic “too far” remaining our guiding light.

6. *Id.* at 302.
7. *Id.* at 236.
10. *Id.* For a discussion of the eight U.S. Supreme Court decisions between 2010 and 2016 dealing with property rights (all of them favoring the property owners’ positions), see Michael M. Berger, *Property, Democracy, & the Constitution*, 5 BRIGHAM-KANNER PROP. RTS. CONF. J. 45, 96–105 (2016) [hereinafter Berger, *Property*]. A footnote to this footnote should mention that, after this manuscript was written, the Supreme Court broke that string. See *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017) (adding, in this observer’s view, nothing but additional confusion to regulatory takings law by importing valuation issues into the definition of property...
honor—and inspired by the example he set by tugging and pulling at various loose threads of the law to tease out hidden meanings and theories—the remainder of this Article will consist of a series of ruminations on various issues and developments in the law of takings. Some of these issues have been the subjects of recent, unsuccessful petitions for certiorari, showing their currency. Interest in them will continue until the issues are resolved. Some—if not all—of these deserve more extensive treatment than can be afforded here, hopefully leading to further exegesis.

I. CAN GOVERNMENT CONVERT PRIVATE INTO PUBLIC PROPERTY BY STATUTORY REDEFINITION WITHOUT COMPENSATION?

An issue that keeps popping up like some crazed whack-a-mole is whether the government can simply redefine private property, so as to convert property interests that it would like to own into public property, with the wave of a Harry Potteresque wand and without having the good grace of paying for the transformation. One wonders why government agents keep trying, because the Supreme Court has been quite clear that such definitional games cannot fit the constitutional matrix.

The issue is worth examining at this time because the courts of both Mississippi and North Carolina have recently issued opinions seeming to approve the conversion of private into public property by the simple “definitional game” of saying so. Petitions for certiorari were filed to have both decisions reviewed. Regardless of the outcome of as well as into the liability determination of whether a taking occurred at all). See infra text accompanying notes 50–55.

11. The idea is hardly new. Nearly a half century ago, the Rockefeller Brothers Fund financed a study whose conclusion is aptly summarized in the news article announcing it: Gladwin Hill, Authority to Develop Land Is Termed a Public Right, N.Y. TIMES, May 20, 1973, at 1. In other words, “henceforth ‘development rights’ on private property must be regarded as resting with the community rather than with property owners.” Id. at 1.

12. One surmise, of course, is that the government plays the odds. The U.S. Supreme Court hears very few cases of any kind during any given year. The Court has never heard a lot. In 1987, for example, when I argued my first regulatory taking case there, it decided only one hundred fifty cases—from state and federal courts throughout the entire country. That number has steadily declined until currently the Court hears only about half that amount. So, if an agency is able to convince a state supreme court—or even one of the federal courts of appeals—to buy such a theory, the odds that the U.S. Supreme Court will review and reverse it are slim indeed. So, with a soupçon of cynicism, they keep trying.

those decisions, it is a certainty that the issue will not go away. Either the Court will decide the issue now—in a hopefully definitive manner, or at least with clearer standards—or the issue will pop up in some other jurisdiction to be presented to the Supreme Court again.

It is possible that some agencies are seduced by the virtual and oft-repeated truism that property interests are created by state law. The underlying concept is largely true. The Supreme Court has said that property rights “are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.” However, the Court has rejected the assertion that federal courts lack the power to determine whether a state action that “purports merely to clarify property rights has instead taken them.” Thus, states do not have the power to run roughshod over private property rights by exercising sleight of hand by redefining existing rights. The U.S. Constitution in general, and the Fifth and Fourteenth Amendments in particular, stand as a bulwark providing protection against confiscation. In short, the ability to define—or even redefine—property rights does not mean that such wordplay may be done without compliance with the Fifth Amendment’s just compensation guarantee. The power to define is not the power to confiscate.

19. Professor Tribe noted this truth in the early days of modern takings law. Analyzing Kaiser Aetna v. United States, 444 U.S. 164 (1979), he queried, “Did the government effect a taking by saying to the general public, ‘Come on in, the water’s fine’?” LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES 176 (1985). The Court had answered the question by voiding the government action. In Tribe’s words, the owners possessed “investment-backed expectations
That this solid foundation of protection for the rights of private property owners might cause some difficulties for government agencies is something that the Court has acknowledged and accepted—even celebrated—as a necessary part of our constitutional system:

> We realize that even our present holding will *undoubtedly lessen* to some extent the freedom and flexibility of land-use planners and governing bodies of municipal corporations . . . . But such consequences *necessarily* flow from any decision upholding a claim of constitutional right; many of the provisions of the Constitution are *designed to limit the flexibility and freedom of governmental authorities*, and the Just Compensation Clause of the Fifth Amendment is one of them.\(^{20}\)

Indeed, two weeks after the Court published these words of clear restriction on governmental power and flexibility, it added emphasis by holding that compliance with the Fifth Amendment’s property clause requires more from the government “than an exercise in cleverness and imagination.”\(^{21}\) So saying, the Court struck down an action by a California agency that sought to evade the Fifth Amendment by what the Court called a “play on words.”\(^{22}\) To ease the reader’s suspense, the “play on words” was a decision to call a compelled ex-action (which the Supreme Court would bluntly label “extortion”\(^{23}\)) a “dedication,” as though it were some voluntary gift from property owner to government regulator.\(^{24}\)

These concepts from 1987—a year in which the Court decided more takings cases than any other\(^{25}\)—show the need for the Court’s rising to the status of property rights for which the government must pay when it effectively nationalizes them.”\(^{\text{Id. at 176–77.}}\)

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\(^{20}\) *First English*, 482 U.S. at 321 (emphasis added).


\(^{22}\) *Id.* at 838.

\(^{23}\) *Id.* at 837.

\(^{24}\) California continues to like this game. Recently, for example, it ducked the question of whether an inclusionary housing requirement was a taking within the meaning of *Nollan* and its progeny by asserting that the government action was not an “exaction” but merely a police-power regulation, and the *Nollan* line did not apply. So saying, the California Supreme Court simply ducked the holdings in *Nollan*, *Dolan*, and *Koontz*. See infra notes 62–86 and accompanying text.

continuing intervention to protect the rights of property owners. Left to their own designs, government agencies continue to seek to acquire property at no cost. The current cases from Mississippi and North Carolina illustrate rather bluntly how government agencies can abuse such power: simply redefining property so that what once was private becomes, ex post facto, public.

In Bay Point Properties, the Mississippi Supreme Court upheld a state statute whose effect was to convert private property underlying an easement into public property. This was allowed to stand, despite the fact that the easement encumbering the plaintiff’s land had ended. In a nutshell, the dispute arose after Hurricane Katrina destroyed a bridge. The bridge was rebuilt but at a slightly different location. An easement that had provided access to the former bridge was no longer needed for bridge access, so the easement’s governmental owner converted it into a park—simply by saying so. Thereafter, when the agency sought to acquire the vestigial fee title, the trial court instructed a condemnation jury to provide virtually no compensation because the agency had not formally abandoned the easement even though it had ceased using it for its intended purpose. This cannot satisfy the constitutional strictures laid down by the Supreme Court. The Supreme Court’s jurisprudence has steadily enforced the protections established by the Fifth Amendment.

After all, the Bill of Rights was adopted to protect individuals

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26. See United States Trust Co. v. New Jersey, 431 U.S. 1, 26 (1977) (“[C]omplete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State’s self-interest is at stake. A governmental entity can always find a use for extra money . . . .”). As the Chief Justice recently put it, “governments . . . might naturally look to put private property to work for the public at large.” Murr v. Wisconsin, 137 S. Ct. 1933, 1951 (Roberts, C.J., dissenting).

27. For a discussion of such restricted-use easements, see Marvin M. Brandt Revocable Tr. v. United States, 134 S. Ct. 1257, 1265 (2014) (“[I]f the beneficiary of the easement abandons it, the easement disappears, and the landowner resumes his full and unencumbered interest in the land.”); Prescault v. Interstate Commerce Comm’n, 494 U.S. 1, 8 (1990); Toews v. United States, 376 F.3d 1371, 1376 (Fed. Cir. 2004); Jon W. Bruce & James W. Ely Jr., THE LAW OF EASEMENTS AND LICENSES IN LAND §§ 10:8, 10:26 (2017).


29. All clauses of the Fifth Amendment were designed to “limit the power of government.” Tonja Jacobi, Sonia Mittal & Barry R. Weingast, Creating a Self-Stabilizing Constitution: The Role of the Takings Clause, 109 Nw. U. L. Rev. 601, 616 (2015).
against the government—the few against the many—not the other way around.\textsuperscript{30}

Mississippi’s actions bear strong resemblance to the Florida actions disallowed in \textit{Webb’s Fabulous Pharmacies, Inc. v. Beckwith}.\textsuperscript{31} There, the Supreme Court struck down an action treating privately owned, interpleaded funds as though they were public. The issue in \textit{Webb’s} was the assignment of interest earned on the funds while in the state court’s custody. Treating the funds as public merely because they had been deposited with the court clerk for safekeeping (as the government wanted) was disallowed. The Court left no doubt, saying that the government could not make such a presumptive conversion from private to public ownership “simply by recharacterizing the principal as ‘public money.’”\textsuperscript{32}

In other words, neither Florida’s nor Mississippi’s actions fit the constitutional matrix, which, for years, has placed determinative focus on the beliefs and expectations of property owners.\textsuperscript{33} The expectations of the property owner at the time the property was acquired have been central to the Court’s takings jurisprudence for nearly four decades, as the Court explained in \textit{Penn Central}.\textsuperscript{34} Indeed, the \textit{Penn Central} formulation has been referred to as the Court’s “polestar” in takings clause analysis.\textsuperscript{35}


\textsuperscript{32} \textit{Id.} at 164. See also \textit{Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Envtl. Prot.}, 560 U.S. 702 (2010) (plurality opinion) (“States effect a taking if they recharacterize as public property what was previously private property.”); \textit{Preseault v. Interstate Commerce Comm’n}, 494 U.S. 1, 8 (1990) (O’Connor, J., concurring).


\textsuperscript{34} \textit{Penn Central}, 438 U.S. at 124. In sum, the property acquired by an individual is “guided by the understandings of our citizens regarding the content of, and the State’s power over, the ‘bundle of rights’ that they acquire when they obtain title to property.” \textit{Lucas v. S.C. Coastal Council}, 505 U.S. 1003, 1027 (1992) (citations omitted). While this manuscript was being prepared, the Court muddied the water a bit when it decided \textit{Murr v. Wisconsin}, 137 S. Ct. 1933 (2017). \textit{See infra} notes 50–55 and accompanying text.

\textsuperscript{35} \textit{Tahoe-Sierra Pres. Council v. Tahoe Reg’l Planning Agency}, 535 U.S. 302, 326 n.23 (2002). See also \textit{Stop the Beach Renourishment}, 560 U.S. at 715 (2010) (plurality opinion) (“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.”).
The Supreme Court dealt with a similar railroad-easement definitional problem in *Preseault*. That case involved an easement that had been acquired for railroad purposes and railroad purposes only. The railroad sought to abandon the easement and then sell the right of way to the State and trail groups for transformation into a recreational trail. A number of state courts had similar issues and uniformly held that factual abandonment of railroad use meant that the railroad company retained nothing that it could transfer to others.  

So Congress intervened, enacting a statute that purported to redefine the concept of “railroad use” to mean that such uses have not been “abandoned”—even if the tracks and ties are torn up and sold for scrap, and the trains are gone—as long as the railroad retains an intent (however ephemeral or inchoate) to someday, maybe, perhaps, relay the tracks and reactivate the line. Honest. In other words, by definitional sleight of hand, Congress sought to completely change the nature of railroad easements. In *Preseault*, the Supreme Court refused to permit that change. At least, it refused to permit it without compensation. The parties were told to repair to the Court of Federal

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37. The text of the statute plainly reads:

Consistent with the purposes of that Act, and in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use, in the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise in a manner consistent with this chapter, if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes. If a State, political subdivision, or qualified private organization is prepared to assume full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use, and for the payment of any and all taxes that may be levied or assessed against such rights-of-way, then the Board shall impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent with this chapter, and shall not permit abandonment or discontinuance inconsistent or disruptive of such use.


38. Remember, as noted above, the definition of property has generally been a matter of state, rather than federal, law. It would seem there was little room for such congressional action in any event.

39. Geneva Rock Prods., Inc. v. United States, 107 Fed. Cl. 166, 172 (2012) (stating that there was "not enough to insulate the government from a takings claim").
Claims to determine the compensation that might be due. Compensation was eventually awarded.\footnote{Preseault v. United States, 100 F.3d 1525 (Fed. Cir. 1996).} If Congress could not get away with such definitional gamesmanship, Mississippi should not either.\footnote{Indeed, the Court of Federal Claims and the Court of Appeals for the Federal Circuit have consistently applied the \textit{Preseault} rule and have required compensation in similar situations. \textit{E.g.}, Howard v. United States, 106. Fed. Cl. 343 (2012); Ellamae Phillips Co. v. United States, 564 F.3d 1367, 1373 (Fed. Cir. 2009); Schmitt v. United States, No. IP 99-1852-Y/S, 2003 WL 21057368 (S.D. Ind. 2003).}

If anything, North Carolina has been even more high-handed than Mississippi. An example comes in the case \textit{Nies v. Town of Emerald Isle},\footnote{Nies v. Town of Emerald Isle, 780 S.E.2d 187 (N.C. App. 2015).} which involved beachfront property. In this case, there was no dispute over the ownership of the wet-sand areas; they had always been public. However, the dry sand—in North Carolina as in many other states—had historically been privately owned. That was the law until the legislature enacted a statute purporting to treat all dry-sand area as part of the state’s “public trust” land that was subject to unlimited public use. North Carolina, in fact, did the California Coastal Commission’s \textit{Nollan} extortion one better. It simply declared, majestically, that all dry sand was ipso facto public, rather than seeking to accomplish its statewide goal one property at a time.

Guidance may be found in \textit{Hughes v. Washington},\footnote{Hughes v. Washington, 389 U.S. 290 (1967).} particularly in the concurring opinion of Justice Stewart. The issue in that case was the boundary of property on the coast. The State sought a rule that would have made all accretions to the shore (i.e., to Stella Hughes’s land) public land. Mrs. Hughes claimed any accretions belonged to her under settled state law. Justice Stewart examined the effect of a sudden change in law coming from the state court system. His conclusion was simple and straightforward: “to the extent that it constitutes a \textit{sudden change} in state law, \textit{unpredictable} in terms of the relevant precedents,” the new state law would be entitled to no deference. “[A] State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of \textit{asserting retroactively that the property it has taken never existed at all}.”\footnote{Id. at 296–97 (emphasis added).} In other words, a state cannot simply declare private property to be public and have that be the end of the matter. The Constitution remains a bar. As another recent opinion

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40. Preseault v. United States, 100 F.3d 1525 (Fed. Cir. 1996).
41. Indeed, the Court of Federal Claims and the Court of Appeals for the Federal Circuit have consistently applied the \textit{Preseault} rule and have required compensation in similar situations. \textit{E.g.}, Howard v. United States, 106. Fed. Cl. 343 (2012); Ellamae Phillips Co. v. United States, 564 F.3d 1367, 1373 (Fed. Cir. 2009); Schmitt v. United States, No. IP 99-1852-Y/S, 2003 WL 21057368 (S.D. Ind. 2003).
44. \textit{Id.} at 296–97 (emphasis added).
put it, “[s]tates effect a taking if they recharacterize as public property what was previously private property.”45

Thus, the property that is constitutionally vouchsafed is the property as it existed when the owner acquired it. And that is the central point of this issue. No state can “redefine” what has plainly been private property so that it automatically becomes public property, just because the State wishes that it were so.46 At least, it cannot do so, as Justice Holmes put it for the Court, “by a shorter cut than the constitutional way of paying for the change.”47

As it happens, the Supreme Court denied certiorari in Bay Point as it was leaving town for the summer.48 The North Carolina town involved in Nies elected to file no response to the petition. The Supreme Court requested a reply and asked that it be filed in August.49 Alas, when all was said and done, the Court denied certiorari in Nies.50 However, it is a matter of time until the issue will be decided in another case down the road. My point is simply that this is an important issue and deserves consideration by the Supreme Court, not just rumination by me. It will keep popping up until the Supreme Court deals with it.

A postscript: After the draft of this Article was virtually complete, the Supreme Court decided Murr v. Wisconsin.51 Before allowing this Article to go to bed, we ought to poke at that new opinion to see whether it sheds any light. Sadly, I think it sheds only confusion, but its impact on this issue bears note.

The reason that Murr is related to this issue at all is that it involves a family’s acquisition of two adjoining lots and the County’s adoption of an ordinance that impacted the lots by redefining them

46. See Kaiser Aetna v. United States, 444 U.S. 164 (1979), in which the Court repeatedly noted that the property in litigation was private under state law (id. at 166, 167, 179) and thus protected from interference—even from federal law—by the Fifth Amendment (id. at 180). See also Hodel v. Irving, 481 U.S. 704 (1987) (finding that the statute purporting to eliminate Native American rights to devise and inherit property by intestacy was invalid because it was not accompanied by compensation).
as a single lot, through the magical planning tool known as “virtual joinder or merger.” Had the two lots remained in separate ownership, they would have universally been recognized as separate lots available for separate development. However, as soon as title settled on the same people, the County’s ordinance created a “virtual” merger of the two lots, and they “virtually” became a single lot for all intents and purposes, except, perhaps, for taxation.52 When the Murrs sought to sell one of the lots, the County told them that the heretofore separate lot had ipso facto, eo instante, abracadabra, etc., become merely a part of the virtually conjoined lot. What had been two had become one, and the lots could not be rent asunder to facilitate development.

So, does Murr stand for the proposition that local government is free to redefine property interests at will, allowing rearrangement of land titles for the benefit of the government? I suppose we’ll have to wait and see. The Murr decision directly says it does not want to be stretched that far. Pointedly, it notes that “[s]tates do not have the unfettered authority to shape and define property rights and reasonable investment-backed expectations, leaving landowners without recourse against unreasonable regulations.”53 By invoking that settled precept from Palazzolo, the Court signaled its intent to deny government the unfettered right to “shape and define property rights” so as to violate constitutional doctrine. Carrying the hypothetical to its extreme, the Court concluded that a state’s ability to define property could not go so far as to “merge” “nonadjacent property owned by a single person or entity in different parts of the State and then impose[] development limits on the aggregate set.”54 Of course, this should not be the case. Not even the most ardent planner or bureaucrat has suggested that non-congruent lots owned by the same person or congruent lots owned by different people should be considered virtually joined in order to ease the planning burden.55

52. In a somewhat cruel twist of fate, the same county that insisted that these two lots must be treated as a single entity had been sending separate property tax bills to the owners for years, taxing each individually at its highest and best use, without regard to the neighboring lot. But this is probably digressive.
54. Murr, 137 S. Ct. at 1945.
55. There is one place where such separated joinder is allowed. In direct condemnation cases, where such separated properties share unities of title and use (and at least close
Although rendering a decision in favor of the State, the Court declined the State’s suggestion to clothe it with absolute, definitional power over property, saying the State’s approach was equivalent to framing the question this way: “May the State define the relevant parcel in a way that permits it to escape its responsibility to justify regulation in light of legitimate property expectations?” In a word, no.

But wait; there is more. Four days after deciding Murr, the Supreme Court denied certiorari in United States v. Lost Tree Village Corp. The reason this action may have meaning here (which some might dismiss as routine in light of the myriad petitions that receive the “denied” stamp every week) is that it was considered at the very time the Court was parsing the words of the Murr opinion and its two dissents, and it involves a related (perhaps similar) issue. One might even call Lost Tree the blood brother of Murr. Moreover, the Lost Tree petition had been pending since March 2016—fifteen months earlier—and the United States (the petitioner) had asked the Court to defer action pending the decision in Murr so that the decisions could be consistent. Whether acting deliberately or not, holding Lost Tree is what the Court did. There are additional threads to harry here.

Lost Tree was another “parcel as a whole” case. It certainly received its share of judicial attention, having made two trips to the court of appeals. It was another case in which the U.S. Army Corps of Engineers denied a wetlands-fill permit. The property owner had developed homes on approximately 1,300 acres and then sought a permit to fill a 4.99-acre wetlands tract. The permit was denied. The trial court initially entered judgment on the takings claim in favor of the government. On appeal, that was reversed. The next time around, the property owner won. The trial court held that the denial

proximity), they can be considered together for the purpose of computing severance damages. See, e.g., City of San Diego v. Neumann, 6 Cal. 4th 738 (1993); City of Los Angeles v. Wolfe, 6 Cal. 3d 326 (1971). But that is a different story for a different day. A good discussion of the complex issues involved in analyzing proximity and use in inverse condemnation cases can be found in Steven J. Eagle, The Parcel and Then Some: Unity of Ownership and the Parcel as a Whole, 36 VT. L. REV. 549 (2012).

56. Murr, 137 S. Ct. at 1946.


of the permit deprived the owner of 99.4% of the property’s value\footnote{There have been disagreements about how much use or value can be eliminated before courts will acknowledge that a taking has occurred, but 99.4% should be “too far” in anyone’s view. Compare this with Florida Rock Indus., Inc. v. United States, 45 Fed.Cl. 21 (1999) (determining that there was a 73.1% value loss; taking found).} rendering the government action a total and categorical taking.

Seeking certiorari, the government argued that the wetlands parcel could not be evaluated separately from what it called “the contiguous uplands under common ownership.”\footnote{Petition for Writ of Certiorari at i., United States v. Lost Tree Vill. Corp., 137 S. Ct. 2325 (2017) (No. 15-11192), 2016 WL 1166134.} Right after \textit{Murr}, however, where the Court held that such contiguity was an important factor, certiorari was denied without comment, or dissent. This provides more food for thought.

\section*{II. WHETHER GOVERNMENT ACTS LEGISLATIVELY OR ADMINISTRATIVELY, IT MUST COMPENSATE WHEN ITS ACTIONS ADVERSELY IMPACT PRIVATE PROPERTY}

The Constitution is concerned with governmental action. Its Bill of Rights is designed specifically to protect individuals against governmental actions.\footnote{Some examples include the protections around the government actions of quartering soldiers (U.S. Const. amend. III), establishing religion (U.S. Const. amend. I), interfering with the possession of property (U.S. Const. amend. V), and deprivations of life or liberty (U.S. Const. amend. V).} As Justice Stewart put it in a classic concurring opinion, “the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it \textit{does}.”\footnote{Hughes v. Washington, 389 U.S. 290, 298 (1967) (concurring opinion) (emphasis in the original).}

The most serious place where this issue currently arises is in the field of exactions. Specifically, it arises in analyzing whether a taking occurs only when an exaction is imposed during an administrative process (i.e., on a case-by-case basis, depending on the individual facts) or whether a taking also occurs when an exaction is imposed legislatively (i.e., across the board, regardless of individual facts). The issue is of particular importance in California where municipalities are seeking to increase their stock of housing for low- and moderate-income residents.\footnote{More than four decades ago, the California legislature formally declared “a serious shortage” of housing for those of low and moderate means. CAL. HEALTH & SAFETY CODE} The favored governmental method of ensuring
such housing construction is to compel the developers of market-rate housing to include a specified amount of “affordable” housing as part of their developments. In its most recent iteration, the California Supreme Court approved a requirement that obligated residential developers to sell at least fifteen percent of their units at a price that is “affordable” to low- or moderate-income occupants—and to keep those units affordable for forty-five years. Developers who don’t want the low-income units in their developments were given the option of either paying ransom (in the form of fees “in lieu” of contributing those units to the local low-income housing stock) or building the units on a different site.

Forgetting the lesson the U.S. Supreme Court tried to teach in Nollan about not evading the Fifth Amendment by a “clever” “play on words,” the California Supreme Court concluded that it need pay no attention to Nollan, Dolan, or the most recent application in Koontz through the simple, definitional expedient of saying that the affordable housing condition was not an “exaction” but merely

§ 50003 (1977). That problem remains unsolved. Cal. Bldg. Indus. Ass’n v. City of San Jose, 61 Cal. 4th 435, 441 (2015). A recent study suggests that local government may be engaging in some version of the infamous “shell game” by planning for housing but not approving any. See Liam Dillon, California Lawmakers Have Tried for 50 Years to Fix the State’s Housing Crisis. Here’s Why They’ve Failed, L.A. TIMES, July 4, 2017, at 1. The supply continues to trail the need. See Kevin Smith, With California Housing Prices Surging, Developers Say They Can’t Build Enough Homes, L.A. DAILY NEWS, July 5, 2017, at 1; Liam Dillon, A Bay Area Developer Wants to Build 4,400 Sorely Needed Homes. Here’s Why It Won’t Happen, L.A. TIMES, July 28, 2017, pt. B, at 1. Recently, the California Department of Housing and Community Development released a report concluding that more than five hundred cities and counties are failing to meet housing goals for all income levels. Jeff Collins, 98% of California Jurisdictions Fail to Approve Adequate Housing, State Report Finds, ORANGE COUNTY REGISTER, Feb. 1, 2018. See also Liam Dillon, Blame California’s Cities and Counties for Housing Delays, Not State Environmental Law, New Study Says, L.A. TIMES, Feb. 21, 2018.


66. No pejorative meaning is intended by the choice of this word. All the Justices use it. In the recent decision in Horne v. U.S. Dept. of Agriculture, 135 S. Ct. 2419, 2431 (2015), liberal Justices Ginsburg, Breyer, and Kagan joined an opinion decrying the government’s holding property “hostage” to be “ransomed by the waiver of constitutional protection.”

67. A mild digression brings us to the City of Patterson, California, which sought to increase its “in lieu” fee from $734 per house to $20,946 per house. Even the California courts could not stomach that. Bldg, Indus. Ass’n of Cont. Cal. v. City of Patterson, 171 Cal. App. 4th 886 (2009). See Michael M. Berger, Appellate Advice On What Is NOT A “Reasonable” In-Lieu Fee, REAL ESTATE FIN. J. 114 (Winter 2010). At least in this context, we have an answer to the conundrum spawned by Mahon, that is, how can we tell how far is “too far”?


a “regulation” of land use. So saying, the California court found no need to analyze this legislatively imposed exaction by U.S. Supreme Court standards. Although the California Supreme Court’s opinion was a little blurred about the administrative/legislative distinction, a recent court of appeal decision applied that distinction clearly.

That the California courts have approved such actions should not be surprising. The U.S. Supreme Court has repeatedly had to explain to the California judiciary that the Constitution will not permit some of California’s actions regarding private property. The surprising thing is the state courts’ analyses in these cases. In a nutshell, a central reason for the courts saying they approve of these government regulations is that the Constitution protects only against administrative actions not legislative ones. Is that—more importantly, can that be—true? We need to deconstruct the analyses and see if there is any there there.

Let’s begin with a fundamental misconception: that the U.S. Supreme Court’s exactions cases involved administrative impositions of conditions based on the individual facts of each case. Even Justice Thomas, who wants the Court to decide this issue, fell into this trap. But that premise is wrong—demonstrably so. In fact, each of the

70. Cal. Bldg. Indus. Ass’n v. City of San Jose, 61 Cal. 4th 435, 443–44 (2015) (stating that the regulations “do not impose exactions . . . but rather place a limit on the way a developer may use its property”). See also id. at 457–58 (finding the regulations “do[ ] not effect an exaction”).
71. Candidly, I get a little dizzy when they do things like this. In Nollan, the U.S. Supreme Court had told the California Supreme Court not to play the “word game” of calling an exaction something more bland (in that case, a “dedication”) in order to define its way out of a problem. Yet here is the same lower court playing the same game to evade the same constitutional guarantee, and then certiorari was denied. Cal. Bldg. Indus. Ass’n v. City of San Jose, 136 S. Ct. 928 (2016). Go figure. For further discussion of definitional word games, see generally 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) [hereinafter Berger, To Regulate or Not].
74. E.g., First English Evangelical Lutheran Church v. Cty. of Los Angeles, 482 U.S. 304, 330 (1987) (noting that California cases were decided “inconsistently” with Fifth Amendment law); Nollan v. Cal. Coastal Comm’n, 483 U.S. 825, 837 (1987) (stating that “extortion” is not constitutionally permissible); City of Monterey v. Del Monte Dunes, 526 U.S. 687, 707 (finding the City’s position is “contrary to settled regulatory takings principles”).
75. Cal. Bldg. Indus. Ass’n v. City of San Jose, 136 S. Ct. 928 (2016) (Thomas, J., concurring in denial of certiorari) (“Our precedents in Nollan [and] Dolan . . . would have governed San Jose’s actions had it imposed those conditions through administrative action.”).
Supreme Court’s exaction cases involved a hardline legislative decision that was applied by rote, albeit the decision was handed down in an administrative proceeding. In *Nollan*, the California Coastal Commission adopted “a comprehensive program to provide continuous public access” to the beach.\(^{76}\) That program applied to all coastal property from Oregon to Mexico, and a condition of dedication was attached to all permits, regardless of individual circumstances. Although the condition was imposed in the context of an administrative proceeding where a permit was being sought, the fact is the decision to require the “dedication” in exchange for a permit was legislatively made as a common requirement along the entire coast.

The same is true of *Dolan*. There, the City of Tigard decided that it needed to provide three layers of protection and public uses along the banks of Fanno Creek as it wove through town. In order to implement that plan, the city council decreed that all permits for property bordering the creek *must* dedicate three different classes of concentric easements spreading outward from the creek: one to protect the creek, one to provide pedestrian access, and a third to provide a bike path. Again, although the conditions would be imposed on individual properties during administrative proceedings, there were no considerations made for individual fact-finding or special circumstances. To make the three-deep set of easements work along the entire creek, the same easement, of the same size and quality, had to be imposed on each of the neighboring properties.

In other words, the conditions were ironclad and applied across the board—not dependent on the individual characteristics of individual property owners.\(^{77}\) In technical terms, the condition was imposed legislatively not administratively, notwithstanding some judicial comments to the contrary.\(^{78}\) As the court put it in *California Building Industry Ass’n*, the core distinction is “between ad hoc exactions and legislatively mandated, formulaic mitigation fees.”\(^{79}\) But it really

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76. *Nollan*, 483 U.S. at 841.
78. *E.g.*, Cal. Bldg. Indus. Ass’n, 61 Cal. 4th 457, 459 n.11 (reviewing the validity of “ad hoc administrative decisions”).
79. *Id.* at 471 (quoting this distinction with approval).
shouldn’t matter. As the U.S. Supreme Court has said, “[t]he Takings Clause . . . is concerned simply with the act.”80 And, here, the types of acts being examined are those that force the extraction of valuable property as quid pro quo for a development permit.

A second misconception derives from the first, that is, that the identity of the regulatory entity makes a difference. Should it? Recalling that the Bill of Rights deals with guarding individuals against governmental action and that the Fifth Amendment’s proscription of federal action has been incorporated against the states through the Fourteenth Amendment’s Due Process Clause, there is no valid basis for distinguishing among various, potential actors.81 Justice Thomas raised this issue years ago when he noted, “It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking. . . . A city council can take property just as well as a planning commission can.”82 And yet some courts and commentators persist in maintaining that the identities of the players require different rules and fret that the line dividing them could be erased.83 Thus, one group of states is deferential to legislative bodies and cuts them a great deal of slack when reviewing exactions.84 Other states see no difference whether exactions are imposed legislatively or administratively.85 As this was


81. See James S. Burling & Graham Owen, The Implications of Lingle on Inclusionary Zoning and Other Legislative and Monetary Exactions, 28 STAN. ENVTL. L.J. 397, 407–16 (2009) (showing that Supreme Court precedent before Nollan never distinguished between conditions imposed by different sources of government).

82. Parking Ass’n of Ga. v. City of Atlanta, 515 U.S. 1116, 1117–18 (1995) (Thomas, J., dissenting from denial of certiorari); see San Remo Hotel v. City & Cty. of San Francisco, 41 P.3d 87, 124 (Cal. 2002) (Brown, J., dissenting) (“A public agency can just as easily extort unfair fees legislatively from a class of property owners as it can administratively from a single property owner. The nature of the wrong is not different or less abusive to the victims.”).


84. See 616 Croft Ave., L.L.C. v. City of West Hollywood, 3 Cal. App. 5th 621, 629 (2016); West Linn Corporate Park, L.L.C. v. City of West Linn, 240 P.3d 29, 45 (Or. 2010); Alto Eldorado Partnership v. City of Santa Fe, 634 F.3d 1170, 1179 (10th Cir. 2011).

being written, the Court denied certiorari in the Croft case from California, missing that opportunity to bring clarity to the field, but a new petition has been filed in the Dabbs case from Maryland, keeping the issue alive. One of these days, certiorari will be granted. Unless anarchy is going to be allowed to continue to reign, it will have to be granted.

III. THE RIGHT TO EXCLUDE IS A FUNDAMENTAL RIGHT

“Property” consists of many things. Indeed, the concept is so complex that the Supreme Court has repeatedly used the law professors’ “bundle of sticks” analogy to illustrate it. The Court thus has concluded that both the taking of an entire “stick” (or right) from the “bundle” and the taking of a part of all the “sticks” violate the Takings Clause of the Fifth Amendment.87

One “stick” which has received special protection from the Court has been the right of property owners to exclude others. The Court has repeatedly referred to the right to exclude others as “one of the most essential”88 and “most treasured stands in an owner’s bundle of property rights.”89

Moreover, the Court has been particularly protective against governmental actions that permit strangers to invade the property of others:

This is not a case in which the Government is exercising its regulatory power in a manner that will cause an insubstantial


88. Nollan, 483 U.S. at 831; Irving, 481 U.S. at 716; Ruckelshaus, 467 U.S. at 1011; Loretto, 458 U.S. at 433, Kaiser Aetna, 444 U.S. at 176.

devaluation of petitioners’ private property; rather, the imposition of the navigable servitude in this context will result in an actual physical invasion of the privately owned marina.  

One form of this kind of conflict has arisen lately in the context of labor/management relations. The factual scenarios have to do with where, when, and under what circumstances members of labor unions may take actions that would nominally be recognized as trespasses (either outside or inside stores) but are held not to violate the Fifth Amendment. Like Kaiser Aetna, these cases do not involve “insubstantial devaluation[s]” of property. In Ralphs,91 for example, the court was presented with state statutes that not only allowed actual physical intrusion onto Ralphs’s private property, it also prohibited aid from the judiciary.92 Colorfully, Professor Tribe once referred to such interlopers on private property as “government-invited gatecrashers.”93 Indeed, they are.

But the Fifth Amendment provides a shield against “gatecrashers” who carry government passes. The Supreme Court has routinely noted that government action resulting in actual physical invasion is relatively simple to analyze from the vantage point of the Fifth Amendment: physical invasion is a taking that cannot be accomplished without compensation.

The Court’s cases make no distinction between actual physical invasion by the government,94 and legislation or regulation authorizing trespass by others. Some of the Court’s prime physical invasion cases simply involved enabling third party trespass. In Nollan,95 a California agency sought to authorize random beachgoers to trespass on private property. In Loretto,96 the New York legislature authorized cable TV companies to install equipment in apartment buildings without consent from the building owners. In Kaiser Aetna,97 the United States sought to open a private marina for use by the general public.

90. Kaiser Aetna, 444 U.S. at 180 (emphasis added).
The point is simply this: neither by itself, nor through authorizing others, may a public agency hinder the right of private property owners to exclude third parties from their land—not without compensation.

The labor relations cases are analytical twins to the real estate cases cited above. In each, government regulation sought to compel a private property owner to open property to physical intrusion and use by strangers. Such random and unwanted intrusions by union representatives—at times and in manners of their own choosing, ignoring the property owner's desires or regulations—is so significant that it prompted the Court's holding in *Kaiser Aetna*:

[T]he '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.98

The idea that compensation is necessary following government actions that take private property was augmented eight years later in *First English*. In that case the Court declared: “[G]overnment action that works a taking of property rights necessarily implicates the ‘constitutional obligation to pay just compensation.’”99 Compensation is thus an automatic requirement when property interests are taken.

How does this concept play out in labor/management relations? Simple. To accomplish their goals, labor unions need access to two groups of people: the employees of those businesses whom they would like to represent and the customers of those businesses whom they would like to enlist in their cause. For both of these, the unions seek access to the places of business directly involved. That is the most direct way to reach both targets. Needless to say, the employers and proprietors of the businesses do not want either their employees bothered during the workday or their customers bothered while they could be shopping. The U.S. Supreme Court has considered these issues in the context of shopping centers a couple of times and so has the California Supreme Court. It probably goes without saying that the latter court has been less protective of the rights of property owners than the former. The issue erupted again recently.

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98. *Id.* at 180.
The question raised by government regulators in the labor/management context is whether the standard takings theory might have been displaced by the Court’s holding in *PruneYard Shopping Center v. Robins*. The California Supreme Court interpreted *PruneYard* as elevating the First Amendment rights of unions and employees over the Fifth Amendment rights of property owners and employers. I recognize that the *PruneYard* case involved students soliciting signatures to oppose an anti-Zionist measure in the United Nations, but the underlying constitutional precepts are the same and should have provided Ralphs’s substantial protection. But California misreads the federal precedents.

California began its analysis with an erroneous premise and followed that line to an erroneous conclusion. The focal point of the analysis was the U.S. Supreme Court’s decision in *Lloyd*. *Pruneyard’s* erroneous premise was that *Lloyd* was “primarily a First Amendment case.” But here is how the U.S. Supreme Court characterized the question it addressed in *Lloyd*:

We granted certiorari to consider petitioner’s contention that the decision below violates rights of private property protected by the Fifth and Fourteenth Amendments.

*Lloyd* thus addressed—and answered—a Fifth Amendment question, deciding that the Fifth Amendment rights of the property owner, even in the context of a large (fifty-acre) shopping center, prevailed over the First Amendment rights of Vietnam War protesters to distribute handbills. Two points were paramount in that determination. First, the First Amendment guards against restrictions by the government, not private property owners. Second, even

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101. California is not alone. New Jersey, for example, has held all private property subject to an inchoate servitude to free speech: “We do not interfere lightly with private property rights, but when they are exercised, as in this case, in a way that drastically curtails the right of freedom of speech in order to avoid a relatively minimal interference with private property, the latter must yield to the former.” *N.J. Coalition Against War v. J.M.B. Realty Corp.*, 650 A.2d 757, 780 (1994).
103. *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899, 904 (1979). Note that the two courts spell the shopping center’s name differently. In other words, California makes it one word (Pruneyard) while the U.S. Supreme Court makes a mashup of two words (PruneYard). The latter seems to be the actual name of the center.
105. Even public property is not universally available for “free speech” activities, as the
the creation of a large shopping center, which the public is generally invited to use, does not automatically result in “dedication of private property to public use.” In a companion case, argued and decided on the same days as Lloyd, the Supreme Court elaborated:

Before an owner of private property can be subjected to the commands of the First and Fourteenth Amendments the privately owned property must assume to some significant degree the functional attributes of public property devoted to public use. The First and Fourteenth Amendments are limitations on state action, not on action by the owner of private property used only for private purposes.

Curiously, California leapt over the first issue and went right to the second, disagreeing with the U.S. Supreme Court about the protection accorded property owners. The California jurists held that article I, sections 2 and 3, of the California Constitution accorded greater protection to speakers than the First Amendment and thus prevailed even in private shopping centers.

California’s failure to deal with the question of whether the First Amendment or the slightly expanded California equivalent is restricted to state action has been regularly criticized by both courts in sister jurisdictions and by legal commentators. When the California Supreme Court addressed the question again in Golden Gateway Center v. Golden Gateway Tenants Ass’n (in the context of an apartment complex rather than a shopping center), only a plurality of the court concluded that state action—rather than private action—was a necessary element of the California Constitution, like its federal counterpart. The court determined the only exception to this was when private property had become “functionally equivalent to a traditional public forum.” The Golden Gateway plurality reached that conclusion in an effort to retain California’s Pruneyard as

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106. Lloyd, 407 U.S. at 569.
108. See comments collected by the plurality opinion in Golden Gateway Center v. Golden Gateway Tenants Ass’n, 26 Cal.4th 1013, 1020 n.4 (2001), and by the dissenting opinion in Fashion Valley Mall v. National Labor Relations Bd., 42 Cal.4th 850, 874.
precedent\textsuperscript{110} but still keep it closely tied to the federal Constitution’s restriction of free speech protections in public forums.

California was wrong in its generalized characterization of shopping centers as having become the functional equivalent of public parks and town squares. \textit{First}, implicit in the court’s rationalization for considering shopping centers quasipublic spaces was the perceived need for the ability of citizens to communicate broadly and easily. The focus of the analysis was on the idea that more and more people congregated in shopping centers\textsuperscript{111} making access to those people essential to the dissemination of ideas and the collection of signatures on petitions. If nothing else, technology has overtaken that need. Not only has the Internet expanded apace, but (as recent events in the Middle East have shown) social networking sites like Twitter and Facebook have transformed the way in which people are able to communicate with vast numbers of others on an almost instantaneous basis. People no longer need to congregate in town squares to commune with one another.\textsuperscript{112} \textit{Second}, to the extent that California’s generalized characterization of shopping centers as having become the functional equivalent of public parks and town squares can have meaning, it may have application only to the largest shopping centers, like the one involved in \textit{PruneYard}. These are perceived to have become focused gathering spots that contain centralized courtyards serving as places for general, public gatherings (in contrast to other shopping centers’ primary function of providing places to shop). California’s failure to specifically define the contours of a public forum leaves businesses, property owners, lower courts, and those seeking to exercise free speech to guess which private properties are quasipublic and which are strictly private. \textit{Third}, shopping malls are dropping like flies.\textsuperscript{113}

\textit{PruneYard} was sui generis. It involved neither a single store nor a modest shopping mall. Instead, \textit{PruneYard} arose from issues at a shopping center so massive that it drew daily crowds of twenty-five thousand people. In that context, that shopping center had become,

\textsuperscript{110} A member of that plurality later explained that retention was based “reluctantly” on stare decisis. \textit{Fashion Valley}, 42 Cal.4th at 875 (dissenting opinion).

\textsuperscript{111} Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899, 907, 910 n.5 (1979).

\textsuperscript{112} See discussion of the so-called “Arab Spring” in Berger, \textit{Property}, supra note 10, at 61.

in effect, the equivalent of a town square, where members of the public were invited to congregate for myriad purposes. Even there, the Supreme Court concluded that the property owner was entitled to establish time, place, and manner regulations for use of its facilities. No such protection is available under the California statutes. Nor is such protection available even though the California Supreme Court recognized that Ralphs’s owner had done nothing to convert the store entry to a “public” space.

The California Supreme Court suggested that the California legislature had recognized a problem, accepted the duty to solve it, and devised a solution. But its opinion proceeds as though recognition of a legitimate governmental goal (accepting, arguendo, that the goal is legitimate) validates whatever solution is chosen. That is not the law in the United States. Determination of a legitimate governmental objective is the first, not the last, step. The means chosen to achieve the objective must then survive constitutional scrutiny. Good intentions are irrelevant. For the proper exercise of any governmental power, the underpinning of such a beneficent purpose must exist. This much had been settled by 1922, when the Supreme Court examined a statute designed to stop land subsidence caused by underground coal mining and concluded that the prerequisites for the exercises of both police power and eminent domain were present:

We assume, of course, that the statute was passed upon the conviction that an exigency existed that would warrant it, and we assume that an exigency exists that would warrant the exercise of the power of eminent domain. But the question at bottom is upon whom the loss of the changes desired should fall.\(^\text{114}\)

More recent authority echoes that conclusion: “[T]he Takings Clause presupposes that the government has acted pursuant to a valid public purpose.”\(^\text{115}\) Once it is determined that the government action


\(^{115}\) Lingle v. Chevron USA, Inc., 544 U.S. 528, 543 (2005) (emphasis added). See also Fla. Rock Indus., Inc. v. United States, 18 F.3d 1560, 1571 (Fed. Cir. 1994) “It is necessary that the Government act in a good cause, but it is not sufficient. The takings clause already assumes the Government is acting in the public interest . . . .” Id. at 1571. More than that, the Takings Clause assumes that the government is acting pursuant to lawful authority. If not, the action is ultra vires and void. Compare Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (finding an unlawful wartime seizure void), with United States v. Peewee Coal Co., 341 U.S. 114 (1951) (finding that compensation is mandatory after lawful wartime seizure.)
was done to achieve a legitimate goal, then the means chosen to achieve the goal must be examined against the constitutional matrix to ensure that private property rights have not been violated.

Mahon was merely one in a long line of decisions in which the Supreme Court—speaking through various voices along its ideological spectrum (Mahon having been authored for the Court by Justice Holmes)—patiently, and consistently, explained to regulatory agencies that the general legal propriety of their actions and the need to pay compensation under the Fifth Amendment present different questions. The need for the latter is not obviated by the virtue of the former. Emphasizing the point, the dissenting opinion in Mahon argued the absolute position that a “restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking.”116 Eight Justices rejected that proposition. In Loretto,117 New York’s highest court upheld a statute as a valid exercise of the police power and therefore dismissed an action seeking compensation for a taking. The Supreme Court put it this way as it reversed that decision:

The Court of Appeals determined that § 828 serves [a] legitimate public purpose . . . and thus is within the State’s police power. We have no reason to question that determination. It is a separate question, however, whether an otherwise valid regulation so frustrates property rights that compensation must be paid.118

Similarly, in Kaiser Aetna,119 the Army Corps of Engineers decreed that a private marina could be opened to public use without compensation. The Supreme Court disagreed, and explained the relationship between justifiable regulatory actions and the just compensation guarantee of the Fifth Amendment:

In light of its expansive authority under the Commerce Clause, there is no question but that Congress could assure the public a free right of access to the Hawaii Kai Marina if it so chose. Whether a statute or regulation that went so far amounted to a “taking,” however, is an entirely separate question.120

116. Mahon, 260 U.S. at 417. Note that this was one of the few times that Justice Brandeis (the lone dissenter) disagreed with Justice Holmes.
118. Id. at 425 (Marshall, J.) (emphasis added).
120. Id. at 174 (Rehnquist, J.) (emphasis added).
That is why the Court concluded in *First English* that the Fifth Amendment was designed “to secure compensation in the event of otherwise proper interference amounting to a taking.”\(^\text{121}\)

In a similar vein are cases like *Preseault*,\(^\text{122}\) *Ruckelshaus*,\(^\text{123}\) *Dames & Moore*,\(^\text{124}\) and the *Regional Rail Reorganization Act Cases*.\(^\text{125}\) In each of them, the Court was faced with the claim that Congress, in pursuit of legitimate objectives, had taken private property without just compensation in violation of the Fifth Amendment. The governmental goal in each case was plainly legitimate (respectively, creating recreational hiking and biking trails over abandoned railroad right-of-way easements, obtaining expert input prior to the licensing of pesticides to protect the consuming public, dealing with the issue of compensation in the aftermath of the Iranian hostage crisis, and handling widespread railroad bankruptcy). Nonetheless, the Court did not permit those proper legislative goals to trump the constitutional need for compensation when private property was taken in the process. In each, the Court directed the property owners to the Court of Federal Claims to determine whether these exercises of legislative power, though substantively legitimate, nonetheless required compensation to pass constitutional muster.\(^\text{126}\)

In sum, for a taking to occur, what matters is the impact of the government’s acts, not the purity vel non of the actors’ motives. Indeed, if their motives are benign—or done for the best of reasons—that only fortifies the need for compensation required by the Takings Clause of the Fifth Amendment.\(^\text{127}\) Thus, it is not enough for California to conclude that—as a matter of state policy—it was a good thing to allow uncontrolled picketing at the entry to stores like Ralphs.

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127. The only potentially contrary Supreme Court voice came somewhat earlier than this group of decisions in the relatively cosmic language of *Berman v. Parker*, 348 U.S. 26, 33 (1954), where the Court broadly pronounced: “Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine.” To the extent that this was the law in 1954, it seems to have been seriously reined in since then.
Grocery. As a matter of federal constitutional policy, such a severe invasion of protected property rights cannot occur unless compensation is paid.

Returning to Pruneyard, it is worth noting that the dissent in the California Supreme Court’s opinion took on directly the idea that the First Amendment rights of the unions and their picketers could stand at a higher level than the Fifth Amendment rights of the store owner:

> The majority relegates the private property rights of the shopping center owner to a secondary, disfavored, and subservient position vis-à-vis the ‘free speech’ claims of the plaintiffs. Such a holding clearly violates federal constitutional guarantees announced in Lloyd Corp. v. Tanner. ¹²⁸

Indeed, as the Court put it in Lloyd, “The essentially private character of a store and its privately owned abutting property does not change by virtue of being large or clustered with other stores in a modern shopping center.”¹²⁹ In Lloyd, the Supreme Court prevented the distribution of political handbills in a shopping center. In weighing the Fifth Amendment rights of the shopping center owner against the First Amendment rights of those who wanted to distribute leaflets, the Court made the following conclusion:

> We do say that the Fifth and Fourteenth Amendment rights of private property owners, as well as the First Amendment rights of all citizens, must be respected and protected. The Framers of the Constitution certainly did not think these fundamental rights of a free society are incompatible with each other.¹³⁰

Likewise, in Central Hardware, decided on the same day as Lloyd, the Court concluded that care must be taken by courts to avoid the “unwarranted infringement of long-settled rights of private property protected by the Fifth and Fourteenth Amendments.”¹³¹

In other words, “freedom of speech” does not ipso facto override the Fifth Amendment. Indeed, the U.S. Supreme Court was blunt

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¹²⁸. Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899, 911 (1979) (dissenting opinion) (emphasis original) (citation omitted).
¹³⁰. Id. at 570. See also Dolan v. City of Tigard, 512 U.S. 374, 392 (1994) (property rights are not “poor relation” to other constitutionally protected rights).
¹³¹. Central Hardware Co., 407 U.S. at 547.
in recognizing the inherent constitutional problem of compelling store owners to provide space for union picketers:

To hold that store owners are compelled by law to supply picketing areas for pickets to drive store customers away is to create a court-made law wholly disregarding the constitutional basis on which private ownership of property rests in this country...132

When given the opportunity to clarify the relationship between the seminal values of the First and Fifth Amendments in Ralphs, the Supreme Court denied certiorari.133 It will surely have another chance, and it will hopefully make better use of it.

IV. WHEN THE GOVERNMENT INSISTS ON SO MUCH PROCESS THAT THE PROPERTY OWNER CHOKES ON IT, HAS DUE PROCESS BEEN DENIED?

Substantive due process is the blood brother of takings law. In many cases, the two can be used as interchangeable theories for correcting the same (or, at least, similar) governmental wrong.134 It thus seems appropriate to include some discussion of due process in this compendium.

Normally, we think of due process denials as being caused by the absence of process or, at least, the twisting of process. However, due process can be denied by too much as well as not enough process—indeed, too much process can drown any semblance of due process of law. Years ago, Fred Bosselman, dean of the national land use bar and one of Callies’s early mentors,135 queried whether “our system of land use and environmental regulation [can] become so Byzantine as to deny due process of law to the participants through the sheer

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134. For an example, see the various opinions in Eastern Enterprises v. Apfel, 524 U.S. 498 (1998). The plurality struck down the statute as a taking. But that only provided the property owner with four votes. Justice Kennedy concurred in the judgment, concluding that the statute deprived the owner of property without due process. The same conclusion is reached but with different reasoning. The dissent also opted for a due process analysis, but did so because the lower standard of proof applicable to the government in due process cases would have allowed the government to prevail.
135. See supra notes 2–3.
complexity of the system." The precise focus of this discussion is “finality,” that is, what must a property owner do so that a case is sufficiently “final” for a court to litigate?

For illustrative purposes, I am going to use two cases that I keep in a file marked “Great Cases I Have Lost” (and believe me, I have lost some wonderful cases). The cases are Charles A. Pratt Construction Co. v. California Coastal Comm’n and Galland v. City of Clovis. Pratt involved the potential development of the last portion of an undeveloped stretch of land in San Luis Obispo County, California. The owner planned 149 homes for an 81-acre parcel, and the County approved the concept. After completion of a neighboring tract, the owner pared down its plan to forty-one homes and, at the same time, added forty-three more acres to the tract (to be left undeveloped). The owner spent nearly a decade in planning and studying, including examining ten alternative uses in its environmental impact report (“EIR”). Leaving eighty percent of the land undeveloped exceeded the County’s official-plan requirement of sixty percent.

However, after the owner’s specific plan for development was approved by the County and appealed, the California Coastal Commission overturned the County’s approval, disregarding the decade of county planning and the voluminous EIR prepared and evaluated by the County. Not only did the commission reject the plan approved by the County, it rejected ten alternative plans evaluated in the EIR.

Pratt shows how Bosselman’s fears have materialized. The U.S. Supreme Court had a valid goal when it sought to restrict its reviews of local government decisions to those in which the regulatory agency had reached a “final” determination of how a property owner

140. Have you noticed how many takings cases involve the “last piece of undeveloped property” in the jurisdiction? See, e.g., City of Monterey v. Del Monte Dunes, 526 U.S. 687 (1999).
141. Note the high-handedness of the county’s plan, demanding that sixty percent of the land remain vacant as the price for developing the other forty percent. Interestingly, the property owner was willing to donate even more for the chance to make any semblance of realistic development.
would be allowed to make use of his or her land. Premature adjudication serves no one. However, some lower courts have used the Court’s pragmatic desire for “finality” to launch a quest for some sort of Holy Grail, thus putting off “finality” indefinitely rather than viewing the facts—ad hoc—to determine whether enough process has been completed. Just as the Court disagreed with the contrary conclusions about finality made by the Rhode Island courts in *Palazzolo*, some uniform treatment of this concern seems required.

*Pratt* is a paradigm of this issue for two reasons, each of which will be familiar to land developers and their counsel.

First, during the administrative process leading up to the Coastal Commission’s ruling, Charles Pratt had spent the better part of a decade intensively working with county officials to produce a development plan. As part of that process, an EIR was prepared by the County (and subjected to full probing at public hearings) that analyzed ten different alternatives for using this property. The project that is the subject of the litigation was the preferred choice of both the county board of supervisors and Pratt.

When the County’s permit issuance was appealed to the Coastal Commission, the commission had before it the entire record of the County’s proceedings, including the EIR. The commission not only rejected the permit the County had approved, it rejected the other alternatives as well. It did this by concluding that there was “no way” it could suggest to modify the project (e.g., by using or slightly altering one of the alternatives) because the “revisions that would be necessary . . . are so extensive . . . denial . . . is the only appropriate course.”

Notwithstanding the Coastal Commission’s suggestion that some alternative must be available that could be approved, the facts belie that suggestion. The reasons given by the commission for denial would not change. The water available on site would not increase.

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142. *Palazzolo*, 533 U.S. at 619. The state supreme court had required multiple applications and denials before “finality” could be achieved. The U.S. Supreme Court held that if the reasoning for the first denial would doom future applications, then finality had been achieved.

143. The administrative record is not published any place. It is in my office and at the courthouse. Trust me on this.

144. The water-service company for San Luis Obispo County had assured Pratt and the County that it could provide adequate water for the project. The Coastal Commission simply did not like the idea of bringing water from off-site (although the County had approved), and the courts gave short shrift to the water company’s promise.
The extent of the environmentally sensitive habitat area would not decrease. The utility of the property as a scenic background for the already developed part of the community would not change. As the Court held in *Palazzolo*, once it has been made clear that the reasons for denial will not change, there is no need to waste time making additional applications merely for the sake of making applications: “Ripeness doctrine does not require a landowner to submit applications for their own sake.”

In this context, rigid application of a multiple-application rule makes no more sense than it did in *Palazzolo*. The Coastal Commission’s views on the private development of this property are clear. The rejection of all ten alternatives analyzed in the EIR removes any doubt. Under the ripeness framework of *Williamson County*, the idea is to allow sufficient consideration of alternatives to be able to conclude that adequate finality has been reached, which in turn would allow a court to conduct a Fifth Amendment analysis. It should make no difference whether the various alternatives were considered seriatim, as part of technically separate permit applications, or as part of one comprehensive analysis of the property as is the case here. The point should be to find the answer not to engage in process for its own sake.

Second, the Coastal Commission has only administrative-appellate jurisdiction over this property, not plenary land use control. The latter power is held by San Luis Obispo County. The only time the Coastal Commission has even the possibility of reviewing the use of a property is if the County grants a development permit and a project opponent appeals, as happened in *Pratt*. In no event does

145. The California Coastal Act contains a provision demanding protection of environmentally sensitive habitat areas (“ESHA”). CAL. PUB. RES. CODE § 30107.5.


147. Saying that, however, brings to mind a period from my dim (and misspent?) past (the 1950s, I believe) when elementary school students were subjected to something called “new math.” In an effort to clarify the concepts, Harvard mathematics expert Tom Lehrer explained: “But in the new approach, as you know, the important thing is to understand what you’re doing, rather than to get the right answer.” TOM LEHRER, *New Math, or That Was the Year That Was* (Reprise/Warner Bros. Records 1965).

148. CAL. PUB. RES. CODE § 30603(a).
Pratt have the ability to present an application directly to the Coastal Commission.\textsuperscript{149}

Thus, unlike City of Monterey v. Del Monte Dunes,\textsuperscript{150} it is virtually impossible for Pratt to receive repeated plan rejections from the same regulatory body, in this instance the Coastal Commission. As noted above, however, the scrutiny given by the commission in this one intense experience was the equivalent of multiple plan applications and rejections. If the commission cannot be called to account in this situation, then the Court may as well issue it a certificate of Fifth Amendment immunity because it is unlikely that any compensation case will ever ripen against it.\textsuperscript{151}

“Ripeness” should not be a game. To Pratt and other land developers, it feels as though that is what it has become for regulators.\textsuperscript{152} After three decades of planning efforts, on a project that reduced the proposed density of the project from 149 homes to 41 homes and from a design that virtually covered the property with houses to one that leaves 80\% of it undeveloped, the courts held that this case was still not ripe. On the contrary, litigation may be the only thing it is ripe for.

As Palazzolo puts it, the point of a ripeness investigation is to make sure that the regulator’s intentions with regard to the property are known with a “reasonable degree of certainty,”\textsuperscript{153} not “complete” certainty but a “reasonable degree” thereof. The law cannot demand more. It is law after all (or, perhaps, planning), not rocket science. Pragmatic evaluation must be the hallmark. The facts in Pratt showed that rigid enforcement of a “more than one” application rule will neither answer the ripeness question nor achieve a just result.

The Coastal Commission’s hostility to the development of Pratt’s parcel was clear in the staff report which, among other things, equated “development” with “habitat degradation” and viewed the Pratt property as some variety of ecological wallpaper for others to

\textsuperscript{149} Id. § 30603.
\textsuperscript{150} City of Monterey v. Del Monte Dunes, 526 U.S. 687 (1999).
\textsuperscript{151} The Coastal Commission’s most famous case, of course, was Nollan, 483 U.S. 825 (1987). It lost on Fifth Amendment grounds but no compensation was sought in that case.
\textsuperscript{152} Justice Brennan described a famous incident in which a prominent government lawyer waxed exuberantly over the “gaming” aspects of the ripeness system and over the ability to keep property owners running like hamsters on a wheel. San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 655 n.22 (1981) (dissenting opinion). Since Justice Brennan brought the “games” to light, government lawyers’ public acknowledgment of their gamesmanship has gone to ground. But the “games” remain afoot.
enjoy as “an open space backdrop” for their own homes. It also sought to “preserve” habitat for species never seen on the property.154

If the concept of ripeness in regulatory takings cases is to have any meaning, it must be grounded in pragmatism and freed of rigidity. As Pratt shows, the record of a single permit consideration can be sufficient to prove there is a “final” determination of what use will be allowed on the property.

Sometimes you just have to shake your head at some boneheaded administrative action. And that suffices to clear the cobwebs until you turn around and find some court approving an action while agreeing that it is wrong—sometimes, very wrong. Galland was a very different kind of case. Yet, at its heart, it bore a kinship to all of the regulatory cases in this category. It was a rent-control case. The trial court found, on ample evidence, that the process through which the City of Clovis ground down Mr. and Mrs. Galland for years—in their futile efforts to obtain city approval for minor rent increases for their mobile-home park—was so grotesquely unfair that it violated both procedural and substantive due process, resulting in rents that were confiscatory. The Court of Appeal affirmed a compensatory award under 42 U.S.C. § 1983.

The California Supreme Court, over two strong dissents, reversed.155 Even the majority opinion conceded that the City’s demands were “shifting, costly, and at times ill-considered,”156 and the most positive spin it could put on the City’s actions was to describe them as “bureaucratic bungling.”157 Nonetheless, the California majority created a new “relief” process so Byzantine that it was no relief at all. The Gallands were denied their compensatory award under section 1983 and told to pursue further rent adjustments with the city. They were directed to resubmit themselves to the same people who had treated them arbitrarily and ask again for their help. Justice Brown’s dissent highlighted the perversity:

[F]laws in Clovis’s rent adjustment mechanism are the very basis of the due process claim. In this circumstance, it defies logic to impose the remedy of further rent adjustment proceedings. Further
administrative proceedings cannot possibly compensate for an injury caused by excessive administrative proceedings.158

In a nutshell, the “remedy” devised by the California Supreme Court requires property owners to jump through the following six (and likely more) state procedural hoops before they can invoke their federal section 1983 remedy.159 (1) Seek approval of a rent increase from the rent-control commission. If dissatisfied, (2) appeal that to the city council.160 If still dissatisfied, (3) seek a writ of administrative mandate from the superior court to review the city council’s decision.161 If such review determined that the denial of a rent increase was confiscatory, then (4) return to the rent-control commission to seek a “Kavanau adjustment.”162 If still turned down, then (5) appeal again to the city council.163 If still dissatisfied, then (6) seek a writ of administrative mandate from the superior court to determine whether the result (even with a Kavanau adjustment) is still confiscatory.164 Only after successful conclusion of this administrative and judicial “remedial” gauntlet, would the property owners be permitted for the first time to (7) pursue, in a third lawsuit, a damages remedy under section 1983—unless, by that time, they have exhausted not only these state preconditions to sue but themselves and their bank accounts, as well.165

V. WHAT’S UP WITH RIPENESS?

I know, I know; what else is there to say about ripeness? But I cannot ruminate about takings issues without at least touching on this

158. Id. at 1048 (dissenting opinion) (emphasis added).
159. Please recall that, even at that time, it had been settled that “[i]t is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.” Monroe v. Pape, 365 U.S. 167, 183 (1961). See also Felder v. Casey, 487 U.S. 131, 148 (Civil Rights Act remedies “are judicially enforceable in the first instance.”).
160. If the city council remands to the rent-control commission, it would revert the process back to step one, to begin again and adding more administrative steps.
161. This could, of course, lead to two additional litigation steps, in the court of appeal and the state supreme court—a process that could consume years.
162. In Kavanau v. Santa Monica Rent Control Board, 16 Cal. 4th 761 (1997), the California Supreme Court created a process for a landlord to seek an upward rent adjustment if the impact of the regulation was too great.
163. See supra note 160.
164. See supra note 161.
165. This, of course, would provide proof for Bosselman’s theory about the Byzantine process being the antithesis of due process. See supra note 136 and accompanying text.
one. Actually, I don’t think I am constitutionally capable of not doing so.\textsuperscript{166} The core ripeness issue is one that has caused confusion and injustice since the Supreme Court’s decision in \textit{Williamson County Regional Planning Commission v. Hamilton Bank}.\textsuperscript{167} The issue is whether property owners who claimed that government action took their property without just compensation in violation of the Fifth Amendment have the right—like other constitutional claimants—to have their cases decided on the merits in federal courts.\textsuperscript{168} The decisions by lower state and federal courts have been confusing and unjust. The only consistency about them is that they have deprived property owners of access to the federal courts, while saying that they are applying a rule that will “ripen” the cases for federal court litigation.

For more than three decades, the judiciary in this country has been hamstrung in its ability to properly adjudicate federal takings claims because of the decision in \textit{Williamson County}. Lower federal


\textsuperscript{168} See, e.g., Bell v. Hood, 327 U.S. 678, 681 (1946) (stating that the complaint, which seeks compensation for violations of Fourth and Fifth Amendment rights, belongs in the federal court if the plaintiff so chooses).
courts have expressed frustration at their inability to adjudicate federal takings claims, with descriptions running the gamut from “odd” and “unfortunate,”169 to “draconian,”170 to one concluding that the situation presents “a Catch-22 for takings plaintiffs,”171 to another describing the plaintiff as having “already passed through procedural purgatory and wended [his or her] way to procedural hell.”172 Why will the Supreme Court not end this national agony? Why, indeed.

Enough cases have been decided to make it clear that the law is every bit as confusing and unjust as the commentators describe. It is also clear that lower courts feel unable to solve the problem because the problem stems from the Supreme Court’s jurisprudence. How to bridge the “anomalous gap” in that jurisprudence, as described by one circuit court, “is for the Supreme Court to say, not us.”173

I have included this abbreviated ripeness discussion as a plea—in case anyone is listening—to resolve this issue at last. It is time for the Court to reconsider Williamson County’s state court—litigation prong, which requires a state court to confirm that there is no state remedy for a given governmental taking of property. Only when that occurs will a Fifth Amendment claim be “ripe” for federal court litigation. The premise of that rule goes beyond the plain language and meaning of the Fifth Amendment. A municipality’s taking of private property without just compensation is complete when property is taken and compensation is not paid by the government.174 It does not require a judicial determination to complete, or ripen, the taking. And, if it did, there is no reason why such a determination must take place in state court.

The Supreme Court’s cases since Williamson County have shown the need to disapprove the state court—litigation requirement. First, in City of Chicago v. International College of Surgeons,175 the Court

170. Dodd v. Hood River County, 59 F.3d 852, 861 (9th Cir. 1995).
172. Front Royal & Warren Cty. Indus. Park Corp. v. Town of Front Royal, 135 F.3d 275, 283–84 (4th Cir. 1998). A collection of the harshly critical analyses directed at Williamson County, 472 U.S., by commentators from all parts of the jurisprudential spectrum—even those who agree that the litigation belongs in state court—appears in Berger & Kanner, Shell Game!, supra note 166, at 702–03.
174. See First English Evangelical Lutheran Church v. Cty. of Los Angeles, 482 U.S. 304, 320 n.10 (1987) (stating “an illegitimate taking might not occur until the government refuses to pay”).
authorized a municipal defendant who was sued for a taking in state court to remove the case to federal court, even though removal would be proper only if the plaintiff could have brought suit in federal court in the first place—something Williamson County forbids. Second, in San Remo Hotel v. City & County of San Francisco,¹⁷⁷ the Court held that, once a case is brought and tried in state court—as commanded by Williamson County—issue preclusion would prevent prosecuting such a case in federal court. Four concurring Justices urged reconsideration of Williamson County.¹⁷⁸ Third, in Horne v. United States Department of Agriculture,¹⁷⁹ the Court concluded that, once there has been a taking without payment, a proper constitutional claim has been presented, without the need for further “ripening.” In these three post–Williamson County opinions, the Court has eliminated any jurisprudential basis for continuing to hew to that plainly outmoded precedent.

No other constitutionally protected right is subjected to state court “ripening” as a condition precedent to sue in federal court. If the Fifth Amendment’s protection of property is truly no “poor relation” to the rest of the protected rights, as the Court proclaimed in Dolan v. City of Tigard,¹⁸⁰ then its holders are entitled to equal access to federal courts. Deferring to state courts is tantamount to granting states a veto over access to federal court, making them de facto gatekeepers to the federal courts. The Court has repeatedly concluded that “Congress surely did not intend to assign to state courts and legislatures a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action.”¹⁸¹ Mandating suit in state court embeds into the Fifth Amendment a remedial requirement, when the just compensation language should be a limitation on the government’s power not an invitation to sue for payment. In the words of a leading treatise, “[i]f there is a reason why free speech cases are heard by federal judges with alacrity and property rights cases receive the treatment indicated above [i.e., the diversion to state courts], it is not readily

¹⁷⁸. Id. at 348 (Rehnquist, C.J., concurring and joined by three others).
¹⁷⁹. Horne v. Dep’t of Agric., 133 S. Ct. 2053, 2062 n.6 (2013).
discernible from the Constitution." The Just Compensation Clause is self-executing.\footnote{182. \textit{Steven J. Eagle, Regulatory Takings} 1070 (2d ed. 2001). For a graphic illustration of the Fifth Amendment/First Amendment differentiation, see \textit{National Advertising v. City of Raleigh}, 947 F.2d 1158 (4th Cir. 1991). This case challenged an amortization ordinance aimed at ridding the city of billboards over a five-year period. The complaint charged violations of both the Fifth and First Amendments. The property owner lost on all counts, but the important thing for this discussion is that it took the court many pages of tortured analysis before it concluded that the Fifth Amendment claim was barred by the statute of limitations while the court wasted almost no time concluding that the First Amendment claim could not be so barred.}

There is an additional reason not to require state court litigation to ripen the federal-constitutional issue. Williamson County\footnote{183. First English Evangelical Lutheran Church v. Cty. of Los Angeles, 482 U.S. 304, 315 (1987).} was brought under the Federal Civil Rights Act,\footnote{184. 42 U.S.C. § 1983.} as many regulatory takings cases are. Such cases are probably the worst scenarios in which to inject a state court—litigation requirement. As the Court has held, the point of the civil rights legislation was to “interpose the federal courts between the States and the people, as guardians of the people’s federal rights.”\footnote{185. Mitchum v. Foster, 407 U.S. 225, 243 (1972).} It was not intended to work the other way round—by interposing state courts between the federal courts and the people in order to restrict the people’s federal rights. Williamson County’s state court—litigation mandate inverted this basic building block of 42 U.S.C. § 1983: it interposed state courts to shield municipalities from federal accountability. It is time for the Court to end this practice.

That property owners have been singled out is clear.\footnote{186. See, \textit{e.g.}, \textit{Daniel R. Mandelker, Land Use Law} § 2.24, at 2–32 (5th ed. 2003) (“The Supreme Court has adopted a special set of ripeness rules to determine whether federal courts can hear land use cases.”); \textit{John Delaney & Duane Desiderio, Who Will Clean Up The “Ripeness Mess”? A Call For Reform so Takings Plaintiffs Can Enter the Federal Courthouse}, 31 \textit{URB. LAW.} 195, 196 (1999) (“[T]he ripeness and abstention doctrines have uniquely denied property owners, unlike the bearers of other constitutional rights, access to the federal courts on their federal claims.”).} As one commentator concluded, “[t]he state compensation portion of [Williamson County] finds no parallel in the ripeness cases from other areas of the law”\footnote{187. Gregory M. Stein, \textit{Regulatory Takings and Ripeness in the Federal Courts}, 48 \textit{VAND. L. REV.} 1, 23 (1995).}—no parallel, indeed. The settled rule in other areas of substantive litigation under section 1983 is that the federal
forum is available at the plaintiff’s demand, regardless of alternative remedies under state law:

It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.188

Precedents are not cast away lightly. The Court, however, has done so when scholars have been sharply critical of decisions,189 when the application of a precedent has produced a rule that “stands only as a trap for the unwary,”190 when necessary to clarify the implications of earlier decisions,191 when decisions of the Court are “if not directly . . . [conflicting.] are so in principle,”192 or when “the answer suggested by [the Court’s] prior opinions is not free of ambiguity.”193 It is time for Williamson County to go. It may be that the Supreme Court agrees. As this Article goes to press, the Court has granted certiorari in Knick v. Township of Scott194 for the sole (stated) reason of reconsidering this aspect of Williamson County.

VI. DOES “PROGRESSIVE” PROPERTY THEORY COMPORT WITH THE CONSTITUTION?

Recently,195 a new group of scholars has arisen. This group views property not so much as something that can be owned by individuals and used at their will as something that can be put to generally useful, societal purposes. They begin, of course, by redefining property, because control over the meaning of words is paramount to any debate over their content.196 If I get to tell you to ignore two centuries of

195. In the context of property law, anything within the last half century qualifies as “recently.”
196. For an earlier and more expansively critical discussion of this kind of analysis by definitional ipse dixit, see Berger, To Regulate or Not, supra note 71.
judicial explications of the meaning and content of “property,” and to substitute something wholly different in its stead, then I have gone a long way toward remaking our system of property rights and perforce their protection. The idea that the affixing of labels is critical to governance is of ancient lineage:

> When the Prince of Wei needed advice on sound governance, he asked Confucius what is the most important function of government. The wise one responded that the most important function of government is to see to it that things are called by their proper names.\(^\text{197}\)

As one prominent, scholarly ensemble puts it, “[p]roperty implicates plural and incommensurable values.”\(^\text{198}\) But that assessment is argle-bargle, because “incommensurable” necessarily means things that have nothing in common and no common basis of comparison.\(^\text{199}\) Thus, instead of dealing with recognized (or at least recognizable) items, the progressive definition of property has it that property consists of things that are, by definition, disparate.

Progressive redefining leads to very different analyses of both the Constitution and the case law interpreting and applying the Constitution. Indeed, at times, it appears to be a different language.\(^\text{200}\) Let’s be clear. The evident goal of the so-called progressive-property theorists is to remove protection from individual property owners and transfer control over property to the state in an ever-increasing degree. In other words, the “progress” they seek is to eliminate constitutional protections that theorists and courts have historically viewed as inherent in the Fifth Amendment’s protection of the rights of property owners. It has been settled for years that the Bill of

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Rights was adopted to protect individuals against the government, the few against the many, individuals against the collective—not the other way round. As Justice Douglas put it, “[t]he Constitution and the Bill of Rights were designed to get Government off the backs of the people.” This is neither a liberal nor a conservative proposition, and it applies as much to protecting criminal defendants as to protecting law-abiding property owners and others.

It is not that progressives do not understand the concept of property ownership. They understand quite well. They just don’t like it and want to change it because the traditional definition places the benefits of property ownership with the property owner. In place of that, they would change the slope of the playing field in order to emphasize values like human dignity, social obligations, democratic governance, community relationships, and biodiversity. All of this would be crammed into the concept of property ownership. Why? Because “lawmakers can define ownership in many ways, and fashioning rules or standards on the meaning of ownership therefore inevitably requires lawmakers to make value choices.” Here is how they justify making quick, definitional changes to this fundamental concept of our constitutional system: it is just a question of values, and we are always free to adopt new values. This is how they put it:


204. See, e.g., Joseph William Singer, Entitlement 6 (2000) (“If property means ownership, and if ownership means power without obligation, then we have created a framework for thinking about property that privileges a certain form of life—the life of the owner.”); Gregory S. Alexander, The Social-Obligation Norm in American Property Law, 94 Cornell L. Rev. 745, 747 (2009) (“The core image of property rights, in the minds of most people, is that the owner has a right to exclude others and owes no further obligation to them. That image is highly misleading.”). Compare these examples with the Cal. Civ. Code § 654, which defines “property” as “the right of one or more persons to possess and use it to the exclusion of others.”


The current set of property rules resulted from value choices; therefore, continuing open conversations about the reasons for preferring one set of rules or standards over the alternatives are paramount.\footnote{Id. at 162; see Eric T. Freyfogle, The Owning and Takings of Sensitive Lands, 43 U.C.L.A. L. REV. 77, 120 (1995) (Courts “must at all times keep one eye on the community and its evolving norms and expectations.”).}

The problem with treating the entirety of “property” as some sort of fluid concept that can be altered at will is that time tends to vest rights, and those that have been recognized and protected for many years are not so easily uprooted as one might think. As Justice Cardozo remarked: “Deep into the soil go the roots of the words in which the rights of the owners of the soil find expression in the law. We do not readily uproot the growths of centuries.”\footnote{Techt v. Hughes, 128 N.E. 185, 191 (N.Y. 1920); see also Reconstruction Fin. Corp. v. Beaver County, 328 U.S. 204, 210 (1920) (Black, J.) (“Concepts of real property are deeply rooted in state traditions, customs, habits, and laws.”); City of Knoxville v. Knoxville Water Co., 212 U.S. 1, 18 (1909) (“[O]ur social system rests largely upon the sanctity of private property, and the State or community which seeks to invade it will soon discover the error in the disaster which follows.”); Davis v. Mills, 194 U.S. 451, 457 (1904) (Holmes, J.) (“[P]roperty is protected because such protection answers a demand of human nature, and therefore takes the place of a fight.”).}

Indeed, one of the leaders of the progressive movement had to redefine the concept of “constitutional” in order to make it fit the progressive mode. Rather than using the concept of “constitutional” to refer to the Constitution and those rights vouchsafed by it, the concept has been transmogrified to this:

\begin{quote}
By constitutional I do not mean to refer only to constitutional law, but to the fact that property institutions are fundamental to social life, moral norms, political power, and the rule of law.\footnote{Joseph William Singer, Property as the Law of Democracy, 63 DUKE L.J. 1287, 1299 (2014).}
\end{quote}

Those things may all be relevant subjects for a social or political science seminar, but it transforms (indeed, adulterates) the concept of a “constitutional” right. It blends the concept with social, moral, and political issues that inherently vary from time to time and from person to person, rather than allowing the concept to remain rooted in our founding document. While each definition of “property” has an important role in American society, the individual notions of creative professors should not be used to describe other people’s “property.”
Nor are such definitions part of legal “constitutional” analysis because the terms can become so malleable that they can mean virtually anything the speaker wants them to. When Keats wrote “beauty is truth, truth beauty,”\footnote{John Keats, Ode on a Grecian Urn, 15 ANNALS OF FINE ARTS, Jan. 1820, reprinted online under John Keats, Ode on a Grecian Urn, POETRY FOUNDATION, https://www.poetryfoundation.org/poems/44477/ode-on-a-grecian-urn (last visited June 6, 2018).} it was a lyrical use of language, but not very explanatory, as each term is too pliant to pin down.

This progressive theory may not actually be so new after all. Lewis Carroll derided it more than a century and a half ago, sarcastically putting these words in Humpty Dumpty’s mouth:

“What is beauty?” Humpty Dumpty said, in rather a scornful tone, “it means just what I choose it to mean—neither more nor less.”

“The question is,” said Alice, “whether you can make words mean so many different things.”

“The question is,” said Humpty Dumpty, “which is to be master—that’s all.”\footnote{L E W I S C A R R O L L , THROUGH THE LOOKING GLASS (Macmillan 1872).}  

How is continuously looking for ways to change the rules a “progressive” or even a proper or worthwhile thing to do? Particularly when rule changes are sought in ways that cause harm to those whose rights were stable under the old rules, one would think that theorists who profess to be concerned about “individuals” and “democratic” precepts would be wary.\footnote{E.g., Gregory S. Alexander et al., supra note 198 at 743–44; Rashmi Dyal-Chand, Pragmatism and Postcolonialism: Protecting Non-Owners in Property Law, 63 AM. U. L. Rev. 1683, 1742–45 (2014); Timothy M. Mulvaney, Progressive Property Moving Forward, 5 CALIF. L. REV. CIR. 349, 354 (2014); Joseph William Singer, Property as the Law of Democracy, 63 DUKE L.J. 1287, 1299 (2014); Joseph William Singer, Subprime: Why a Free and Democratic Society Needs Law, 47 HARV. C.R.-C.L. L. REV. 141, 142 (2012); Andre van der Walt, The Modest Systemic Status of Property Rights, 1 J.L. PROP. & SOC’Y 15, 92 (2014).} A prime rule of American civilization is that we don’t change the rules while the game is in progress.\footnote{Do you really need a citation of authority for this?} There are good reasons for that, but they have their origins in the idea that people should be able to rest secure that what is theirs when they go to sleep will still be theirs when they wake up. As Professor Callies put
We are talking about rules that are so basic that most children are able to understand them. Distinguishing between the concepts “mine” and “not mine” is something that is supposed to occur in the preschool years. Sometimes some of us forget those early playground lessons. The concept is easy: if it is “mine,” I get to play with it and you don’t, unless I approve. Professor Kochan has compared the traditional definitions of rights and duties, devised by Professor Hohfeld, with the basic precepts of child psychology and has found much commonality:

Sharing starts to seem more acceptable to a child when a child understands their reciprocal claims and obligations regarding owned things. In other words, we are more willing to share once we know three things: (1) we can get our things back; (2) we can set the terms and conditions of sharing; and (3) the sharee must accept the bitter with the sweet in sharing and abide by the owner’s terms if the sharee wishes to have the benefit of using, possessing, or accessing the property of another. **We are more willing to share when there are strong property norms, backed by the confidence generated by strong property rights enforcement mechanisms.**

If you insist on taking it from me, then you need to pay me. When that concept gets tangled up with emotional issues like endangered species, climate change, or equal access to facilities, however, some people’s vision tends to glaze over. They wrap themselves in global homilies and talk as though what is “mine” is actually not. But that is a revolutionary thought.

Our constitutional system is based, in significant part, on the idea that property can be privately owned—and can be used by its owners. But it seems hard for some people to remain clear about it or

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217. Ironically, people who do so are often wealthy and tend to scream bloody murder were someone to interfere with their ample assets. See Bernard Frieden, *The Environmental Protection Hustle* (1979); William Tucker, *Environmentalism and the Leisure Class*, Harper’s Magazine, Dec. 1977, at 49.
CONCLUSION

One of the things that demonstrates how far David Callies has come since those self-styled, pro-environmental “screeds” of the 1970s is that he has been publicly attacked by environmentalists for having the nerve to express in print his beliefs about the rights of property owners. I will close with this quote from him that I found in a Honolulu newspaper responding to one such attack:

I make no apologies for attempting to defend the rights of all landowners to use their property. The U.S. Supreme Court has equated protection of such rights with civil rights like freedom of press, expression, and security against unreasonable search and seizure. I agree. The use of land is not a privilege but a right.218

That is the real David Callies. I am proud to have been part of the symposium in his honor.

DAVID CALLIES AND THE FUTURE OF LAND USE REGULATIONS

JAMES W. ELY JR.*

It is a privilege to acknowledge the enormous contribution of David L. Callies to our understanding of property rights and land use regulations. He has long wrestled with the relationship between the rights of individual owners and the concerns of the community, and has given thoughtful attention to current environmental issues such as hydraulic fracking.¹ Moreover, the range of his scholarship has been impressive and far-reaching. In addition to numerous legal articles, Callies has authored innovative books² and remained active in bar association and law reform affairs. As I was preparing for the first edition of The Guardian of Every Other Right,³ I came across his 1988 article with the plaintive title “Property Rights: Are There Any Left?”⁴ This piece has always resonated with me, perhaps because it captured my mood at the time. Despite the then-recent Supreme Court decisions in Loretto⁵ and Nollan,⁶ Callies was skeptical that the Court had meaningfully checked the erosion of private property rights. But he bravely concluded:

Although we probably must regulate, it is worth taking care that in this period of critical examination of our constitutional values

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and protections, we do not lose by degrees what our founding fathers sought to protect in a more simple time and more rural place. There are many values enshrined in that Constitution. Lest we forget, private property is one of them.7

My purpose, however, is not just to praise Callies for his fine scholarship but to build upon his work to assess future developments in the land use field. This, of course, is a hazardous assignment. I am skeptical that persons like myself, trained in history, possess any unique crystal ball to read the future. This challenge is compounded, moreover, by the fact that in 2014 Callies authored a comprehensive article in which he offered predictions for future developments in the field of land use law.8 It is a daunting task to compete with that erudite piece.

Throwing caution to the winds, I will start by considering some of Callies’s predictions in light of subsequent decisions. He maintained that the Nollan-Dolan-Koontz line of cases, limiting land-development conditions, such as exactions and impact fees, would prompt continued judicial scrutiny.9 That would certainly seem to be the case. Litigation abounds on the constitutionality of imposed conditions. A few examples must suffice. At issue in Horne v. Department of Agriculture was a marketing order under a 1937 agricultural marketing act, which required the growers of raisins to deliver a portion of their crop to the government, free of charge.10 The Ninth Circuit

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7. Callies, supra note 4, at 645.
9. Nollan, 483 U.S. at 837 (1987) (determining that building permit conditions must have an “essential nexus” to the impact of the proposed project); Dolan v. City of Tigard, 512 U.S. 374, 391 (1994) (holding that there must be “rough proportionality” between exactions and proposed development); Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595 (2013) (ruling that Nollan-Dolan apply when a building permit is denied as well as when permit is granted with conditions, and that monetary exactions are subject to the same heightened scrutiny). This trilogy of cases establish the parameters governing exactions that may be constitutionally required of developers.
Court of Appeals upheld the validity of this scheme against a takings challenge, determining that personal property received less protection than land under the Takings Clause, and analyzing the set-aside requirement as akin to a government-imposed condition on the grant of a land use permit.\footnote{11}{Horne v. Dep’t of Agric., 750 F.3d 1128 (9th Cir. 2014).} Rejecting this analysis, the Supreme Court, in an opinion by Chief Justice Roberts, ruled that the government’s action amounted to the physical appropriation of personal property and was therefore a per se taking of property.\footnote{12}{Horne, 135 S. Ct. at 2428, 2430–31.} The \textit{Horne} decision not only confined the application of the land use–exaction cases to regulatory takings but rejected the bizarre contention that personal property was somehow afforded less protection than real property under the Fifth Amendment against physical dispossession.\footnote{13}{Id. at 2426–28. See 1 John Lewis, A Treatise on the Law of Eminent Domain in the United States 51 (3d ed. 1909) (“The Constitution protects personalty as fully as real estate.”).}

Rental practices provide another example. In 2014, a federal district court in California considered yet another in a long line of San Francisco ordinances purporting to deal with rental-housing shortages and high market values by placing financial burdens on landlords.\footnote{14}{Levin v. City & County of San Francisco, 71 F. Supp. 3d 1072 (N.D. Cal. 2014), appeal dismissed as moot, 2017 WL 957211 (9th Cir. 2017), and declining to vacate judgement, 2017 WL 2335358 (N.D. Cal. 2017). While the appeal was pending, the city sufficiently amended the ordinance to present a different controversy from the one originally adjudicated. A California court ruled that the revised ordinance imposed a “prohibitive price” on the right of a landlord to exit the residential housing market by mandating relocation payments to displaced tenants, and was preempted by state law. Coyne v. City & County of San Francisco, 9 Cal. App. 5th 1215, 215 Cal. Rptr. 3d 589 (1st Dist. 2017) (review denied June 28, 2017).} Before the court was an ordinance requiring landowners who wished to withdraw rent-controlled properties from the housing market—which was their right under state law—to pay hugely enhanced payments, potentially involving hundreds of thousands of dollars, to the displaced tenants. The district court held that the ordinance ran afoul of the \textit{Nollan-Dolan} nexus and proportionality tests, and emphasized that under \textit{Koontz} monetary exactions must also satisfy these tests. It found no nexus between the enhanced payments and the owner’s proposed change in land use, concluding that the ordinance “seeks to force the property owner to pay for a broad public problem not of the owner’s making.”\footnote{15}{Levin, 71 F. Supp. 3d at 1086.} The real-world impact of \textit{Nollan-Dolan-Koontz} on exactions has been mixed, but in this instance they had some bite.
An allied issue relates to the spread of inclusionary zoning. As land values and housing costs have increased markedly in many urban areas, a number of cities are facing a shortage of affordable housing. They have responded by adopting policies to create less expensive housing. An allied issue relates to the spread of inclusionary zoning. As land values and housing costs have increased markedly in many urban areas, a number of cities are facing a shortage of affordable housing. They have responded by adopting policies to create less expensive housing.\textsuperscript{16} Inclusionary zoning requires developers to set aside a number of residential units for sale or rent at below-market prices or to contribute to a fund for the construction of such housing. A threshold question is whether such requirements are exactions subject to \textit{Nollan-Dolan-Koontz} limitations.\textsuperscript{17} One obvious problem is that the private developer is not responsible for the lack of affordable housing in the community, and so the “essential nexus” test may not be satisfied. Callies argues convincingly that inclusionary zoning should be viewed as a type of exaction, which would pass constitutional muster only if the municipality can demonstrate a clear nexus between the proposed development and the affordable housing shortage and the developer receives a meaningful incentive, such as a density bonus or tax abatement.\textsuperscript{18} He cautions that unduly onerous requirements are likely to discourage development and thus render any inclusionary program meaningless. To date there has been relatively little litigation challenging inclusionary zoning, much of it from California. Still, inclusionary zoning is bound to trigger increasing judicial scrutiny. Given the uncertainty about the application of the nexus and proportionality tests, as well as the unsettled ramifications of \textit{Koontz}, exactions will no doubt provide a fertile field for future litigation.

In this connection, Callies also considers whether the constitutional limitations on exactions should apply when imposed by general legislation on property as well as when imposed by administrative determinations on individual projects. The Supreme Court has never squarely addressed this question, and lower courts remain sharply divided on this point.\textsuperscript{19}

\textsuperscript{17} Audrey G. McFarlane & Randall K. Johnson, \textit{Cities, Inclusion and Exactions}, 102 IOWA L. REV. 2145, 2168–84 (2017) (considering whether inclusionary zoning should be treated as ordinary land use regulation or as exaction).
\textsuperscript{19} Christina M. Martin, \textit{Nollan, Dolan and Koontz—Oh My! The Exactions Trilogy Requires Developers to Cover the Full Social Costs of Their Projects, But No More}, 51
A number of courts have declined to apply *Nollan-Dolan-Koontz* to conditions imposed legislatively.\(^\text{20}\) California courts, for instance, have confined the reach of the unconstitutional conditions doctrine to burdens imposed by ad hoc administrative decisions.\(^\text{21}\) In 2016, a California appellate court upheld the validity of an in-lieu-fee exaction imposed on a developer under the state’s Mitigation Fee Act. The purpose of the in-lieu fee was to help address the shortage of affordable housing in the community, not to defray the increased public costs arising from the specific development project.\(^\text{22}\) Adhering to the prevailing rule in California, the court found that *Nollan-Dolan-Koontz* limitations were inapplicable because the fee was imposed legislatively.\(^\text{23}\) The effect of this decision, of course, is to limit the protective shield against the imposition of unconstitutional conditions.

In contrast, other courts have applied the *Nollan-Dolan-Koontz* standard to conditions imposed legislatively.\(^\text{24}\) The Supreme Court of Texas sharply challenged the distinction between legislative determinations and individualized decisions in the context of exactions. The court declared:

> While we recognize that an ad hoc decision is more likely to constitute a taking than general legislation, we think it entirely possible that the government could “gang up” on particular groups to force exactions that a majority of constituents would not only tolerate but applaud, so long as burdens they would otherwise bear were shifted to others.


\(21\) For California’s position on the standard for the review of prescribed conditions, see California Building Industry Ass’n v. City of San Jose, 61 Cal.4th 435, 459 n.11, 351 P.3d 974, 990 n.11 (2015), cert. denied, 136 S. Ct. 928 (2016).

\(22\) This distinction highlights the concern that exactions may be wholly unrelated to the impact caused by developers’ activities, and designed to impose the costs of other government projects on developers rather than taxpayers. Martin, [*supra* note 19], at 43–44.


Nor are we convinced that a workable distinction can always be drawn between actions denominated adjudicative and legislative.\textsuperscript{25}

Applying \textit{Nollan-Dolan} scrutiny, the court found that a road improvement project attached as a condition for plat approval amounted to a compensable taking of property. Such a severe split of authority surely warrants Supreme Court review.

It is noteworthy that Justices Thomas and O’Connor have expressed their view that \textit{Nollan-Dolan} should apply to both administrative and legislative determinations. They declared:

\begin{quote}
It is not clear why the existence of a taking should turn upon the type of governmental entity responsible for the taking. A city council can take property just as a planning commission can. . . . The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference.\textsuperscript{26}
\end{quote}

Along the same lines, Callies concluded, correctly to my mind, that courts should find the legislative/administrative distinction irrelevant.\textsuperscript{27} The purpose of the Takings Clause is to prevent landowners from being singled out to bear a burden that should be appropriately placed on society as a whole.\textsuperscript{28} Consistent with this principle, the judicial focus, I submit, should be upon the impact on the landowner, not on the vehicle by which the exaction was imposed. It makes no sense to allow localities to impose exactions legislatively that could not pass muster if done by an administrative body.

\begin{footnotesize}
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\item[\textsuperscript{25}] Town of Flower Mound v. Stafford Estates Ltd. P’ship, 135 S.W.3d 620, 641 (Tex. 2004).
\item[\textsuperscript{27}] Callies, \textit{supra} note 8, at 44–45, 48–51.
\item[\textsuperscript{28}] Armstrong v. United States, 364 U.S. 40, 49 (1960) (Black, J.) (“The Fifth Amendment’s guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”). \textit{See also} \textit{Monongahela Navigation Co. v. United States}, 148 U.S. 312, 325 (1893) (Brewer, J.) (explaining that the just compensation principle “prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him”).
\end{itemize}
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Callies’s prediction that the Supreme Court “will soon re-examine” the controversial Supreme Court decision in *Kelo v. City of New London*\(^{29}\) seems more questionable.\(^{30}\) He is surely on sound ground in pointing out that “the Public Use Clause is virtually eliminated in federal courts” and that “government may once more acquire private property by eminent domain on the slightest of public purpose pretexts.”\(^{31}\) Much as I wish the Supreme Court would reconsider the constitutionality of allowing the exercise of eminent domain for economic development by private parties, I doubt that the Justices will revisit the meaning of “public use” in the near future. Three of the dissenters in *Kelo* have left the bench, and it is uncertain how their replacements would vote in a “public use” case.

To be sure, as Callies noted, there was a substantial public uproar over *Kelo*. Many states, by legislative enactment or constitutional amendment, purported to reign in the exercise of eminent domain for economic development purposes.\(^{32}\) The efficacy of these measures varies widely but some appear to constitute meaningful reform.\(^{33}\) Moreover, state constitutional law can provide additional safeguards against eminent domain abuse.\(^{34}\) A number of state constitutions contain explicit restrictions on the exercise of eminent domain.\(^{35}\) In

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31. Id. at 67.
33. See, e.g., City of Marietta v. Summerour, 807 S.E.2d 324 (Ga. 2017) (holding that the Landowner’s Bill of Rights and Private Property Protection Act sets forth policies designed to increase due process protections for property owners, that such statutory procedures were binding on the city, and that the condemnation petition be dismissed for failure to comply with statute); St. Louis Cty. v. River Bend Estates Homeowners’ Ass’n, 408 S.W.3d 116, 135–38 (Mo. 2013) (upholding the statute providing for additional compensation for taking homesteads or property held within the same family for fifty or more years, and stating that the statutes “promote the legislature’s intended policy of providing additional benefits to certain property owners whose real property is taken for public use”); State of Missouri ex rel. Jackson v. Dolan, 398 S.W.3d 472, 478–82 (Mo. 2013) (construing Missouri statutes prohibiting the exercise of eminent domain “for solely economic development purposes,” and finding that the proposed condemnation by the port authority violated statute).
35. For example, the Arizona Constitution, art. 2, § 12, provides: “Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question.” There is similar language in
addition, state constitutional guarantees may be construed to afford more expansive protection for property owners than their federal counterparts. Indeed, some state supreme courts, invoking state constitutional provisions, have invalidated the exercise of eminent domain for economic development purposes, and have even looked skeptically on so-called “blight” takings. I submit, therefore, that the states are likely to emerge in the near future as the most fertile source of efforts to curtail the reach of eminent domain.

Likewise, Callies’s optimistic insistence that the Supreme Court “needs to, and will, resolve the so-called ‘relevant parcel’ or denominator issue, both with respect to partial and total regulatory takings,” seems to have been wide of the mark. At issue in *Murr v. Wisconsin* was application of a Wisconsin law that treated two adjacent substandard lots with a common owner as a single lot, and barred the separate sale or improvement of one substandard lot. The law, in effect, drastically reduced the economic value of one lot. Speaking for the Court, Justice Kennedy set forth a list of considerations to determine the relevant parcel for regulatory takings analysis. In so doing, he blurred the distinction between two discrete inquiries—what is the relevant parcel and whether the regulation constitutes

See, e.g., Miss. Const., art. 3, § 17; Okla. Const., art. 2, § 24; Wash. Const., art. 1, § 16.

36. For a classic argument urging increased reliance on state constitutional law, see William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977).

37. See, e.g., Gallenthin Realty Dev. v. Borough of Paulsboro, 191 N.J. 344, 924 A.2d 447 (2007) (invalidating a “blight” condemnation); City of Norwood v. Horney, 110 Ohio St. 3d 353, 853 N.E.2d 1115 (2006); Bd. of Cty. Comm’rs of Muskogee Cty. v. Lowery, 136 P.3d 639 (Okla. 2006); Benson v. State, 710 N.W.2d 131 (S.D. 2006); County of Wayne v. Hathcock, 471 Mich. 445, 684 N.W.2d 765 (2004). This is not to suggest that all state courts are prepared to restrict the reading of “public use” or to limit the condemnation of private property. The New York Court of Appeals, for instance, has endorsed a broad exercise of eminent domain. In *Goldstein v. New York State Urban Development Corp.*, 13 N.Y.3d 511, 921 N.E.2d 472 (2009), the court upheld the condemnation of the Atlantic Yards section in Brooklyn as a blighted area for the purpose of transfer to a private developer to construct a sports stadium. See also *Violet Dock Port, LLC v. St. Bernard Port, Harbor & Terminal Dist.*, 239 S. 3d 243 (La. 2018) (upholding the exercise of eminent domain to acquire a privately-owned port facility for a one-to-one transfer to a state agency with plans to lease the acquired property to favored businesses outside of a comprehensive redevelopment plan).

38. Callies, *supra* note 8, at 45.

a taking of that parcel. Kennedy expressly rejected reliance on state property-law definitions to identify the property at issue for regulatory takings purposes.40 Viewing the parcels as merged for takings purposes, Kennedy held that the owners were not deprived of all economically beneficial use and that no regulatory taking occurred. His malleable cluster of factors requires an ad hoc factual inquiry for each case, thus providing no guidance or certainty to buyers or landowners concerning regulatory risk. As Richard A. Epstein has convincingly observed: “[I]t is hard to see how massive levels of ad hocery advance any conception of fairness and justice.”41

I argue that the murky multifactor test adopted in *Murr* falls well short of providing the clarification that Callies sought, and indeed compounds the confusion in identifying the relevant parcel for regulatory takings analysis. Surely reliance on parcel boundaries as defined by state law would better accord with the settled expectations of owners and would provide a readily ascertainable test for regulatory takings purposes. Instead, Kennedy offers an amorphous, multifactor balancing test that is virtually worthless and is likely to disadvantage individual owners. The impact of *Murr*, therefore, is to weaken the protective function of the Takings Clause.42 As Nicole Stelle Garnett cogently pointed out, *Murr* “further undermined the already enfeebled constitutional rights enjoyed by property owners against regulatory excess.”43

There is a partial silver lining to the *Murr* saga. In 2017, the Wisconsin legislature enacted a law which effectively overturned the Supreme Court decision with respect to that jurisdiction. The law provides that localities cannot enforce an ordinance prohibiting a property owner from conveying or developing a substandard parcel

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40. *Murr*, 137 S. Ct. at 1945–47. In sharp contrast, Chief Justice Roberts, writing for three dissenters, insisted that “[s]tate law define[] the boundaries of distinct parcels of land, and those boundaries should determine the ‘private property’ at issue in regulatory takings cases”. *Id.* at 1950.


42. *Murr*, 137 S. Ct. at 1954 (Roberts, C.J., dissenting) (complaining that the majority’s definition of the parcel “undermines the effectiveness of the Takings Clause as a check on the government’s power to shift the cost of public life onto private individuals”).

that was of legal size when created, and bars localities from requiring the merger of lots for any purpose without the consent of the owners.\textsuperscript{44} It gives no relief, of course, to the application of the unfortunate Kennedy opinion in \textit{Murr} in other jurisdictions. Perhaps the lesson is that landowners should not overlook the possibility of a legislative remedy from onerous regulations.

Callies also takes aim at the ripeness doctrine, which often serves, as a practical matter, to prevent claimants from litigating regulatory takings claims on the merits in federal court. As Steven J. Eagle has cogently explained: “Over the years, the U.S. Supreme Court has established many doctrinal and procedural barriers that landowners must confront in ascertaining and protecting their rights. Some barriers are of Byzantine complexity.”\textsuperscript{45} A centerpiece in this obstacle-labyrinth is the Supreme Court decision in \textit{Williamson County Regional Planning Commission v. Hamilton Bank}.\textsuperscript{46} The Court ruled that a regulatory takings claim against a state or local government was not “ripe” for adjudication in federal court until the claimant was denied compensation in the state court. This requirement alone imposed a substantial hurdle for claimants, but the Court compounded the difficulty in \textit{San Remo Hotel v. City & County of San Francisco}, holding that by virtue of the Full Faith and Credit Statute takings claimants were precluded from relitigating in federal court issues that were raised in state court actions.\textsuperscript{47} Consequently, takings claimants are effectively denied any access to a federal forum. No other constitutional rights are treated in such a dismissive manner. This problematic outcome speaks volumes about the Supreme Court’s disinterest in protecting the rights of property owners.\textsuperscript{48}

Based on his review of the case law, however, Callies suggests that the Supreme Court is in the process of weakening the ripeness requirement, characterizing the doctrine as “prudential” rather than “jurisdictional.”\textsuperscript{49} A recent Supreme Court decision concerning the

\textsuperscript{49} Callies, \textit{supra} note 8, at 45, 92–103.
judicial review of a determination by the Army Corps of Engineers under the Clean Water Act provides some indirect support for Callies’s assessment. Called upon to review an order that stated the subject property contained “waters of the United States,” the Supreme Court reiterated its “pragmatic” approach to the issue of final agency action. It rejected the government’s contention that the landowner either must run the risk of severe criminal and civil penalties for violating the order or must pursue an “arduous, expensive, and long” permitting process before having a right to judicial review.50 This decision should make it easier for landowners to challenge wetlands designations and might prove a harbinger for a more general review of when takings claims can be heard in federal court.51 Indeed, in March of 2018 the Supreme Court granted review of a case raising the question of the application of the ripeness doctrine as a bar to takings claims in federal court.52

These brief comments hardly do justice to the balance of the 2014 article by Callies. But I would now like to offer some additional comments about the future direction of property rights and land use law.

First, regulation of land use is not about to disappear. In fact, the developmental pressure on land will almost certainly increase, sparking calls for more controls. Indeed, I would maintain that landowners themselves, especially in our heavily zoned suburbs, are often the driving force for more regulations. I detect little interest in a free market in land. On the contrary, many residential owners seek to escape the vicissitudes of the real estate market, valuing stability and protection against change more highly than the right of individuals to use and develop their property as they see fit. As a rule, they are highly risk adverse. The popularity of planned communities, which commonly place intrusive restrictions on the use of land, attest to the widespread acceptance of this norm.

Second, even a supposedly conservative Supreme Court has done relatively little to safeguard property rights against regulation.53

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51. Eagle, supra note 45, at 264–65 (noting the trend toward the removal of procedural barriers in environmental cases).
53. Stuart Banner, American Property: A History of How, Why, and What We Own 271 (2011) (observing that by the end of the twentieth century “property rights clearly received more protection from government regulation than they had a few decades before, but exactly how much more was a matter of debate”).
Perhaps this should not be a surprise. In 1987 Justice Scalia bluntly observed: “I do not detect the sort of national commitment to most of the economic liberties generally discussed that would enable even an activist court to constitutionalize them.” He urged those interested in the rights of property owners to remind modern society of the importance of private property as a fountainhead of individual liberty. Yet to reclaim the property-centered constitutional vision of the framers will not be an easy task. Consequently, I predict that the Supreme Court will continue to move cautiously in this area, incrementally strengthening the rights of owners and invalidating egregious regulations but stopping short of an aggressive revival of property rights.

Third, in assessing the judicial reaction to land use controls, one must not overlook the role of state courts. They in fact do much of the heavy lifting. As discussed above, state courts are more likely than their federal counterparts to put some teeth into the “public use” limitation on the exercise of eminent domain. Now, I fully recognize that state court handling of property rights claims is a mixed bag. They provide little solace if you live in California. Indeed, in 1999, Callies perceptively pointed out that a number of state courts narrowly construed the Supreme Court decisions in Nollan, Dolan, and Lucas v. South Carolina Coastal Council, and rejected takings claims. This melancholy trend has continued. A Lucas takings claim can be defeated by a finding that the subject property retains some economic value, however slight or speculative. Indeed, a recent

55. For problematic results, see Violet Dock Port, Inc., LLC v. St. Bernard Port, Harbor & Terminal District, 239 So. 3d 243 (La. 2018) (upholding the exercise of eminent domain to acquire a privately-owned port facility for a one-to-one transfer to a state agency with plans to lease the acquired property to favored private businesses outside of a comprehensive redevelopment plan), and Bay Point Properties, Inc. v. Mississippi Transportation Commission, 201 So. 3d 1046 (Miss. 2016), cert. denied, 137 S. Ct. 2002 (2017) (holding that the state agency effected a taking of property by exceeding the scope of an express easement for highway purposes to construct a public park, but denying just compensation for the unencumbered value of the land so taken based on a state statute governing termination of highway easements).
56. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992) (finding that regulation that deprived owners of “all economically beneficial or productive use of land” constituted a per se taking of property).
57. 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, 551–74 (1999) (“Clearly, state (and some lower federal) courts are not hearing (or not wanting to hear) the U.S. Supreme Court.”).
58. See Leone v. County of Maui, 141 Haw. 68, 404 P.3d 1257 (Haw. 2017) (reaching the
study has pointed out that the Lucas test for a categorical regulatory taking has been successfully invoked in only a handful of cases. Yet there are heartening developments as well. The practice of state agencies, pursuant to state law, of mapping vacant lands for possible future projects and barring the owners from developing the designated land has long been controversial. Courts have looked skeptically upon such mapping laws, reasoning that they deprive the owner of the right to develop and use his or her land. Following in this pattern, in 2016 the Supreme Court of North Carolina struck a blow for property rights when it invalidated the Transportation Corridor Official Map Act that restricted an owner’s right to improve, develop, or subdivide property within a highway corridor map for an indefinite period. Not surprisingly, it was very difficult to sell land within a designated corridor. Designed to hold down the cost of acquiring land for future development by freezing the status quo, the Map Act clearly privileged the state’s budgetary concerns over the severe economic loss inflicted on private owners. In an inverse condemnation action, the North Carolina court determined that the Map Act constituted a taking of property requiring the payment of compensation. It is striking that in reaching this conclusion, the court quoted William Blackstone, John Locke, and James Madison, and characterized property as a “fundamental right.”

59. Carol Necole Brown & Dwight H. Merriam, On the Twenty-Fifth Anniversary of Lucas: Making or Breaking the Takings Claim, 102 IOWA L. REV. 1847, 1862–63 (2017). See also Luke A. Wake, The Enduring (Muted) Legacy of Lucas v. South Carolina Coastal Council, 28 GEO. MASON U. C.R. L.J. 1, 40 (2017) (“At best, Lucas has proven to be only a modest gain for the property rights movement. Even as originally conceived, the Lucas rule would only apply in an extreme case. But, subsequent developments have significantly winnowed the field of viable Lucas claims in many jurisdictions—both in narrowly conceiving the test and in applying the background principles exception broadly.”).

60. Forster v. Scott, 136 N.Y. 577, 584–85, 32 N.E. 976, 977–78 (1893) (declaring that as the landowner “was virtually deprived of the right to build upon his lot by the statute in question, and as this circumstance obviously impaired its value and interfered with his power of disposition, it was to that extent void as to him”). The New York Court of Appeals adhered to this position in Jensen v. City of New York, 42 N.Y.2d 1079, 369 N.E.2d 1179 (1977). See also LEWIS, supra note 13, at 431–32.

One, of course, cannot assign undue significance to a single judicial opinion. Nonetheless, it is promising that at least some state courts recognize that property is a “fundamental right,”62 a position surely in harmony with the views of the framers of the Constitution and Bill of Rights.63 Whether such recognition will produce more stringent judicial protection over the rights of property owners remains to be seen. I submit that any broad revival of property rights in our constitutional system must begin by reclaiming the understanding that private property plays a vital role in safeguarding individual liberty. As David Callies has reminded us, “Property rights, and in particular rights in land, have always been fundamental to and part of the preservation of liberty and personal freedom in the United States.”64

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62. See also City of Norwood v. Horney, 110 Ohio St. 3d 353, 363, 853 N.E.2d 1115, 1129 (2006) (“Ohio has always considered the right of property to be a fundamental right.”).

63. Stuart Bruchey, The Impact of Concern for the Security of Property Rights on the Legal System of the Early American Republic, 4 WIS. L. REV. 1135, 1136 (1980) (“Perhaps the most important value of the Founding Fathers of the American constitutional period was their belief in the necessity of securing property rights.”).

64. Callies, supra note 57, at 526. There is a large body of scholarly literature linking private property and individual liberty. See, e.g., Ely Jr., supra note 3; Richard Pipes, Property and Freedom (2000); Walter Dellinger, The Indivisibility of Economic Rights and Personal Liberty, 2003–2004 CATO SUP. CT. REV. 9, 19 (“Economic rights, property rights, and personal rights have been joined, appropriately, since the time of the founding.”).
EXACTIONS AND IMPACT FEES

SHELLEY ROSS SAXER∗

INTRODUCTION

I first met Professor David Callies at a land use conference at Chapman Law School, organized by Professor Craig “Tony” Arnold. As a relatively new law professor, I had switched to using David's land use casebook for my class.1 I was delighted to meet one of the authors of the casebook I was using. Professor Callies was one of my legal “rock stars,” along with Professors Jesse Dukeminier, Carol Rose, Grant Nelson, Dale Whitman, Gideon Kanner, Holly Doremus, Joe Sax, Bob Ellickson, Richard Epstein, and others. I have since added more “rock stars” to my list, many of whom spoke at the Fourteenth Annual Brigham-Kanner Property Rights Conference. Because of all of those in attendance, and most of all because of David Callies, I was honored to be a part of the conference and journal publication.

From the beginning, David supported my work as a junior scholar and encouraged me by introducing me to other greats, like Steve Eagle and Michael Berger. Professor Callies and I co-authored an article and talked about exchanging teaching assignments and houses so that I could go to Hawai‘i and he could visit family in Los Angeles. Although the exchange has not worked out yet, David arranged for me to visit for a semester at University of Hawai‘i while he was on sabbatical in 2013. During that visit, I discovered that he and I disagree about one topic in land use, and I will address that issue in this Essay. I was using Professor Callies’s property book (as agreed in advance),2 and when covering impact fees, I discovered that he thinks they should be subject to the Nollan/Dolan test and I do not. This was in 2013, right before Koontz was decided. Of course, I let

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2. DAVID L. CALLIES ET AL., CONCISE INTRODUCTION TO PROPERTY LAW (1st ed. 2011).
the students know about this difference of opinion, but because I would be grading their exams, I suggested they adopt my view for purposes of the class. This Essay suggests that any future review by the U.S. Supreme Court of this issue should determine that while monetary exactions are subject to \textit{Nollan/Dolan}, legislatively enacted impact fees are not.

\section*{I. Background: The Nollan/Dolan/Koontz Trilogy}

Before discussing how courts, practitioners, and academics have interpreted the judicial scrutiny requirements for exactions and, by extension, for impact fees, this section will focus on the major U.S. Supreme Court cases addressing the issue. In addition to \textit{Nollan}, \textit{Dolan}, and \textit{Koontz}, I will also discuss \textit{Horne} and \textit{Lingle} as they relate to the Court’s takings jurisprudence for exactions.

In \textit{Nollan v. California Coastal Commission}, the Nollans submitted a permit application for coastal development to the California Coastal Commission, where they proposed to demolish their current property to rebuild a new property.\footnote{3} The commission recommended that the permit be granted, subject to the condition that the Nollans allow the public an easement to pass laterally across their property.\footnote{4} The Nollans objected to the condition, but the commission overruled the objections and granted the permit subject to the Nollans’ recordation of a deed restriction granting the easement.\footnote{5} The Supreme Court noted that the commission could not require the Nollans to convey this easement without paying just compensation but that it could deny the permit “outright if their new house (alone, or by reason of the cumulative impact produced in conjunction with other construction) would substantially impede” legitimate state interests.\footnote{6} Therefore, if the commission required the Nollans to convey the easement as a condition for obtaining a land use permit, then such “a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking.”\footnote{7} However,
a permit denial that “would interfere so drastically with the Nollans’ use of their property as to constitute a taking” would be compensable under *Penn Central Transportation Co. v. City of New York*.

The *Nollan* Court explained:

> [T]he Commission unquestionably would be able to deny the Nollans their permit outright if their new house (alone, or by reason of the cumulative impact produced in conjunction with other construction) would substantially impede [legitimate state] purposes, unless the denial would interfere so drastically with the Nollans’ use of their property as to constitute a taking.

The Commission argues that a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking. We agree. . . . Moreover (and here we come closer to the facts of the present case), the condition would be constitutional even if it consisted of the requirement that the Nollans provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere. Although such a requirement, constituting a permanent grant of continuous access to the property, would have to be considered a taking if it were not attached to a development permit, the Commission’s assumed power to forbid construction of the house in order to protect the public’s view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end. If a prohibition designed to accomplish that purpose would be a legitimate exercise of the police power rather than a taking, it would be strange to conclude that providing the owner an alternative to that prohibition which accomplishes the same purpose is not.

The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. . . . In 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.”

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In *Nollan*, the Court held that because the demand for an easement was a condition for granting a development permit that the government could otherwise deny the easement condition would not be a taking so long as it satisfied the same purpose achieved by a permit denial.\(^\text{10}\) This “essential nexus” requires that in order to substitute the exaction for the permit denial, the exaction must “further the end advanced as the justification for the prohibition.”\(^\text{11}\)

The *Dolan v. City of Tigard*\(^\text{12}\) decision used the same premise as *Nollan* “that, had the government simply appropriated the easement in question, this would have been a *per se* physical taking.”\(^\text{13}\) The *Dolan* Court refined the *Nollan* “essential nexus” test to require “that an adjudicative exaction requiring dedication of private property must also be ‘“rough[ly] proportiona[ll]” . . . both in nature and extent to the impact of the proposed development.”\(^\text{14}\)

In *Dolan*, Florence Dolan submitted an application to expand her store and parking lot.\(^\text{15}\) The city planning commission conditioned the approval upon her agreement to set aside land for a public greenway that would minimize flooding in the nearby lake and to place a pedestrian/bicycle pathway that would relieve traffic congestion.\(^\text{16}\) The Supreme Court held that the City’s requirements constituted an unconstitutional taking.\(^\text{17}\) The Court distinguished the City’s actions against Florence Dolan from other situations involving “legislative determinations classifying entire areas of the city, [because] here the city made an adjudicative decision to condition [the] petitioner’s application for a building permit on an individual parcel.”\(^\text{18}\) In addition, the City imposed conditions that went beyond limitations on the use of Ms. Dolan’s parcel, instead requiring “that she deed portions of the property to the city.”\(^\text{19}\) The Court relied on

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10. *Id.*
11. *Id.* at 837.
14. *Id.* at 547 (citing *Dolan*, 512 U.S. at 391, and *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999) (emphasizing that we have not extended this standard “beyond the special context of [such] exactions”).
16. *Id.*
17. *Id.*
18. *Id.* at 385.
19. *Id.*
the well-settled doctrine of “unconstitutional conditions,” [under which] the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property.20

In determining “whether the degree of exactions demanded by the city’s permit conditions bears the required relationship to the projected impact of petitioner’s proposed development,” the Dolan Court turned to state court decisions since they “have been dealing with this question a good deal longer than we have.”21 The Court employed the “Goldilocks” test. They found that the state court standard using “very generalized statements as to the necessary connection between the required dedication and the proposed development” was too lax, while the standard requiring “a very exacting correspondence, described as the ‘specific’ and uniquely attributable’ test” was too strict.”22 Instead, the state court standard “requiring the municipality to show a ‘reasonable relationship’ between the required dedication and the impact of the proposed development” was an intermediate standard that was “just right.”23 However, the Court described this test as “rough proportionality” instead of “reasonable relationship” to avoid confusion with the similar “term ‘rational basis’ which describes the minimal level of scrutiny under the Equal Protection Clause.”24

The Court in Dolan expanded the justification for treating land-use permit conditions as an exception to the per se physical taking rule by relying on the unconstitutional conditions doctrine.25 Dolan also stressed two differences between the land use regulations that were sustained against constitutional challenges in Village of Euclid and Pennsylvania Coal from the exactions that were asserted against Florence Dolan.26 The Court explained:

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20. Id. at 385 (noting that “the city has forced her to choose between the building permit and her right under the Fifth Amendment to just compensation for the public easements”).
21. Id. at 388–89.
22. Id. at 389.
23. Id. at 390.
24. Id. at 391.
26. Id. at 384–85 (citing Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), and Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922)).
First, they involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an *adjudicative* decision to condition petitioner’s application for a building permit on an individual parcel. Second, the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city.27

Courts across the country applied the *Nollan/Dolan* standard to physical exactions for more than twenty years. Some courts also applied this standard to in-lieu monetary exactions.28 In *Koontz v. St. Johns River Water Management District*,29 the U.S. Supreme Court directly addressed the issue of whether monetary exactions should be subject to review under the *Nollan/Dolan* test. It recognized that lower courts divided over this question of federal constitutional law and resolved the conflict by holding that monetary exactions should be subject to the *Nollan/Dolan* test.30

Coy Koontz had applied for a permit to develop 3.7 acres of his 14.7 acre property.31 To offset the environmental impact of this development on existing wetlands, one of the alternatives suggested by the water district required Koontz to fund offsite mitigation work that would enhance fifty acres of wetlands owned by the water district.32 The Court noted that “in lieu of” fees “are functionally equivalent to other types of land use exactions” and held that “so-called ‘monetary exactions’ must satisfy the nexus and rough proportionality requirements of *Nollan* and *Dolan.*”33 Therefore, when the government demands property from a permit applicant, this demand “must satisfy the requirements of *Nollan* and *Dolan* even when the government denies the permit and even when its demand is for money.”34

The *Koontz* Court explained the reasoning for protecting owners applying for land use permits:

27. *Id.* at 385 (emphasis added).
30. *Id.* at 2594.
31. *Id.* at 2592.
32. *Id.* at 2593.
33. *Id.* at 2599.
34. *Id.* at 2603.
Nollan and Dolan “involve a special application” of this doctrine that protects the Fifth Amendment right to just compensation for property the government takes when owners apply for land-use permits. Our decisions in those cases reflect two realities of the permitting process. The first is that land-use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than property it would like to take. By conditioning a building permit on the owner’s deeding over a public right-of-way, for example, the government can pressure an owner into voluntarily giving up property for which the Fifth Amendment would otherwise require just compensation. So long as the building permit is more valuable than any just compensation the owner could hope to receive for the right-of-way, the owner is likely to accede to the government’s demand, no matter how unreasonable. Extortionate demands of this sort frustrate the Fifth Amendment right to just compensation, and the unconstitutional conditions doctrine prohibits them.

A second reality of the permitting process is that many proposed land uses threaten to impose costs on the public that dedications of property can offset. Where a building proposal would substantially increase traffic congestion, for example, officials might condition permit approval on the owner’s agreement to deed over the land needed to widen a public road. Respondent argues that a similar rationale justifies the exaction at issue here: petitioner’s proposed construction project, it submits, would destroy wetlands on his property, and in order to compensate for this loss, respondent demands that he enhance wetlands elsewhere. Insisting that landowners internalize the negative externalities of their conduct is a hallmark of responsible land-use policy, and we have long sustained such regulations against constitutional attack.35

Prior to Koontz, the Court’s discussions about the need for increased scrutiny of exactions under Nollan and Dolan emphasized the special context of “adjudicative exaction” as an exception to what would otherwise be considered a per se physical taking.36 However,

35. Id. at 2594–95 (citations omitted).
in *Koontz* the majority did not specifically address the distinction between legislative action and adjudicative action and instead focused on the unconstitutional conditions doctrine first applied to land use permits by the Court in *Dolan*. Justice Kagan’s dissent in *Koontz* noted the lack of clarity in regards to this distinction:

> Perhaps the Court means in the future to curb the intrusion into local affairs that its holding will accomplish; the Court claims, after all, that its opinion is intended to have only limited impact on localities’ land-use authority. The majority might, for example, approve the rule, adopted in several States, that *Nollan* and *Dolan* apply only to permitting fees that are imposed ad hoc, and not to fees that are generally applicable. *Dolan* itself suggested that limitation by underscoring that there “the city made an adjudicative decision to condition petitioner’s application for a building permit on an individual parcel,” instead of imposing an “essentially legislative determination[ ] classifying entire areas of the city.” Maybe today’s majority accepts that distinction; or then again, maybe not. At the least, the majority’s refusal “to say more” about the scope of its new rule now casts a cloud on every decision by every local government to require a person seeking a permit to pay or spend money.37

Following *Koontz*, the Supreme Court again addressed a takings challenge involving personal property as opposed to real property. In *Horne v. Department of Agriculture*, raisin growers brought a takings claim under the Fifth Amendment because the Agricultural Marketing Agreement Act of 1937 required them to turn over a portion of their raisins to ensure an orderly raisin market.38 Under this Act, the California Raisin Marketing Order demanded that the growers physically set aside a percentage of their crops for transfer to the government, which “then sells, allocates, or otherwise disposes of the raisins in ways it determines are best suited to maintaining an orderly market.”39 The Ninth Circuit Court of Appeal’s challenged decision “viewed the reserve requirement as a use restriction, similar to a government condition on the grant of a land use permit” and subjected it to the *Nollan/Dolan* test because the government

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39. *Id.*
imposed a condition (the reserve requirement) in exchange for a
Government benefit (an orderly raisin market).”

After applying the test, the Ninth Circuit “found that the reserve
requirement was a proportional response to the Government’s in-
terest in ensuring an orderly raisin market, and not a taking under
the Fifth Amendment.” The Supreme Court instead addressed
“[w]hether the government’s ‘categorical duty’ under the Fifth Amend-
ment to pay just compensation when it ‘physically takes possession
of an interest in property,’ applies only to real property and not to
personal property.” The Court responded “no” and held that the
reserve requirement was a physical taking because it required that
the growers transfer actual raisins to the government. Such a re-
quirement is the “classic taking in which the government directly
appropriates private property for its own use.”

Thus, the Horne Court viewed the federal legislative requirement
to set aside raisins and transfer them directly to the government as
a physical taking under the Loretto per se doctrine. Because the set-
aside was not in exchange for a permit that the government could
otherwise deny, it was not analogous to the land-use permit condi-
tion. Therefore, the Court did not treat it as an exception to the per
se physical taking rule that might be constitutionally allowable so
long as it survived Nollan/Dolan scrutiny. Just as the Loretto Court
required just compensation for the per se physical taking of space
on Jean Loretto’s apartment building for a cable line, the Horne
Court required just compensation for the per se physical taking of the
Hornes’ raisins.

Before Koontz, but subsequent to Nollan and Dolan, the Court in
Lingle v. Chevron U.S.A. Inc. addressed the “long recognized” principle from Agins v. Tiburon that “land-use regulation does not effect
a taking if it ‘substantially advance[s] legitimate state interests’ and

40. Id. at 2425.
41. Id.
42. Id. (quoting Arkansas Game & Fish Comm’n v. United States, 133 S. Ct. 511, 518
(2012)).
43. Id. at 2425–26.
44. Id. at 2425 (quoting Tahoe–Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency,
535 U.S. 302, 324 (2002)).
45. Id. at 2426 (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419,
426–35 (1982)).
does not ‘deny[ ] an owner economically viable use of his land.’” The Nollan Court relied on the Agins principle in addressing the scrutiny required for exactions. The Lingle Court held that the “substantially advances” prong of the two-prong Agins test was, in actuality, a substantive due process argument not a takings test.

In Lingle, Chevron brought suit challenging Hawai’i’s statute that limited the rent that oil companies could charge dealers who were leasing company-owned service stations. Chevron sought a declaration that the rent cap constituted a taking under the Fifth and Fourteenth Amendments of the U.S. Constitution. The Court held that Chevron was not entitled to summary judgment since it “argued only a ‘substantially advances’ theory in support of its takings claim.” The Court noted that the “substantially advances” test was derived from substantive due process decisions, not takings.

Instead of addressing a challenged regulation’s effect on private property, the “substantially advances” inquiry probes the regulation’s underlying validity. But such an inquiry is logically prior to and distinct from the question whether a regulation effects a taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose. The Clause expressly requires compensation where government takes private property “for public use.” It does not bar government from interfering with property rights, but rather requires compensation “in the event of otherwise proper interference amounting to a taking.” Conversely, if a government action is found to be impermissible—for instance because it fails to meet the “public use” requirement or is so arbitrary as to violate due process—that is the end of the inquiry. No amount of compensation can authorize such action.

To set the stage before addressing the Agins’s “substantially advances” prong, the Court described its regulatory taking precedents.

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48. Id.
49. Lingle, 544 U.S. at 545.
50. Id. at 533.
51. Id.
52. Id. at 545.
53. Id. at 544.
54. Id. at 543 (emphasis added) (citation omitted).
55. Id. at 538–42.
These precedents established “two relatively narrow categories (and the special context of land-use exactions . . .)” of per se takings for Fifth Amendment purposes, and noted that outside of these categories the factors set forth in *Penn Central* would govern regulatory takings challenges. The two categories of per se takings arise from *Loretto v. Teleprompter Manhattan CATV Corp.*, finding a taking “where government requires an owner to suffer a permanent physical invasion of her property,” and from *Lucas v. South Carolina Coastal Council*, where “regulations that completely deprive an owner of ‘all economically beneficial use’ of her property” constitute a taking. The Court explained that these three tests focus on the severity of the burden that the government places on property rights. First, a permanent physical invasion “eviscerates the owner’s right to exclude others” and justifies finding a per se taking. Second, the total deprivation of economically viable use is the same as a permanent physical occupation and results in a per se taking. Finally, the *Penn Central* test examines the “magnitude of a regulation’s economic impact and the degree to which it interferes with legitimate property interests.”

After finding that the “substantially advances” prong of *Agins* was a substantive due process challenge and not a takings challenge, the *Lingle* Court addressed the impact that its decision might have on previous cases. The Court recognized that its decisions in *Nollan* and *Dolan* “drew upon the language of *Agins,*” but explained that both of these decisions were takings challenges to “adjudicative land-use exactions” and did not apply the “substantially advances” test. In neither case did the Court question whether the exaction would substantially advance some legitimate state interest. Rather, the issue was whether the exactions substantially advanced the same interests that land-use authorities asserted would allow them to deny the permit altogether. As the Court explained in *Dolan*,

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56. *Id.* at 538.
60. *Id.*
61. *Id.* at 539–40.
62. *Id.* at 540.
63. *Id.* at 541–46.
64. *Id.* at 546.
these cases involve a special application of the “doctrine of ‘unconstitutional conditions,’” which provides that “the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property.” That is worlds apart from a rule that says a regulation affecting property constitutes a taking on its face solely because it does not substantially advance a legitimate government interest. In short, Nollan and Dolan cannot be characterized as applying the “substantially advances” test we address today, and our decision should not be read to disturb these precedents.65

In Lingle, the Court explained that its decision to reclassify the Agins’s “substantially advances” test from a takings challenge to a substantive due process challenge did not affect the principles developed in Nollan and Dolan.66 Although the Court used language from Agins in these two cases, it did not rely on the “substantially advances” test but instead applied a Fifth Amendment takings analysis.67 “Both Nollan and Dolan involved Fifth Amendment takings challenges to adjudicative land-use exactions—specifically, government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit.”68

The Supreme Court precedent briefly discussed above establishes that the per se physical taking category from Loretto requires just compensation whenever the government effects a permanent physical occupation (no matter how minor) of either real property or personal property.69 However, when the government demands either real or personal property from a landowner in exchange for a permit to develop her land, such demands are exactions subject to the Nollan/Dolan test for constitutional validity. The exaction sought must have an “essential nexus” to the anticipated impact of the development on the community, and the magnitude of the exaction sought must have “rough proportionality” to the magnitude of the potential impact.70

65. Id. at 547–48 (citations omitted).
66. Lingle, 544 U.S. at 546.
67. Id.
68. Id. (emphasis added).
The government may deny the permit because of its anticipated externalities, unless such denial would constitute a taking under the *Penn Central* factors test because of its severe impact on the landowner’s property interest. However, so long as the government is entitled to deny the permit without effecting a taking, the *Nollan/Dolan* scrutiny serves as a check against the government imposing unconstitutional conditions (“the government may not deny a benefit to a person because he exercises a constitutional right”) on the landowner’s right to assert a Fifth Amendment takings claim.71

The issue of whether impact fees, even though legislatively enacted, will require *Nollan/Dolan* scrutiny—just as adjudicative actions involving physical or monetary exactions do—is a continuing debate after the *Koontz* decision. Justice Thomas concurred in denying certiorari to a subsequent case involving this issue, *California Building Industry Ass’n v. City of San Jose*. 72

This case implicates an important and unsettled issue under the Takings Clause. The city of San Jose, California, enacted a housing ordinance that compels all developers of new residential development projects with 20 or more units to reserve a minimum of 15 percent of for-sale units for low-income buyers. . . . Petitioner, the California Building Industry Association, sued to enjoin the ordinance. A California state trial court enjoined the ordinance, but the Court of Appeal reversed, and the Supreme Court of California affirmed that decision.

Our precedents in *Nollan v. California Coastal Comm’n* and *Dolan v. City of Tigard* would have governed San Jose’s actions had it imposed those conditions through administrative action. In those cases, which both involved challenges to administrative conditions on land use, we recognized that governments “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.”

For at least two decades, however, lower courts have divided over whether the *Nollan/Dolan* test applies in cases where the alleged

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taking arises from a legislatively imposed condition rather than an administrative one. That division shows no signs of abating. The decision below, for example, reiterated the California Supreme Court’s position that a legislative land-use measure is not a taking and survives a constitutional challenge so long as the measure bears “a reasonable relationship to the public welfare.”

I continue to doubt that “the existence of a taking should turn on the type of governmental entity responsible for the taking.” Until we decide this issue, property owners and local governments are left uncertain about what legal standard governs legislative ordinances and whether cities can legislatively impose exactions that would not pass muster if done administratively. These factors present compelling reasons for resolving this conflict at the earliest practicable opportunity.

Yet this case does not present an opportunity to resolve the conflict. The City raises threshold questions about the timeliness of the petition for certiorari that might preclude us from reaching the Takings Clause question. Moreover, petitioner disclaimed any reliance on Nollan and Dolan in the proceedings below. Nor did the California Supreme Court’s decision rest on the distinction (if any) between takings effectuated through administrative versus legislative action. Given these considerations, I concur in the Court’s denial of certiorari.73

As mentioned above in his concurrence to the denial of certiorari in California Building Industry Ass’n v. City of San Jose, Justice Thomas dissented to the denial of certiorari in Parking Ass’n of Georgia, Inc. v. City of Atlanta based on the same issue. He noted that “[t]he lower courts are in conflict over whether Dolan’s test for property regulation should be applied in cases where the alleged taking occurs through an Act of the legislature.”74

Practitioners and scholars anticipate that this issue will come before the Court once litigation presents the appropriate case to allow

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the Court to give guidance to state and federal courts.\textsuperscript{75} I am hopeful that some of the ideas presented in this publication as well as in my article, \textit{When Local Government Misbehaves}, might help convince the Court to treat judicial scrutiny of legislative impact fees as a land use regulation. Instead of subjecting such fees to the \textit{Nollan/Dolan} test, applicable state standards should govern judicial scrutiny. These state standards range from a deferential rational basis test in California to a searching inquiry in North Carolina.\textsuperscript{76} The Court should distinguish legislative action from adjudicative action and give states the opportunity to apply their own standard of judicial review to legislative land use regulations.

Unlike most legislative actions, exactions pose a special concern because

\begin{quote}
land-use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than property it would like to take. . . . [and] [e]xtortionate demands of this sort frustrate the Fifth Amendment right to just compensation.\textsuperscript{77}
\end{quote}

Therefore, it is appropriate to apply a federal test (\textit{Nollan/Dolan}) to physical and in lieu exactions—situations where it is necessary to “provide important protection against the misuse of the power of land-use regulation.”\textsuperscript{75} However, state and local legislative actions should receive deference, and any claim of a taking based on legislative action should be subject to \textit{Penn Central} if it constitutes a partial

\textsuperscript{75} See, e.g., Dabbs v. Anne Arundel Cty., No. 18-54 (July 6, 2018) (petition of certiorari filed presenting the question of “whether legislatively proscribed monetary exactions on land use development are subject to scrutiny under the unconstitutional conditions doctrine”). \textit{Compare State and Local Government Land Use Liability} § 12:10 (2017) (“Following \textit{Koontz}, the U.S. Supreme Court is likely to apply \textit{Nollan/Dolan} in the same manner as the California Supreme Court interpreted in \textit{Ehrlich} and \textit{San Remo}. . . . The \textit{Nollan} and \textit{Dolan} heightened scrutiny tests apply only to development fees imposed on an individual, ad hoc basis in a discretionary permit granting process, and not to general legislatively formulated fees.”), \textit{with Brian W. Blaesser & Alan C. Weinstein, Federal Land Use Law & Litigation} § 3:45 (2017–2018 ed. 2017) (stating that “the majority’s decision [in \textit{Koontz}] to extend \textit{Nollan/Dolan} to monetary exactions can be construed to include both ad hoc monetary exactions as well as legislatively exactions such as impact fees and even mandatory affordable housing requirements”).


\textsuperscript{78} \textit{Id.} at 2591.
taking, *Loretto* if it is a permanent physical occupation not associated with a permit request, or *Lucas* if it deprives a landowner of all economically viable use.

II. JUDICIAL, PRACTITIONER, AND ACADEMIC VIEWS AS TO IMPACT-FEE SCRUTINY

In his article, *Mandatory Set-Asides as Land Development Conditions*,79 Professor Callies notes that even courts that do not apply heightened scrutiny to legislatively imposed fees do apply some form of *Nollan*’s essential nexus test. I agree that courts should apply a rational nexus test to legislative impact fees to make sure there is a rational connection between the fee collected and the project’s impact that the fee will mitigate. As Professor Callies discusses in his article, such was the case in both the California Supreme Court’s decision in *San Remo Hotel v. City & County of San Francisco*80 and the New Jersey Supreme Court’s decision in *Holmdel Builders Ass’n v. Township of Holmdel*.81 He points out that the only part of the *Nollan* decision that these two cases did not apply was the act of shifting the burden to the government to prove the nexus.82 The reason is that the burden of proof was unclear until the U.S. Supreme Court “clarified in *Dolan* that the burden of proof shifts to the government. There, the Court cited to *Nollan* when it said that ‘the burden properly rests on the city.’”83 What is important, however, is that all jurisdictions require some form of nexus between the harm caused by the development and the interest that the exaction purportedly serves. Thus, even under the California or New Jersey approach, *Nollan*’s requirement that the “same’ interest be served by the exaction still applies, albeit in different terms.”84 It seems we do agree on the need to apply a rational nexus test to impact fees. However, it is at this point that we part company. Professor Callies would apply the *Dolan* requirement of rough proportionality, while I would apply

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83. Id. at 320.
84. Id.
a second rational nexus test that examines whether the government uses funds obtained from the impact fees for the purpose collected.

Professor Callies concludes his article by noting that most local government-inclusionary housing programs provide substantial density bonuses and other advantages to developers who are required to provide affordable housing. He advises that if local government wishes to mandate affordable housing set-asides or fees on development, it should make sure that they only apply to development that creates the need for affordable housing and are “set low enough to survive a proportionality challenge.”85 I agree that any legislatively adopted set-asides or impact fees, whether for affordable housing or other infrastructure needs, should only apply to development projects that adversely impact the public needs for which the fees were intended. However, requiring proportionality of the fee collected does not make sense in the case of legislatively imposed impact fees. The municipality has already calculated these fees based upon the needs of the community and upon an assessment of how different types of development activity affect those needs.

When a city council adopts an ordinance to establish impact fees, it calculates the legislative impact fee after an in-depth analysis of the impact that certain development activities will have on city services. For example, an ordinance setting wastewater impact fees will likely define the relevant factors in calculating these fees—such as the equivalent residential unit (¨ERU¨), plumbing fixture unit, service unit (¨SU¨), connection charge, strength factor, flow factor, etc.—based on the type of unit and the expected wastewater discharge from that particular use.86 Various formulas will employ these factors to calculate an impact fee based on general information about the expected impact of particular uses. The municipality builds proportionality into the formula based on these factors. For example, in 2012 the City of Thousand Oaks, California, set a connection charge rate per service unit for wastewater at $10,168 and set the formula to determine service unit as SU = [(ERU) x (strength factor) x (flow factor)] or [(ERU) x (combined factor)].87

Applying the Dolan proportionality test to legislatively determined impact fees would require a court to review the city council’s formulas

85. Id. at 329.
87. See id. at 317.
and calculations to determine whether it had calculated these fees in proportion to the anticipated impact of the development activity. Such judicial scrutiny would be excessive, particularly when reviewing a legislative action. Instead, the dual rational nexus test requires the court to ask whether the city has used these collected funds to maintain and improve the wastewater collection system to ensure that these fees are not taxes collected and deposited into the city’s general revenues.

The outcome from the Nollan/Dolan scrutiny over legislative impact fees may be the same as applying the dual rational nexus test, used in many states before the advent of the Nollan/Dolan test for exactions. Here, Professor Callies and I agree that distinguishing between legislative and administrative actions over impact fees may be a distinction without a big difference—but there are differences. The dual rational nexus test, applied to impact fees in many states, requires scrutiny—to make sure not only that the fees are related to the development’s potential impact, but also that they are not a tax in disguise by requiring that the fees collected go to the specified purpose and are not deposited as general revenue. This test has a very different rationale for the scrutiny of impact fees than does the Dolan review for rough proportionality. The legislative process determines whether the impact fee is rationally related and proportional to the anticipated impact based on studies, formulas, calculations, etc., that are unconnected to the actual project proposed. Finally, treating exactions differently than impact fees preserves the distinction between legislative and adjudicative decisions. This distinction is an important part of land use jurisprudence and provides a check on the greater potential for governmental abuse of power when decisions are individualized.88

In his subsequent article, Through a Glass Clearly: Predicting the Future in Land Use Takings Cases, Professor Callies suggested that:

(1) Land development conditions will continue to come under even more strict scrutiny for nexus and proportionality to the problems and needs generated by the development/developer so charged. This is particularly true with respect to affordable, workforce housing exactions—so-called “inclusionary zoning”—where the connection to market-priced housing projects has always been

88. Saxer, supra note 76, at 167.
virtually non-existent. Only commercial developments generating a demonstrated need for low-income workers will successfully generate such mandatory housing set-asides.

(2) Courts will continue to be confused by the difference, if any, between legislative and administrative/quasi-judicial exactions in the application of Nollan-Dolan-Koontz. If this last unresolved land development conditions issue reaches the United States Supreme Court, the Court is likely to find the distinction irrelevant.89

Professor Callies examined the ramifications of the Court’s decision in Koontz and concluded “[w]hat the Supreme Court clearly decided” was as follows:

   (4) Impact Fees. The [Koontz] decision by its terms also applies to impact fees imposed by government to pay for public facilities such as schools, public parks, and wastewater treatment plants. There is no reasonable distinction among in-lieu fees, mitigation fees, and impact fees, since all are fees charged by government as a condition for land development approval (as distinguished from charges such as user fees and taxes, discussed below). All are embraced by the Court’s term “monetary exaction,” and thus all are now subject to the nexus and proportionality requirements of Nollan and Dolan.

   (5) Other “Exactions” vs. Taxes and User Fees. The dissent in Koontz makes much of the confusion between impact fees, on the one hand, and property taxes and user fees, on the other, that will become more significant as a result of the decision. . . .

   (6) Legislative vs. Non-Legislative Conditions. A key remaining issue with respect to land development conditions is whether different standards apply if the land development condition is legislatively, rather than administratively or quasi-judicially, imposed. While at least one sitting Justice on the Court has opined in a certiorari petition denial dissent that there is no defensible difference, other judges have suggested that deference to legislative determinations should lower the level of scrutiny applied to such legislative exactions as compared with administrative or quasi-judicial, one-off exactions.90

90. Id. at 46–48.
Professor Callies discusses whether to apply the *Nollan/Dolan* test to legislative actions. He asserts that until the Supreme Court addresses the question of whether *Nollan, Dolan, and Koontz* apply to more generalized exactions, “it is likely that government entities will endeavor to adopt more generalized exactions that look like legislation” and argue that exactions challenged by landowners are not subject to heightened scrutiny because they are more legislative than adjudicative. Professor Callies also addresses the potential for a “lose-lose” outcome if local government finds it easier to deny requests for permits outright rather than negotiate with applicants and face the heightened standard of *Nollan and Dolan*. Instead of encouraging negotiations that would allow landowners to trade property or money to obtain a permit, the bargains “w[ould] fail to occur because of the government’s fear that [their] offer, even if rejected, w[ould] attract the heightened scrutiny that *Koontz* now requires.”

In his article *Legislative Exactions and Progressive Property*, Professor Timothy Mulvaney addresses this debate about the level of judicial scrutiny applied to administrative exactions and legislative impact fees in takings cases (although he calls both exactions). He notes that there are three choices as to how to approach this debate:

1. Subject both categories to a level that is deferential to the government—rational basis.
2. Subject both categories to heightened scrutiny—*Nollan/Dolan*.
3. Subject only administrative actions to heightened scrutiny—*Nollan/Dolan*.
4. Subject administrative actions (exactions) to *Nollan/Dolan* scrutiny and legislative impact fees to a dual rational nexus test.

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91. Callies, *supra* note 89.
92. *Id.* at 48.
93. *Id.; see also Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2611 (2013) (Kagan, J., dissenting) (“If every suggestion could become the subject of a lawsuit under *Nollan* and *Dolan*, the lawyer can give but one recommendation: Deny the permits, without giving [the developer] any advice—even if he asks for guidance.”).
This fourth category contains the same first prong from *Nollan* but has a second prong that requires courts to scrutinize whether the municipality uses the impact fee for the purpose stated in support of the first prong, and not as a general revenue-raising device. If the municipality uses the fees it collects for general revenues, we should treat the impact fee as a tax, which may not be within the municipality’s authority to enact. Applying this dual rational nexus test to impact fees retains the distinction between legislative and administrative actions—a distinction that runs throughout the land-use law framework.

Professor Mulvaney asserts that scholars who adopt the category three view (legislative exactions should be immune from heightened takings scrutiny) should be aware that “such a position could produce some second-order consequences that actually undercut the goals of progressive conceptions of property.” He goes on to state,

> In this Part, I identify and assess two potential anti-progressive secondary consequences of recognizing the legislative-administrative distinction in exaction takings law. I contend in the first section that pressing the idea that legislative exactions are significantly less likely to abuse property owners than administrative exactions (and thus deserve greater judicial deference) necessarily risks marginalizing case-by-case administration more generally, which could have important ripple effects on takings law outside the exactions context. I assert in the second section that formal acceptance of the legislative-administrative distinction in the exactions context could prompt governmental entities to retreat from employing administrative exactions and other administrative measures, a move that could come with substantial costs given that in many contexts only administrative processes can respond comprehensively to the heterogeneous impacts of a given development project and afford crucially important attention to the affected parties’ personal, social, political, and economic identities.

While I appreciate Professor Mulvaney’s perceptive observations about the potential for second-order consequences when distinguishing between legislative and administrative actions, I assert that using the distinction between administrative action and legislative action in regards to impact fees and exactions is intellectually honest and

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95. *Id.* at 140.
96. *Id.* at 152.
is not intended to achieve any particular political outcome. Courts have applied this distinction throughout the framework of land use law as a way to protect against local government overreach.97

The decision whether to recognize the distinction between legislative and administrative actions should not depend upon whether or not it promotes progressive property objectives. As a proponent of robust property rights, I support this distinction and argue that the outcome in this debate should not depend upon how it fits into any particular political or theoretical mindset. Professor Mulvaney contends that “cabining the application of Nollan and Dolan scrutiny to administrative exactions amounts to a pragmatic effort to halt expansion of what is perceived as an ill-conceived and dangerous roadblock to government regulation in the land use arena.”98

As an advocate of not applying Nollan and Dolan scrutiny to legislative impact fees, I do not consider this heightened scrutiny applied to administrative exactions to be “an ill-conceived and dangerous roadblock.” In fact, I support this heightened scrutiny, as it provides a much-needed check on the potential for government abuse in the individualized permitting process. I also support applying heightened scrutiny to other individualized actions such as eminent domain, both under the Fifth Amendment and under the RLUIPA (Religious Land Use and Institutionalized Persons Act) protections for religious institutions.99

The Koontz majority subjected in-lieu monetary exactions to the heightened scrutiny test of Nollan/Dolan. This approach fits within the existing state and federal judicial framework used to prevent land use regulatory abuse.100 However, legislatively determined impact fees are not monetary exactions and should not be subject to Nollan/Dolan heightened scrutiny. Instead, courts should evaluate impact fees under existing state standards, which range from rational basis scrutiny to more exacting reviews.

Much debate and scholarship has followed the Koontz decision. Some have predicted that the consequences will be dire for local governments if the Court’s holding is applied to any monetary

97. Saxer, supra note 76, at 115.
98. Mulvaney, supra note 94, at 141.
100. Saxer, supra note 76.
fee demanded of developers and possibly to environmental regulation as well. Justice Kagan’s dissent, which disagreed with the majority’s extension of Nollan and Dolan to the payment or expenditure of money in government permitting, expressed this concern by avowing that the uncertainty of this rule “threatens to subject a vast array of land-use regulations, applied daily in States and localities throughout the country, to heightened constitutional scrutiny.” Others assert varying views including that 1) the Koontz decision is a “big yawn” that will have little effect, particularly on environmental regulation, which is already governed by environmental impact review; 2) the Koontz majority was wrong to extend the Nollan/Dolan inquiry to monetary exactions and instead should have recognized that the claim ultimately rests on substantive due process that should be governed by the deferential rational basis standard; 3) similar to the impact of Nollan/Dolan, after Koontz, planners and local officials will do a better job of “justifying and documenting the rationale for exacting money or land from developers”; 4) Koontz created a per se taking when a government attaches a monetary obligation to property that cannot be classified as a tax; 5) the Court’s Nollan/Dolan limitations on land-use negotiations “run counter to the economic idea that takings jurisprudence makes governments face a higher cost for regulation”; and 6) the courts should differentiate between fees and expenditures such that heightened scrutiny should apply to fees only where the permit applicant is required to directly transfer money to the government, but not to expenditures that “require a permit applicant to spend money to carry out mitigation activities.” This Article, with the support of others, proposes that in-lieu exactions that are individually assessed as part of the permitting process should be treated differently than the impact fees that are developed through the legislative process and applied equally to all developers without regard to the specific project.101

In Takings and Extortion, Professor Daniel P. Selmi rejects what he calls the “extortion narrative,” which underlies the Court’s recent exaction cases and “sees local governments not as acting in good faith in the public interest, but as fixed on extorting concessions out of developers.”102 Professor Selmi first reviews the Court’s takings

101. Id. at 108–09 (citations omitted).
cases on exactions to show how the Court developed and endorsed the extortion narrative beginning in 1987 with the *Nollan* decision. Selmi notes that *Koontz* in its holding and reasoning “fully reflect[s] the extortion narrative in the context of exactions takings.” He then examines the “basis for [t]his fundamental premise that governments are prone to misuse their land use power” and finds that the following theories may explain the basis:

1. The economic theory, particularly the public choice theory “proposes that, like individuals acting in the private sector, regulators will act largely in their self-interest” and that politicians will seek to extract benefits for voters from proposed projects to gain re-election from the voters who outnumber developers;

2. The impacts addressed by exactions are believed to have expanded to include environmental degradation, housing, and additional conditions negotiated by development agreements;

3. Development interest groups are believed to use the narrative as “an important vehicle both for attracting the Court’s attention to appeals and for articulating a theme in briefing them;”

4. The narrative is believed to be aligned “with the personal political ideologies of the individual Justices who make up the majority in the exactions cases” based mainly on the “distrust of local government efforts at environmental protection.”

Professor Selmi asserts that “the extortion narrative does not rest on literal proof of extortion” but rather on whether the imposed or proposed exactions fail the *Nollan/Dolan* test. Even if the local

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103. *Id.* at 327–33.
104. *Id.* at 338 (noting that the Court did not explain the basis for this narrative in *Nollan, Dolan*, or *Koontz*).
105. *Id.* at 338–39 (noting that this theory fails to take into account the studies that have examined conditions placed on projects by the government and found that government has not overreached, as well as the fact that developers have the ability to exit those jurisdictions that overreach and instead use the economic power of development interests at the local level).
106. *Id.* at 340–41.
107. *Id.* at 341.
108. *Id.* at 341–42.
109. *Id.* at 362.
government acted in good faith when imposing conditions, courts will automatically assume extortion if the exactions fail the test.\textsuperscript{110} In addition, Selmi notes “the Court now has fully linked its exactions jurisprudence to the unconstitutional conditions doctrine,” which is “nowhere reflected in the text of the Constitution,” and thus distances the Court’s jurisprudence from the actual language of the Fifth Amendment.\textsuperscript{111} Professor Selmi concludes by suggesting that, while “[a] majority of the Court has endorsed the extortion narrative,” there are critical flaws in this narrative such that it will not provide a convincing and sustainable foundation for exactions takings law.\textsuperscript{112}

The unconstitutional conditions doctrine creates an analytical “fly in the ointment” for takings jurisprudence and is an unnecessary distraction from the language of the Fifth Amendment. Without using this doctrine, the \textit{Nollan} decision created an exception to the per se taking rule for physical occupations under \textit{Loretto} when the government imposed an exaction in exchange for granting a permit, even though the government would be justified in denying the permit entirely unless such denial resulted in a taking under the \textit{Penn Central} test. In my view, it was unnecessary to add the unconstitutional conditions doctrine to the takings analysis in the \textit{Dolan} case, which established the degree of nexus needed under \textit{Nollan} to avoid the per se physical taking claim from \textit{Loretto}. Extending this test to in-lieu monetary exactions in \textit{Koontz} did not require the unconstitutional conditions doctrine. The \textit{Nollan} case had already established the exception to \textit{Loretto} for exactions demanded in exchange for permit approval when the government could constitutionally deny the permit without paying just compensation.

The concern about overreach or government abuse of power in local land use regulation has driven the development of varying degrees of judicial scrutiny in our land-use law jurisprudence long before the Court raised the “extortion narrative” in the \textit{Nollan} decision. My article, \textit{When Local Government Misbehaves}, addresses the “various levels of scrutiny applied to land-use decisions and shows how these levels are designed to prevent the abuse of power, particularly when actions are exercised at the individualized level.”\textsuperscript{113} I compare

\begin{thebibliography}{99}
\bibitem{110} Id.
\bibitem{111} Id. at 373–75.
\bibitem{112} Id. at 376.
\bibitem{113} Saxer, \textit{supra} note 76, at 110.
\end{thebibliography}
the scrutiny levels applied to land use actions[—]such as: legislative versus administrative actions; spot zoning challenges; consistency with the general plan; impermissible delegation of legislative authority; initiative and referendum authority; eminent domain challenges; and constitutional challenges, both facial and as applied[—]to corroborate the theme that abuse of power is controlled through increased judicial scrutiny when appropriate.114

It is this consistent framework, not the “extortion narrative,” that supports subjecting ad hoc in-lieu exactions to heightened scrutiny when a developer applies for a permit. However, this rationale should not apply to uniform monetary fees imposed legislatively.

State courts have been uncertain as to whether they should subject legislatively enacted impact fees to the Nollan/Dolan test. Courts in California, Arizona, Georgia, and Colorado have found that it does not apply,115 while courts in Washington, Illinois, South Dakota, and Oregon have applied the Nollan/Dolan test to legislative actions.116

After the Koontz decision, the Washington Court of Appeals in an unpublished decision rejected the unconstitutional conditions challenge by the Common Sense Alliance against a county ordinance requiring the dedication of property by owners applying for permits to develop shoreline parcels.117 Relying on an earlier “Washington appellate court decision that characterized Nollan and Dolan as establishing a due process test, subject only to minimal scrutiny,” as well as the dissent in Koontz, “the lower court concluded that a landowner may not challenge a legislative exaction under the doctrine of unconstitutional conditions.”118 Instead, “the lower court applied a rule that excludes legislatively-imposed exactions from heightened Nollan/Dolan scrutiny.”119

The Utah Supreme Court in Alpine Homes, Inc. v. City of West Jordan adjudicated property developers’ allegations that the City violated regulations requiring a municipality to spend the impact fees

114. Id.
119. Id. at *9.
collected on specific categories of expenditures within six years.\textsuperscript{120} The court held that “[t]he developers’ allegations here that West Jordan either failed to spend impact fees within six years or spent the fees on impermissible expenditures are inadequate to support a takings claim.”\textsuperscript{121} The court explained that “[t]he manner in which a city spends impact fees does not affect the constitutionality of the initial demand for fees, which is the focus of the \textit{Koontz} monetary exactions analysis.”\textsuperscript{122} However, the Utah court’s analysis seems to confirm that it would subject impact fees to the \textit{Nollan/Dolan} test. It stated, “In the context of a city’s demand for impact fees in exchange for a land-use permit, the applicant may challenge the fee by asserting that it lacks either an essential nexus or rough proportionality to the anticipated external impacts of the proposed development.”\textsuperscript{123}

The California Court of Appeal in \textit{616 Croft Ave. v. City of West Hollywood} relied on the California Supreme Court’s decision in \textit{California Building Industry Ass’n v. City of San Jose} to resolve a challenge to an affordable housing ordinance.\textsuperscript{124} The appellate court held that a city ordinance, requiring developers “to sell or rent a portion of their newly constructed units at specified below-market rates or, if not, to pay an ‘in-lieu’ fee designed to fund construction of the equivalent number of units the developer would have otherwise been required to set aside,” was not an exaction.\textsuperscript{125} Therefore, the restriction was not subject to \textit{Nollan} and \textit{Dolan} scrutiny and was instead “a municipality’s permissible regulation of the use of land under its broad police power.”\textsuperscript{126}

Federal courts have also struggled with the level of scrutiny required for legislatively enacted impact fees. A federal district court in Illinois reviewed state and federal constitutional challenges to an ordinance enacted by the City of Chicago to increase the availability of affordable housing in Chicago. In \textit{Home Builders Ass’n of Greater Chicago v. City of Chicago}, a real estate developer was required to

\begin{footnotesize}
\begin{enumerate}
\item[121.] Id. ¶ 29.
\item[122.] Id.
\item[123.] Id. ¶ 28 (citing Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2595, 2603 (2013)).
\item[125.] Id.
\item[126.] Id. (quoting \textit{City of San Jose}, 61 Cal. 4th at 457).
\end{enumerate}
\end{footnotesize}
“set aside two housing units for rent or sale to low-income residents, or pay a $200,000 fee.” The developer paid the fee and then filed a takings claim in state court. The City of Chicago removed the case to federal court and the court dismissed the claim. The court discussed the unconstitutional conditions doctrine applied in *Nollan, Dolan,* and *Koontz,* and noted that although the *Koontz* Court held that monetary fees imposed in lieu of a requirement to dedicate property are subject to the *Nollan/Dolan* test, it “did not hold . . . that all fees related to property regulation must meet the ‘essential nexus’ and ‘rough proportionality’ requirements.” Explaining that a restriction on the use of property is different from a seizure of property, the court noted that such a restriction is not a taking requiring compensation “unless it goes so far as to be a regulatory taking under *Penn Central Transportation Co. v. City of New York.*” These recent state and federal court decisions illustrate the debate and the need for guidance from the U.S. Supreme Court.

In addition to litigating these issues and preparing amici briefs in support of one side or another, practitioners have weighed in on whether the U.S. Supreme Court will require legislatively imposed monetary exactions to be subject to heightened scrutiny under the *Nollan/Dolan* test. For example, a Sacramento lawyer, Glen Hansen, suggests, “the Court should find that neither the heightened scrutiny of *Nollan/Dolan,* nor the *Penn Central* factored analysis, should govern legislative exactions that (1) are generally applied, and (2) are based on a set legislative formula that provides no meaningful discretion to administrators in its application to specific properties.” Instead, he recommends that such legislative exactions should be subject to a reasonable-relationship test, adopted by state governments such as California, Colorado, and Ohio. Mr. Hansen acknowledges that his recommendation is to follow Justice Kagan’s suggestion in her *Koontz* dissent “that the Court ‘approve the rule, adopted in several

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128. Id.
129. Id. at 1023–24.
130. Id. at 1024 (citing *Penn Cent. Transp. Co. v. City of New York,* 438 U.S. 104 (1978)).
132. Id.
States, that Nollan and Dolan apply only to permitting fees that are imposed ad hoc, and not to fees that are generally applicable.” 133

I agree that legislatively imposed monetary exactions, which I would call impact fees, should not be subject to the Nollan/Dolan test, but should instead be subject to the appropriate state standard. However, Hansen would substitute the reasonable-relationship state standard for existing state tests, such as the dual rational nexus test, and use this reasonable-relationship test as a new takings standard in place of Penn Central. Here we disagree as to the scrutiny that courts should apply to what Hansen calls legislative exactions. I submit that impact fees should be subject to the appropriate state standard, such as the dual rational nexus test, the reasonable-relationship test, or other existing state tests to distinguish these fees from unauthorized taxes. However, if the impact fee passes the applicable state test but “goes too far” in the impact the regulation has on the landowner’s property, the landowner should still be entitled to bring a takings challenge and have it evaluated under the Penn Central analysis. 134

A real estate partner at Sheppard Mullin offered helpful commentary about this issue in her article, Nollan, Dolan, and the Legislative Exception. 135 Deborah Rosenthal explained, “Most state courts addressing the issue have held that heightened scrutiny under Nollan and Dolan does not apply to legislatively adopted exactions.

Instead, they opine, fees and other exaction programs are subject to the same deferential ‘rational basis’ test applied to land use regulation under the police power.” 136 Rosenthal predicts that “the legislative exception will be rejected by the Supreme Court, at least in its most extreme forms.” 137 She argues that “both Nollan and Dolan resulted from generally applicable legislative programs” and that the easements required to obtain coastal development permits were neither ad hoc nor negotiated. 138

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134. But see id. at 281–85 (explaining why Penn Central should not be applied to legislative exactions).
136. Id.
137. Id.
138. Id.
Rosenthal contends that *Nollan* and *Dolan* analysis asks three questions: 1) whether the exaction would be a Fifth Amendment taking if imposed as a stand-alone requirement; 2) whether there is an “essential nexus” between the exaction and the project impacts; and 3) whether the exaction is “roughly proportional” to the project impacts. She suggests “heightened scrutiny is appropriate when courts are making fundamentally legal decisions about the character and nature of an exaction under the first two *Nollan* inquiries.”

The time to challenge these decisions is during the adoption of the generally applicable, legislative-exaction programs, and “[h]eightened scrutiny is not appropriate when a legislatively adopted, generally applicable exaction is challenged under ‘rough proportionality’ at the individual permit level.”

Rosenthal’s approach is similar to mine in that we agree that legislatively imposed impact fees should be subject to *Nollan* scrutiny because if the fees were requested unconnected to a permit application, they would be a per se taking. In order to be an exception to the per se physical taking of money under *Loretto*, the request must be in exchange for the granting of a permit. In addition, there needs to be an “essential nexus” between the fee required and the project’s impacts. However, I contend that applying the “rough proportionality” test from *Dolan* is not appropriate at the individual permit level because the legislature has already determined the “rough proportionality” when it developed the generally applicable formula, as discussed above in the example from Thousand Oaks, California.

**CONCLUSION**

Until the U.S. Supreme Court speaks directly to the distinction between adjudicative exactions for individual development permitting and legislative impact fees designed to offset the general externalities created by land development, local governments, courts, litigators, and scholars will continue to struggle with whether to apply the *Nollan/Dolan* test to these municipal requirements. I give due deference to Justice Thomas’s recognition of this ongoing debate and

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139. *Id.*
140. *Id.*
141. *Id.*
142. See *supra* text accompanying note 86.
his view that there should be no distinction between adjudicative and legislative actions. However, I assert that this distinction governs land use jurisprudence and guides the judicial scrutiny of local government action.143 The Court should recognize this distinction to determine when the judicial branch should give deference to local legislative actions and when the courts should subject individualized government actions to heightened scrutiny to control the abuse of power.

Legislatively enacted impact fees should have a rational nexus (the “essential nexus” required by Nollan) between the impact that a particular type of development is expected to create and the fee that is generally imposed. However, courts should not subject these fees to the Dolan test for rough proportionality because the legislature has already monetarily assessed the impact caused by prototypical development projects. Studies, past experiences, formulas, and guidance from other municipalities will be the basis for these legislative determinations, which should be entitled to judicial deference. Instead, states should be free to apply the appropriate level of judicial scrutiny, ranging from a rational basis level to a more searching inquiry, which could include the dual rational nexus test that reviews whether the local jurisdiction is using the fees collected to offset the actual impact the development imposes.

We should not ignore the distinction between legislative and administrative actions in the context of exactions and impact fees, as this distinction is a bedrock principle of land use law. If the Court finds the distinction to be meaningless in this context, it will threaten the established land use framework that applies heightened scrutiny to local action only when there is concern that government abuse is more likely because of an individualized determination. Subjecting legislative impact fees to the heightened Nollan/Dolan scrutiny has the potential to erode the separation of judicial and legislative power by diminishing the degree of judicial deference given to state and local legislative action. Instead, states should retain the right to establish the level of judicial scrutiny applied to local land use regulation. If such regulation is so onerous as to constitute a taking under state or federal constitutional law, landowners should be entitled to bring a takings challenge under Penn Central as a partial deprivation of property based on legislative action, or under Lucas or Loretto, if applicable.

143. See generally Saxer, supra note 76.
As always, I bring you greetings from the land of Midkiff, the land of Kaiser Aetna, the jurisdiction in which the legislature thought it was a good idea to try and drive gasoline prices lower by adopting a rent-control statute for certain gas stations on the theory that the station owners would naturally pass on the savings to consumers. As you recall, the United States Supreme Court in Lingle held that this scheme should not be analyzed under the Just Compensation Clause, but under the Due Process Clause. The Court concluded that as a question of due process and government power, Hawaii’s scheme survived the rational basis test, even though in reality—the statute did not come anywhere close to accomplishing what it purportedly set out to accomplish: Hawaii continues to have some of the highest gasoline prices in the nation, thank you very much.

I raise all this both as an introduction to my remarks and as background for the panel, “The Future of Land Regulation: A Tribute to David Callies.” But before we can talk about land use law’s future, we must delve into its past. As we all know, the rational basis
test had its genesis in zoning and land use law and over the years has inexorably crept into takings and eminent domain law. Today, I'll focus on two cases, one old, one new.

I. MR. J.C. HADACHEK GETS PLAYED

We usually identify Euclid v. Ambler Realty Co. as the first constitutional land use case, and, indeed, it was the first Supreme Court decision to uphold “everything in its place” and separation-of-uses zoning. This is what we now refer to as Euclidean zoning, quite naturally. But I like to think that modern land use jurisprudence really began a decade earlier at the height of the Progressive Era at a nondescript corner of what could be just about any city street in America. The property is now part of the Arlington Heights neighborhood in Los Angeles. The area contains little of overwhelming interest, just the usual commercial buildings, residences, traffic signals, and small businesses. It contains a self-storage facility, pretty typical in a commercial district (here, the “C-4 District”). There is nothing at all, in fact, to indicate that just over a century ago this was the site of what was to become one of the most important land use cases in U.S. history—the place that gave us the first Supreme Court decision that dealt with how the expanding power to regulate the use of property meshes with private property rights. This area—the block southeast of the corner of Pico and Crenshaw Boulevards—was once a brickyard at the edge of the city, owned by Joseph C. Hadacheck.

The Supreme Court’s opinion in Hadacheck v. Sebastian—upholding Hadacheck’s conviction for violating a newly adopted ordinance that prohibited brickyards in certain districts and denying his request for a writ of habeas corpus—does not give the real flavor of the case. This neighborhood was once outside of the city limits. Indeed, the title of Hadacheck’s property predated the city

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itself and went back to the original Mexican land grant—as most central and southern California land titles do—to a former alcalde of the Los Angeles Pueblo. This parcel was originally a part of the massive Rancho Los Cienegas. Eventually, the rancho was subdivided and parceled off, and Hadacheck purchased a parcel in 1902 because the clay deposits made it an ideal place to manufacture the bricks needed to build the rapidly expanding metropolis. California, you see, “did not have great paving brick manufacturers like other states mainly because of the scarcity of good vitrified clay deposits.”12 This property was prime: as the Court noted, the “clay upon his property is particularly fine, and clay of as good quality cannot be found in any other place within the city where the same can be utilized for the manufacture of brick.”13

Brickmaking, as you might expect, was a messy affair, involving a large hole in the ground to dig out the clay and fire-stoked drying kilns. When Hadacheck’s manufacturing plant was far from downtown, the noise, dust, and smoke it produced was not a big problem. But Los Angeles was growing, and in 1909 the Hadacheck property was annexed by the City and became subject to its jurisdiction. The surrounding land—the site of at least one other brickyard—came into the sights of the land speculators and developers. In the midaughts, the nearby area was developed as single-family homes. Some of these homes were, and remain today, pretty nice. They were mostly in the arts-and-crafts style. One of these developments—built by “a syndicate of a dozen prominent business men”—was an area they labeled “Victoria Park.”14 That had a nice ring to it, and today the area is still called Victoria Park.

To residences nearby, a noisy, smoke-and-dust-belching industrial site was not a recipe for the status quo. Victoria Park, you see, was just a few blocks from the Hadacheck site and was even closer to another brickyard, Hubbard & Chamberlain, located across the street from the residential development. And over a hundred years ago, this meant the same thing it would mean today: a conflict between an existing, possibly undesirable use and late-coming residents (whom

today we might label “NIMBYs”). This conflict could have resulted in a run of the mill tort or nuisance case, with a claim by the residential owners that Hadacheck’s use of his property interfered with theirs and with a defense by Hadacheck that he was there first (thus they “came to the nuisance”).

But it didn’t play out that way. The City Council of Los Angeles, over the veto of Mayor George Alexander, used its police powers to adopt an ordinance prohibiting brickyards in certain districts.” By that, the council pretty much meant this area because the only two brickyards subject to this ordinance were Hadacheck’s and Hubbard & Chamberlain, located directly across from the entrance to Victoria Park on Pico Boulevard.

Remember that “syndicate of a dozen prominent business men” who developed Victoria Park, whose residents were now overwhelmed by the nearby brickyards? One of those “business men” was none other than Josias J. Andrews, who just so happened to be a member of the Los Angeles City Council and who chaired the council’s Legislative Committee. According to a contemporary account:

[Mr. Andrews] is a Progressive and he is altogether progressive in profession and practice in the broadest sense of the word. He was twice elected to the city council and during the time of his service was active in procuring the passage of various progressive measures. He was a strenuous advocate of the law which later as incorporated in the city charter limiting the height of new buildings, and was instrumental in having it passed.

Brickyards in other parts of Los Angeles where Councilman Andrews didn’t have investments were not subject to similar ordinances, and

15. “NIMBY,” an acronym for “not in my back yard,” is used to describe those who object to development primarily on the grounds that it is too close to their own property. See Michael B. Gerrard, The Victims of NIMBY, 21 FORDHAM URB. L.J. 495 (1994).

16. See, e.g., Sturges v. Bridgman (1879) LR 11 Ch D 852 (Eng.) (demonstrating a private nuisance claim not defeated by the fact that the plaintiff moved to the area and that the defendant’s noxious use predated the plaintiff’s arrival).


19. Id.
even where there were conflicts with residences, existing brickyards were given several years to wind down.

But not in this case. The ordinance, prohibiting brickyards in certain districts, made it a crime to continue to operate. Apparently, Mr. Hadacheck tried to use his land in other ways. He obtained a building permit for a two-story residential building on Pico, and there's evidence he allowed the use of the clay pit as a dump site. But he kept up the brickmaking, because he was charged with a misdemeanor, convicted under the ordinance, and was remanded to the custody of the Los Angeles police chief.

You already know the rest of the story. Hadacheck brought a habeas corpus action challenging the constitutionality of his confinement. He argued that he was being singled out and that the regulations severely devalued his property (he argued that before the regulations the property was worth eight hundred thousand dollars but after, only sixty thousand dollars).\(^\text{20}\) He also argued that the land was not really useful for anything but brick manufacturing, a claim belied in hindsight by the future use of the site as blocks of single-family homes. The residences there today are modest and not up to the Victoria Park standard, mind you, but they are still pretty nice.

Even though the courts accepted Hadacheck's argument that he was not creating a nuisance, he lost in the California Supreme Court and eventually in the U.S. Supreme Court, which held that it did not matter that the brickyard was not a common-law nuisance because the City could exercise its police power to prohibit uses, even where those uses predated the regulation:

> It may be that brickyards in other localities within the city where the same conditions exist are not regulated or prohibited, but it does not follow that they will not be. That petitioner's business was first in time to be prohibited does not make its prohibition unlawful. And it may be, as said by the supreme court of the state, that the conditions justify a distinction. However, the inquiries thus suggested are outside of our province.

There are other and subsidiary contentions which, we think, do not require discussion. They are disposed of by what we have said. It may be that something else than prohibition would have satisfied

the conditions. Of this, however, we have no means of determining, and besides, we cannot declare invalid the exertion of a power which the city undoubtedly has because of a charge that it does not exactly accommodate the conditions, or that some other exercise would have been better or less harsh. We must accord good faith to the city in the absence of a clear showing to the contrary and an honest exercise of judgment upon the circumstances which induced its action.\textsuperscript{21}

In short, the Court used the “rational basis” test to evaluate the validity of an exercise of police power. The Court doubted its ability as mere judges to question what the City said it needed and what counted as a good-faith attempt to keep the city beautiful, absent a clear showing of dirty pool. (This sounds a lot like Justice Kennedy’s test for identifying a pretextual public use in \textit{Kelo v. City of New London}\textsuperscript{22} some ninety years later; but more on that in a minute.)

The rest, as they say, is history: the \textit{Hadacheck} decision became the foundation on which the constitutionality of all zoning law is built. Today, we still have yet to resolve completely the tension between the police power to regulate property and the rights of private property owners.

But what of Mr. Hadacheck? After he lost his brickyard business, what became of him? We don’t exactly know for certain. But we do know that in nearby Rosedale Cemetery, there’s a grave for one “J.C. Hadacheck” who died in 1916 at the young age of forty-eight, less than seven months after the Court issued its opinion. Is this the same “J.C. Hadacheck” who petitioned the Supreme Court? We’re not sure, but we wouldn’t be surprised. Not knowing for sure, our imagination wanders to a fanciful conclusion in which Mr. Hadacheck—having been played by the city council, the NIMBYs, and the courts—simply gave up the ghost after realizing that even though he made the bricks that had built the city, his usefulness and his time had passed.

\section*{II. REASON AND LAND USE REGULATION}

Unlike Mr. Hadacheck, the rational basis test, in one form or another, has survived the ninety-plus years in between. It even has

\textsuperscript{21} Id. at 413–14.

been transported into eminent domain law, first by *Midkiff*, the case from my home turf that equated the power to appropriate property for public use upon payment of just compensation, with the power to regulate it, without compensation. Then, in *Kelo*, the Court formally “Eucidized” eminent domain by concluding that if a taking could conceivably be considered part of a comprehensive plan, the public use of the property was, in the words of Justice Douglas in *Berman v. Parker*, “well-nigh conclusive,” even if the specific transfer was to take property from “A” and give it to “B.” Professor Charles Haar would no doubt approve.

The reasonableness test has also crept into regulatory takings law, most recently in *Murr v. Wisconsin*, the case in which the Court addressed the “denominator” or “larger parcel” issue by defining property for takings purposes. It did so by applying a confusing stew of mostly undefined factors, which did not focus on a property owner’s expectations and actual use of her land but shifted the inquiry to the reasonableness of the regulation. That inquiry involved looking at things like the “treatment of the land” under state law, the “physical characteristics” of the properties (which includes the parcels’ topography and “the surrounding human and ecological environment”), and, most strangely, “the value of the property under the challenged regulation.” Owners are not limited to knowing existing regulations also charged with anticipating possible future regulations, especially if the parcels are located in areas presenting “unique

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24. Berman v. Parker, 349 U.S. 26, 32 (1954) (“Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive.”).

25. *Kelo*, 545 U.S. at 484 (“Given the comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of our review, it is appropriate for us, as it was in *Berman*, to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan. Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment.”).

26. See Charles M. Haar, “In Accordance With a Comprehensive Plan”, 68 HARV. L. REV. 1154 (1955) (the comprehensive plan is the foundation of zoning and the basis of judicial deference to such exercises of the police power).


concerns” or “fragile land systems.”

The majority faulted the Murrs for not realizing that merger provisions are common in zoning schemes—and therefore, in the Court’s view, reasonable. Underlying the majority’s opinion was its belief that regulation of the Murrs’ property is a good thing. But the reasonableness of a regulation is not supposed to be part of the takings calculus—especially after the unanimous Court in Lingle rejected the “substantially advance” test as one of takings—because, to even get to the takings question, either the property owner must concede the validity of the regulation, or a court must have concluded it was reasonable. As I argued in an amicus brief in Lingle, this is the “public use” half of the regulatory takings equation, since, if a regulation does not benefit the public, the court should invalidate it not require compensation. Unreasonable regulations cannot be enforced, and this is a separate question from whether an otherwise reasonable regulation results in a regulatory taking and requires compensation, a point Justice Kennedy has made in both condemnation and regulatory takings cases. But Murr made this the central question in determining the preliminary question of defining what “property” is protected by the Takings Clause, because the measure of the owner’s expectation and property right is the “reasonableness” of the regulation.

29. Id. at 1946 (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1035 (1992) (Kennedy, J., concurring)).

30. Id. at 1947.

31. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 536–37 (2005) (The Court explained that the Takings Clause is not designed to prohibit government action but to secure compensation “in the event of otherwise proper interference amounting to a taking.” (emphasis added)).

32. See Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1175 (Fed. Cir. 1994) (“What is not at issue is whether the Government can lawfully prevent a property owner from filling or otherwise injuring or destroying vital wetlands. The importance of preserving the environment, the authority of state and federal governments to protect and preserve ecologically significant areas, whether privately or publicly held, through appropriate regulatory mechanisms is not here being questioned. There can be no doubt today that every effort must be made individually and collectively to protect our natural heritage, and to pass it to future generations unspoiled.”).


34. See Kelo v. City of New London, 545 U.S. 469, 491 (Kennedy, J., concurring); Lingle, 544 U.S. at 548–49 (Kennedy, J., concurring) (Whether a regulation is reasonable or whether an exercise of eminent domain is for public use are questions under Due Process and not the Takings Clause).

35. Murr v. Wisconsin, 137 S. Ct. 1933, 1945 (2017) (“A reasonable restriction that predates a landowner’s acquisition, however, can be one of the factors that most landowners would reasonably consider in forming fair expectations about their property.”).
Now that we’ve covered the past, we turn to the future and our second case. As background, you might think that as a property rights lawyer I’d be downright tickled when my home court—which, as Professor Callies noted, may not be the friendliest court in the land for property owners and property rights—went against the grain and actually recognized a new constitutional property right. It was a right that, as far as I can tell, no other court, state or federal, has ever recognized. But, despite the Hawaii Supreme Court’s recognition of the new right, I cannot say I am on board. In *In re Maui Electric Co.*, the court concluded that the Sierra Club possessed a constitutional property right in a “clean and healthful environment,” entitling the organization to due process protections. This allowed it to intervene in a Public Utilities Commission (“PUC”) petition regarding a power purchase agreement for a by-then defunct electric plant on Maui.

First, some background should be provided. Maui Electric Company filed an application with the state PUC, seeking the commission’s approval of an agreement between the utility and the Hawaiian Commercial and Sugar Company. If approved, it would allow a rate increase to account for the additional production charges associated with the Puunene Power Plant, a coal-powered facility on former sugar lands in central Maui, which transformed bagasse, the by-product of sugar production, into electric power. Sierra Club asked to intervene in the administrative process under the PUC’s rules, seeking to assert its own claims as well as several of its Maui-based members. The power plant, the petition asserted, would “impact Sierra Club’s members’ health, aesthetic, and recreational interests. Sierra Club also asserted its organizational interest in reducing Hawaii’s dependence on imported fossil fuels and advancing a clean energy grid.” It argued that its members were concerned that the Puunene Plant relied too heavily on coal in order to meet its power obligations under the existing agreement and also that its members were concerned “about the public health and visibility impacts of burning coal.”

37. *Id.* at 23.
38. *Id.* at 4–5.
39. *Id.*
That’s pretty vague stuff and seems more like a policy question than something best resolved by an adjudicative proceeding. But under existing judicial-standing rules in similar cases of original jurisdiction actions brought in Hawaii courts, there was nothing too outside the norm in this type of environmental-policy cases: there’s little doubt that, if this were a case brought in a Hawaii trial court, Sierra Club adequately alleged judicial standing. Anyone questioning that conclusion needs only to recall the so-called Superferry case.40 In this case, the Hawaii Supreme Court held that Sierra Club had standing to raise an environmental challenge to the subsequently defunct interisland ferry because the ferry would threaten the organization with four types of injury: (1) endangered species could be adversely impacted by a high-speed ferry; (2) the Hawaii Superferry could increase the introduction of alien species across the islands; (3) surfers, divers, and canoe paddlers who used the Maui harbor could suffer adverse impacts; and (4) there was the threat of increased traffic on the road next to the harbor entrance. Again, that’s a vague connect-the-dots logic to gain standing, but, for better or worse, that is the current state of Hawaii’s standing doctrine.41

However, the Maui Electric case was not an original jurisdiction action. It was an administrative proceeding of the PUC under the agency’s administrative rules, governed by a different standard, one that was based on the Hawaii Administrative Procedures Act (“APA”).42 Under the APA, an outsider may intervene in a “contested case” (a quasi-judicial, adjudicative administrative process) when an agency rule or a statute gives the party a seat at the table, or when intervention is required by law because the agency is determining that party’s rights. In this case, Sierra Club claimed that allowing the power agreement jeopardized its statutory rights and that it possessed a constitutional property right. Thus, the Hawaii Constitution’s due process clause gave Sierra Club the right to intervene in the PUC proceedings.43

40. Sierra Club v. Dep’t of Transp., 167 P.3d 292, 320 (Haw. 2007) (noting the “lowering of standing barriers” in environmental cases).
42. Hawaii Administrative Procedures Act, HAW. REV. STAT. ch. 91 (2017).
Neither the PUC nor the court of appeals bought Sierra Club’s theory. The commission denied intervention and decided Maui Electric’s application without Sierra Club’s presence. The Club appealed to the Hawaii Intermediate Court of Appeals, which agreed with Maui Electric and dismissed the appeal for lack of jurisdiction. It concluded that because Sierra Club was not “aggrieved” by the PUC’s decision (because the PUC correctly excluded the Club from the case), the appellate court did not have jurisdiction. 44 This issue had been brewing in Hawaii’s agencies and lower courts for some time, and presenting the Hawaii Supreme Court the opportunity to make this ruling had been on wish lists at least since former Governor Neil Abercrombie appointed the majority of the members of the five-justice court back in 2014. But until the Maui Electric case, the issue (and other cases which recognize certain rights that are set out in the Hawaii Constitution as property) had never secured the necessary three votes.

It was not so this time. The three-justice majority rejected two arguments that could have avoided this difficult and ground-breaking result. First, by the time the case reached the court, the Puunene Plant was offline, a victim of Hawaii’s loss of the sugar industry. The last sugar plantation had been shuttered, which meant no bagasse and therefore no power plant. Maui Electric thus argued that Sierra Club’s appeal was moot and that the supreme court should dismiss it. Second, the majority might have avoided the constitutional issue by combing through the PUC’s enabling statutes and concluding that Sierra Club possessed a statutory (and not a constitutional) right to intervene. But the majority rejected both arguments, first concluding that the case, even though moot, was nonetheless crying out for resolution by the court (the so-called “public interest” exception to the usual mootness rules), and then rejecting Sierra Club’s claim for a statutory right to intervene. 45

Having disposed of these preliminaries, the court reached the constitutional question: does the Hawaii Constitution recognize Sierra Club’s environmental concerns as a “property” interest entitling it to procedural due process? Three justices said yes. The majority based its conclusion on article XI, section 9 of the Hawaii Constitution:

45. See Maui Elec., 408 P.3d at 8–9, for the majority’s mootness analysis, and 9–12 for its rejection of the statutory argument.
Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.46

The majority held that this provision created a legitimate claim of entitlement to a clean and healthful environment, and thus such claims qualified as “property.”47 It “is a substantive right guaranteed to each person,” and thus could be enforced by any person, including the Sierra Club.48 The majority noted that the court had earlier held that Native Hawaiian rights—rights also set out in the Hawaii Constitution—are “property” rights, and that environmental concerns are no different.49

Interestingly, the majority seemed to anticipate criticisms of its conclusion by noting that the constitutional text itself limited this property right to being exercised within the framework of existing environmental statutes, rules, and ordinances. This will, the majority reasoned, keep things in check, and the slope would not be slippery. What made the majority’s reasoning interesting is that it concluded the very PUC statutes, which it had earlier rejected as providing Sierra Club with the right to intervene, were environmental statutes that recognized Sierra Club’s constitutional property right to intervene:

46. HAW. CONST. art XI, § 9.
47. Maui Elec., 408 P.3d at 13.
48. Id. at 12–13. Lovers of Citizens United v. FEC, 558 U.S. 310 (2010), rejoice: in Hawaii’s courts, corporations are persons entitled to constitutional rights. The constitutional provision at issue here provides, Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law. HAW. CONST. art. I, § 9 (emphasis added). The Maui Electric majority held that Sierra Club, a corporation, has a property right under this provision, meaning that Sierra Club is a “person.” Maui Elec., 408 P.3d at 23.
49. Maui Elec., 408 P.3d at 16 (citing In re Ñao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications, 287 P.3d 129, 142 (Haw. 2012)).
We therefore conclude that HRS Chapter 269 is a law relating to environmental quality that defines the right to a clean and healthful environment under article XI, section 9 by providing that express consideration be given to reduction of greenhouse gas emissions in the decision-making of the Commission. Accordingly, we hold that Sierra Club has established a legitimate claim of entitlement to a clean and healthful environment under article XI, section 9 and HRS Chapter 269.50

After reaching the conclusion that Sierra Club owns property in a clean and healthful environment, the majority held this interest was sufficiently important that the PUC had a duty to provide a hearing before it deprived the Club of its property:

The risks of an erroneous deprivation are high in this case absent the protections provided by a contested case hearing, particularly in light of the potential long-term impact on the air quality in the area, the denial of Sierra Club’s motion for intervention or participation in the proceeding, and the absence of other proceedings in which Sierra Club could have a meaningful opportunity to be heard concerning HC&S’s performance of the Agreement.51

Finally, in a critical footnote, the majority made it clear that the result is immune from future legislative tinkering. This is a ruling based on the Hawaii Constitution, and thus no mere legislature can mess with it too much.52

I’m not going to walk through the complete rationale of the two-Justice dissent, because it is a relatively short 20 pages. In sum, Chief Justice Recktenwald concluded that neither the PUC statutes nor Hawaii’s due process clause gave Sierra Club the property right to intervene in the power plant’s PUC application. The dissenters warned of unintended consequences, which will flow from this decision:

Respectfully, the Majority’s expansive interpretation of what constitutes a protected property interest in these circumstances may have unintended consequences in other contexts, such as

51. *Id.* at 18.
52. *Id.* at 19 & 19 n.33 (“Our ultimate authority is the Constitution; and the courts, not the legislature, are the ultimate interpreters of the Constitution.” (quoting *State v. Nakata*, 878 P.2d 669, 709 (Haw. 1994))).
statutes where the legislature has mandated consideration of specific factors by executive agencies when implementing a statute.53

The dissenters concluded that the majority didn’t need to undertake a constitutional analysis, because if denied administrative intervention in the PUC, Sierra Club simply could have employed those loose standing rules, which I mentioned earlier, and instituted an original jurisdiction action. Same result, without blurring lines and calling it a “property” right. Consequently, the dissenters viewed the recognition of a property right in the environment as unnecessary, and a result driven by the majority’s policy determinations.

My biggest question about the majority’s conclusion is this: if the most fundamental aspect of owning “property” is the right to exclude others from the res, how in the world do members of the public have the right to exclude other members of the public from a clean and healthful environment? As the U.S. Supreme Court held in Nollan v. California Coastal Commission54 “We have repeatedly held that, as to property reserved by its owner for private use, the right to exclude [others is] “one of the most essential sticks in the bundle of rights that are commonly characterized as property.””55 (Or maybe Stevie Wonder said it better when he sang, “This is mine you can’t take it.”56)

Either way, the ability to keep others off what you own—and have the law back you up—is one of the defining sticks in the bundle of rights that we call property. Thus, I think the majority didn’t confront the real, foundational question built into the arguments: could Sierra Club’s environmental concerns even be shoehorned into a concept of “property” as that term has been used for thousands of years? Doesn’t “property” as used in the Hawaii Constitution’s due process clause mean private property? After all, as far as I can tell, every other time the court has dealt with property in Hawaii’s due process clause, it has either expressly defined or implicitly assumed that the property interest at stake was private property, and not a right that looks more like something “owned” collectively by everyone. Yes, the court’s ruling was only that environmental concerns are property

55. Id. at 831 (quoting Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433 (1982); Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)).
56. STEVIE WONDER, FOR ONCE IN MY LIFE (Motown Records 1968).
rights in the context of procedural due process (“new” property), but there’s no reason to distinguish due process property from other forms of property.\textsuperscript{57} Essentially, what the majority accomplished was a subtle redefinition of “property” from a private right to a public resource.

I appreciate the Hawaii Supreme Court’s commitment to opening court-house doors to resolve claims, especially when the claims involve the environment and are made by those who profess to protect it. As I noted earlier, the court’s standing doctrine for original jurisdiction cases sets the bar so low that it is, for all practical purposes, a mere pleading speed bump and not a realistic barrier to courts becoming embroiled in political and policy questions perhaps best left to the political branches. The standing rule—as our courts have held—is a “prudential rule of judicial self-governance”\textsuperscript{58} for courts exercising their original jurisdiction, and does not, technically speaking, govern their appellate jurisdiction in appeals under the Administrative Procedures Act. But as a result of the \textit{Maui Electric} case, the barn doors are wide open for both types of cases. On that point, I think the dissenting opinion got it right when it concluded that rejecting administrative standing would mean only that Sierra Club could have instituted an original action in a Maui trial court. Thus, the court-house door could remain open without needlessly undermining the concept of property.

As I noted earlier, this decision was a long time coming, and anyone paying attention has been expecting this shoe to drop whenever the Justice Pollack-led branch of the court could garner that critical third vote. Now that it has happened, this naturally leads to the follow-up question: what could be next? It stands to reason that the next candidate for the other shoe drop is “public trust” rights, which in the recent telescope cases just missed a third vote.\textsuperscript{59} There, Justice Pollack and Justice Wilson concurred, concluding that both Native Hawaiian and public trust interests are “property” interests. They argued that article XI, section 1, of the Hawaii Constitution created a property interest in natural resources, which are to be administered for public benefit.\textsuperscript{60} Now that this same telescope case is back in the


\textsuperscript{60} See id. at 355 (Pollack, J., concurring).
Hawaii Supreme Court, I would not be surprised if the same three justices who found that environmental concerns are property take a hard look at extending that rationale.61

But despite this mission creep into eminent domain and takings law, traditional Euclidean zoning as the primary tool for regulating land use—and, therefore, restricting property rights—isn’t as in vogue as it once was. A new set of tools is being employed to restrict, justifiably or not, an owner’s ability to exercise property rights and use her land as she sees fit. Thus, we see “form-based codes,” the resurrection of planned unit developments (both of which are mixed-use, not-quite-Euclidean land use regulations).62 We have the rise of environmental law as an additional limitation on property rights (in our jurisdiction, as Professor Callies has pointed out in a study, certain claimants have enjoyed a nearly ninety percent success rate in the Hawaii Supreme Court over a ten-year stretch).63 And, as Professor Callies has also pointed out, areas on the cutting edge—native rights, religious and cultural rights, sea-level rise, and “sustainability”—are the new frontiers in property rights.64 Thus, we’ve seen the concept of public trust expanded from its traditional, Roman-law roots to cover all sorts of things, not only regarding navigable waters and riparian property but also finding that the public trust applies to wildlife65 and all natural resources, including

61. If environmental concerns grounded in the Hawaii Constitution are property, if Native Hawaiian interests are property, and if public trust principles are property, are there other, similar interests in the constitution where “property” might be discovered? There is at least one provision that deserves a hard look, because it reads a lot like sections 1 and 9: “The State shall conserve and protect agricultural lands, promote diversified agriculture, increase agricultural self-sufficiency and assure the availability of agriculturally suitable lands. The legislature shall provide standards and criteria to accomplish the foregoing.” HAW. CONSTR. art. XI, § 3. Farmers and ranchers may want to consider raising arguments similar to those that carried the day in Maui Electric. After all, we don’t have a hierarchy of state constitutional rights—where some rights are more equal than others—do we?


63. See David L. Callies, Emily Klatt & Andrew Nelson, The Moon Court, Land Use, and Property: A Survey of Hawaii Case Law 1993–2010, 33 U. HAW. L. REV. 635, 636–37 (2011) (The Hawaii Supreme Court’s “record on preserving private property rights guaranteed by the U.S. Constitution’s Fifth and Fourteenth Amendments in the face of regulatory challenges is, on the other hand, appalling, particularly given the increasing emphasis on preserving such rights in our nation’s highest court.”).


65. See, e.g., Center for Biological Diversity, Inc. v. FPL Group, Inc., 83 Cal. Rptr. 3d 588, 595–96 (Cal. Ct. App. 2008) (“While the public trust doctrine has evolved primarily around
Thus, the Hawaii Supreme Court could conclude that our state constitution’s public trust provision—added only recently, and which purported to transform all water rights and natural resources into public property—did not interfere with property rights or upset existing expectations. Because, lo and behold, the century-plus of existing jurisprudence, which recognized private rights in water and natural resources, was simply mistaken and those property owners never actually owned anything at all. As a consequence, we have the public trust doctrine compelling decades’ worth of study before a Kauai family can bottle and sell 645 gallons of water per day—an amount roughly equivalent to a single, residential household in usage. This is a decision that a past Brigham-Kanner Prize winner, who is an expert in the public trust, has characterized as a very unusual application of the public trust doctrine. Thus, my prediction, for what it is worth, is that the public trust doctrine will become the preferred tool for land use control because it can be so powerful, and it takes only a court majority to adopt it and not a legislative majority.

CONCLUSION

Allow me to conclude by noting that Professor Callies’s work and scholarship have been ahead of the practicing bar in the public trust arena, and that (unlike a lot of legal scholarship) we lawyers actually find his writings useful to the practice of law. It reminds me that

[66. See HAW. CONST. art. XI, § 7 (“The State has an obligation to protect, control and regulate the use of Hawaii’s water resources for the benefit of its people.”).]

[67. See McBryde Sugar Co. v. Robinson, 504 P.2d 1330 (Haw. 1973). In Robinson v. Ariyoshi, 676 F. Supp. 1002 (D. Haw. 1987), the U.S. District Court held that the Hawaii Supreme Court’s decision in McBryde was a judicial taking.

[68. See Kauai Springs, Inc. v. Planning Comm’n of Kauai, 324 P.3d 951, 983 (Haw. 2014) (Hawaii’s public trust doctrine requires that when considering whether to issue zoning permits to allow an industrial use on land zoned for agriculture the Hawaii Planning Commission determines whether the applicant’s use of water would affect “the rights of present and future generations in the waters of the state.”).]

this is where we come in as property lawyers: to shape and develop the law in such a way that the paramount importance of property rights is not forgotten but celebrated. It may be an uphill climb but one that is worth pursuing.

Finally, I have a reminder: you don’t need to be a true believer in order to engage, and Professor Callies is a prime example. He certainly didn’t start his career on the side of light. Indeed, one of his first, major scholarly publications, *The Taking Issue*, has been called by one of the people for whom the Brigham-Kanner Prize is named a “propaganda screed” to attack the concept of regulatory takings. But the road to Damascus can be a long one, and Professor Callies eventually—and rightly—came around. A lifetime of teaching and practicing in Hawaii can do that to you. As they say in golf, “It’s not how you drive, it’s how you arrive,” and Professor David Callies certainly has arrived. Land use regulation is here to stay, and its reach is expanding. But, thanks to Professor Callies, so has the notion that property rights are a bulwark of liberty and individual rights and an essential part of the land use calculus. Congratulations, David.

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A BRIEF REBUTTAL FROM CALLIES

CALLIES. I learned the hard way not to rebut early in my career, when I was opposite an assistant attorney for a city. He got a really “rough going” by the three-judge panel. What I should have done (and what I learned to do several years later in Hawai‘i) was get up, introduce myself, ask the court if they had any questions, and then sit down. I didn’t do that. I decided to guild the lily, and the result was that the judges took pity on my opponent. They really dragged me over the coals for thirty-five minutes for so obviously winning, and then getting up there and making things worse. I’m not going to do that, except to say I agree with everything that was said.

But since this is about the future of land use, I would like to mention to everybody, and maybe to alert some of you, that something extremely important is going on right now in another part of the country, in Philadelphia. The America Law Institute (“ALI”) has taken upon itself a Restatement Fourth of the law of property. It’s going to be a ten-year operation; the project is in its third year. There’s going to be six volumes, which is a pretty big Restatement. And there’s going to be an entire volume on land use. So, seven years from now, that makes it about 2025, the ALI will be done with its work. Judges tend to pay some attention to Restatements. It’s likely to have a huge impact on the law of property. Now some of us will be hopefully, or not so hopefully, retired and out of the business. But a lot of folks out there are going to still be in the business of property, property rights, litigation, and teaching, and the Restatement is going to be an important piece of work when it’s done. So watch carefully seven years from now when the ALI finally disgorges the Restatement of Property Fourth, which is likely to have a lot of influence on the law of property, generally. And with that, I suggest that it is likely to have as much impact as anything we will say about property rights here at the Conference, and probably in the next six to seven years.

Thanks very much.
Stationarity—the idea that natural systems fluctuate within an unchanging envelope of variability—is a foundational concept that permeates training and practice in water-resource engineering.¹

Changes in extreme weather events are the primary way that most people experience climate change. Human-induced climate change has already increased the number and strength of some of these extreme events. Over the last 50 years, much of the United States has seen an increase in prolonged periods of excessively high temperatures, more heavy downpours, and in some regions, more severe droughts.²

Playing off a famous and provocative 1966 cover story from Time Magazine that asked “Is God Dead?” a group of scientists proclaimed in 2008 in Science Magazine that “Stationarity is Dead.”³ They uttered that phrase as it pertains to water infrastructure planning and management. Their point was that anthropogenic changes in climate had already rendered invalid the assumptions regarding the extremes in water shortage and abundance on which America’s

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³ Milly et al., supra note 1. For the 1966 cover, see “Time Magazine Cover: Is God Dead?” Time, Apr. 8, 1966.
water projects had been based. The events of the last decade have proved their thesis. Climate extremes are now far greater than those that generations of water experts had planned for—more frequent and extended droughts, more intense rainfall events and floods—with the consequence that a new paradigm of water planning and management is needed.

Events in the physical world are playing out in many ways, creating new occasions for the interplay of governmental action and property rights. This Article will identify two such situations, both related to the operation of major water control facilities, where current and potential alterations to past operational regimes are giving rise to protestations that the governmental responses to changed climatic conditions are takings of private property rights.

I. THE NEW "NORMAL"

As a technical, definitional matter, it may be fair to quibble about whether stationarity is really dead4 and, similarly, there likely will continue to be some people who remain climate change skeptics. What is not open to dispute is the empirical reality that the expected operating parameters of the large water supply and flood control projects in the United States, almost all of which were planned and built forty or more years ago, have not accounted either for the more extreme weather patterns—the intensity of droughts and storms—experienced in the most recent forty-year period, or for the frequency with which the extremes are being felt in many different regions of the nation. These changes in the norms are concisely depicted using maps rather than words. One of the maps depicts changes in flood magnitude over time, and two sets of maps depict predicted mid-twenty-first century water shortage and water consumption patterns,

4. See Harry F. Lins, A Note on Stationarity and Nonstationarity, WORLD METEOROLOGICAL ORG. (2012), http://www.wmo.int/pages/prog/hwrp/chy/chy14/documents/ms/Stationarity_and_Nonstationarity.pdf. Dr. Lins is the president of the World Meteorological Organization Commission for Hydrology and a hydrologist at the U.S. Geological Survey. After making a strong argument that the frame of reference affects the characterization of a system, as stationary or not, one of Dr. Lins’s major conclusions is that even stationary systems are not static. Id. at 5.
with and without climate change. All of the graphics are selected from the 2014 *National Climate Assessment*.

**Trends in Flood Magnitude**

![Map showing trends in flood magnitude](image)

**Figure 1.** Trend magnitude (triangle size) and direction (upward pointing arrow = increasing trend, downward pointing arrow = decreasing trend) of annual flood magnitude from the 1920s through 2008. Local areas can be affected by land-use change (such as dams). Most significant are the increasing trend for floods in the Midwest and Northeast and the decreasing trend in the Southwest.


Water Supplies Projected to Decline

Figure 2. Climate change is projected to reduce the ability of ecosystems to supply water in some parts of the country. This is true in areas where precipitation is projected to decline, and even in some areas where precipitation is expected to increase. Compared to 10% of counties today, by 2050, 32% of counties will be at high or extreme risk of water shortages. Projections assume continued increases in greenhouse gas emissions through 2050 and a slow decline thereafter (A1B scenario). Numbers in parentheses indicate number of counties in each category.7

Project Changes in Water Withdrawal

Figure 3. The effects of climate change, primarily associated with increasing temperatures and potential evapotranspiration, are projected to significantly

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increase water demand across most of the United States. Maps show percent change from 2005 to 2060 in projected demand for water assuming (a) change in population and socioeconomic conditions based on the underlying A1B emissions scenario, but with no change in climate, and (B) combined changes in population, socioeconomic conditions, and climate according to the A1B emissions scenario (gradual reductions from current emission trends beginning around mid-century).

Hydroclimate instability threatens to throw into chaos the nation’s water management system, particularly water supply for reclamation projects and lack of storage capacity for flood control. Unless or until those recent extreme weather patterns go quiescent, operators of major water projects have to review and revamp their operating procedures to deal with more frequent extreme weather events. With that awareness even inaction has to be considered a conscious choice among alternatives, as water managers chart the way in which the facilities under their control will respond to the threats and stresses of too little and too much water.

II. HYDROCLIMATE FALLOUT FOR WATER MANAGEMENT AND WATER USERS

The ramifications of hydroclimate instability reach beyond the operation of water supply and control facilities to encompass regulatory choices and legal doctrines and decisions. One of the essential functions of government is to respond to natural disasters and, when possible, to prevent or minimize their effects. Floods and droughts are prime territory for both proactive and reactive governmental interventions. The police power authority over health, safety, and welfare


9. There are also significant water quality effects that will not be considered in this Article attributable to hydroclimate instability. These include increased sedimentation, nitrogen, and other pollution loading. See, e.g., NATIONAL CLIMATE ASSESSMENT, supra note 2, at 70.

10. To be sure, some reviews are underway, but it remains uncertain (and in many settings, doubtful) whether the authorities under which water managers operate are sufficiently broad to allow the managers to consider all of the ramifications of their choices. See, e.g., Reed D. Benson, Reviewing Reservoir Operations: Can Federal Water Projects Adapt to Change?, 42 COLUM. J. ENVTL. L. 353 (2017). See generally KATHRYN FIRSCHING, U. S. Army Corps of Engineers, in LAW OF WATER RESOURCE UTILIZATION: IMPACT OF FEDERAL ENVIRONMENTAL LAWS (Am. Bar Ass’n, Robert Abrams & Latravia Smith, eds., forthcoming 2018).

11. Wildfire mitigation and response is likewise a threat of changed dimension in the most recent decade. Although not an intended topic in this Article, wildfire policies are another
provides the groundwork for laws and regulations addressing the subject. Similarly, numerous laws charge federal and state officials with responsibilities related to the protection of natural resources for the public benefit. A considerable number of those laws, such as the federal Clean Water Act (“CWA”) or state minimum levels and flows legislation, directly address governance of the water resource. Other laws, such as the federal Endangered Species Act (“ESA”)12 and state counterparts, address water indirectly, as critical habitat that must be maintained to avoid jeopardy to listed species.

The reach of the myriad of laws promoting the public interest often overlaps the sphere of the project-specific authority granted to water managers, and the directives of the two sets of laws are not always unitary. Officials of the United States Bureau of Reclamation (“Bureau of Reclamation”) and the United States Army Corps of Engineers (“USACE” or “Corps”) are required to operate their projects in conformity with the congressional authorizations pursuant to which the projects were funded and built. Concurrently, those same officials are required to obey the CWA, ESA, and a host of other laws. State officials, such as those in departments of natural resources, are similarly constrained: many of the dictates of those federal laws circumscribe what state officials can do in pursuance of their organic state-law mandates. In addition, their state constitutions and legislation frequently will prescribe other general duties in relation to water resources and the public’s interest in those resources.

A second constituency affected by the ramifications of hydroclimate instability is water rights holders, both riparians and appropriators. Their interests are affected by the threats of water shortages or overabundance and, necessarily, by the water managers’ responses to those conditions. Changes in the water management status quo affects rights holders’ interests.

On the shortage end of the scale, the most obvious example of adverse impacts falls on those having rights to divert and use water whose diversions are curtailed or limited in times of water shortage. There is a considerable controversy regarding governmental responses

to climate instability that results in reductions in water availability to holders of water rights. Legally, this translates into claims that such actions constitute a taking of property, or whether they are permissible, noncompensable, regulations. On the superabundance end of the scale, the class of interested property holders extends far beyond water users to include those living in the flood plains of rivers who are protected by dams and levees. Still farther, it includes the class of people owning property in communities whose water supply is linked to storage in a reservoir, where dam operators’ responses to particular hydroclimate threats can alter the reliability or force a reduction of that supply. Although less frequent, these more diffusely affected parties also have pursued takings claims.¹³

Before going forward, return for a moment to the initial point about the incorrect assumptions that undergird most of America’s water impoundment and control facilities. The engineers were not the only ones who predicated their structures on incorrect assumptions: the legal community did as well. Water laws that allocate the use of water and the property rights spawned by those laws relied on similarly flawed assumptions regarding stationarity and water availability. The cause of the changed circumstance, whether anthropogenic¹⁴ or not, is immaterial to the claim that the laws were established with flawed assumptions.¹⁵ Present water laws have their

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13. A high visibility example of such a takings claim due to downstream inundation was presented in *Ark. Game & Fish Comm’n v. United States*, 568 U.S. 23 (2012). This Article will not consider issues of municipal and industrial water supply.

14. Consider, for now, two quick examples of anthropogenic changes that radically shift the historic patterns of use that were expected when the relevant legal doctrines developed. At the time U.S. water laws were formed and became the foundational doctrines of riparianism and prior appropriation, who could have foreseen the technological and economic advances, such as the centrifugal pump, electrification of the countryside, and the rise of agribusiness serving international as well as local, domestic markets? In combination, those advancements have created the basin-wide overdraft of the massive Ogallala Aquifer. Similarly, who would have expected that urbanization, by hardening and encroaching on flood plains, would double hundred-year flood peaks? See G. E. Moglen & D. E. Shiver, *Methods for Adjusting Rural Peak Discharges in an Urban Setting*, U.S. Geological Surv. Sci. Investigations Rep. 55 (2006), https://pubs.usgs.gov/sir/2006/5270/.

15. The human role in the changed conditions has relevance in assessing the relative strength of claimed entitlements based on property rights. For example, in some instances the changes being considered are not those having to do with climate. They are instead human exacerbations that cause flooding through development and channel sedimentation and cause dewatering of riverine environments through diversions and consumptive water use on a scale that was unimaginable at the time when key elements of American water laws were established. The law of property has always recognized, in numerous forms, the doctrine of changed
genesis in the distant past. Riparian doctrine predates the founding of the nation, having been carried to the New World with the colonists as a doctrine having a long English history. Prior appropriation is often thought to have its roots in the pragmatic, customary rules of the mid-nineteenth-century gold rush mining camps, but it also has deeper roots in the Spanish settlement of the American Southwest, which can be traced back from there to the time when the Moors ruled in Spain.16 Today’s far more volatile hydroclimate is not the one they considered when they developed legal rules for the allocation and use of the water resource.

Both riparianism and prior appropriation have demonstrated a considerable ability to adapt to changing conditions and modes of water use. This is most pronounced in regard to integrating groundwater and surface water law doctrines as the science of hydrogeology provided an ever more nuanced understanding of the physical interconnection of the two types of water sources.17 However, like the engineers, the legal community, which created the laws governing the use and allocation of water, can hardly be expected to have a more foresighted view of water availability than climatologists, hydrologists, and other physical science and engineering experts. The law will adapt to these changes as well, and with that in mind, this Article will consider whether some of the currently claimed property rights should continue to receive unchanged recognition, given the changed state of the system in which the doctrines operate. To the extent that legal norms incorporate moral norms, the water resource entitlements and expectations that the law condoned and promoted in an earlier era and under a more stable hydroclimate may have lost the footing on which their continued validity stands.


III. A Capsule Review of Takings of Property Doctrine, and How Water-Related Takings Claims Arise

Cases raising claims that private property has been taken without just compensation fall into three major categories: regulatory takings, physical invasion takings, and exactions. After an initial inquiry to ascertain that the claimant has a “cognizable property interest” affected by a governmental action, the issue turns to whether a compensable taking has occurred. At that point, the legal analysis applied in each of these instances is distinctive, and the result in terms of likelihood of success for the claimant vary greatly. When the facts of a case demonstrate either a permanent physical invasion or a regulatory “wipeout,” the claimants have a high probability of success, assuming ripeness and the absence of other defenses. The analysis of non-wipeout regulatory takings and exactions both proceed under multifactor rubrics that make a claimant’s position more difficult to sustain. Exactions have a largely distinctive doctrine and, although mentioned and summarized, that analysis has yet to find its way into the scenarios being considered here.

A. Physical Invasion Takings: Permanent and Temporary

These claims arise when the government has physically taken possession of the property of a claimant either by invasion of the parcel or by taking away or depriving the claimant of a tangible interest. In the various water contexts, the invasion could be by flooding, and the deprivation of the tangible interest could be denying the claimant a water use to which the claimant has a protected property right.

18. See, e.g., Klamath Irrigation v. United States, 129 Fed. Cl. 722, 729 (2016). In a later phase of that litigation, the irrigator claimants were found to lack water rights that would entitle them to receive water, due to the presence of a senior right that required the water to support tribal fishery. Baley v. United States, 2017 WL 4342771 (Fed. Cl. Sept. 29, 2017).

19. ROBERT MELTZ, CONG. RESEARCH SERV., RL31796, THE ENDANGERED SPECIES ACT (ESA) AND CLAIMS OF PROPERTY RIGHTS “TAKINGS” 5–6, (2013), https://fas.org/sgp/crs/misc/RL31796.pdf. In ESA takings-of-property challenges, Meltz makes a seldom-observed point that many of those cases fail due to a lack of ripeness because there are additional steps that can be taken in agency proceedings before the loss of the property interest is attributable to governmental action. Id.

20. Most water rights are usufructuary in nature, and ownership of the corpus of the water remains in the state, although the use, such as bottling spring water, may convert the...
The doctrine here is pretty simple—if the owner is permanently deprived of the property, it is a taking; if the owner is temporarily deprived of the property, the case is analyzed using the test applied in cases of claimed regulatory takings. The Supreme Court in *Arkansas Game & Fish Commission* (“AG&FC”) stated:

> True, we have drawn some bright lines, notably, the rule that a permanent physical occupation of property authorized by government is a taking. So, too, is a regulation that permanently requires a property owner to sacrifice all economically beneficial uses of his or her land. But aside from the cases attended by rules of this order, most takings claims turn on situation-specific factual inquiries.\(^{21}\)

The Court further notes that “temporary limitations are subject to a more complex balancing process to determine whether they are a taking.”\(^ {22}\)

In the water rights area, cases involving takings of property based on a reduction in water rights are, up to this time, very few. In the only such case that has produced an opinion at the circuit court level, *Casitas Municipal Water District v. United States*,\(^ {23}\) the United States Court of Appeals for the Federal Circuit treated a reduction in allowable use of water as a physical invasion case, and treated any deprivation of water as a permanent taking of that quantum of water,\(^ {24}\) a position that the dissenting judge found untenable.\(^ {25}\) In most instances contained water to private property. As a fairly recent development, Texas appears to recognize the right of the overlying owners to groundwater. See Edwards Aquifer Auth. v. Day, 369 S.W.3d 814 (Tex. 2012).


\(^{23}\) Casitas Mun. Water Dist. v. United States, 543 F.3d 1276 (Fed. Cir. 2008).

\(^{24}\) *Id.* at 1295–96.

\(^{25}\) The dissent stated:

> For this to be a physical taking requires expanding the definition to the point of erasing the line between physical and regulatory takings. Indeed, any property use restriction—whether on land, air, or water, and whether temporary or permanent—deprives the owner of a pre-existing right to develop at least a portion of his property for certain economic uses. Yet in Tahoe-Sierra, the Supreme
thereafter, the Court of Federal Claims would be erroneous to con-
tend that the position is well-established, especially in light of the
Supreme Court's decision in AG&FC to remand and have the lower
court analyze the non-permanent invasions by flooding using the
regulatory takings test.

B. Regulatory Takings: “Wipeouts” and Lesser Restrictions

These claims arise when governmental action limits the uses that
an owner may make of his or her burdened property. As noted above,
a similar analysis is used when physical invasions are temporary.
This type of takings claim is similarly bifurcated between so called
“wipeouts,” in which the regulation is so burdensome that the regu-
lated parcel as a whole has no remaining value, and impositions
which may still be found to be takings, but are evaluated using a
multifactor balancing test. The balancing test that is the contempo-
rary standard is drawn from the Penn Central case, which involved
development restrictions placed on Grand Central Station under
New York City’s historic preservation laws. The Court found:

In engaging in these essentially ad hoc, factual inquiries, the
Court’s decisions have identified several factors that have partic-
ular significance. The economic impact of the regulation on the

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26. Casitas demonstrates the lack of a consistent judicial approach. It was not a unani-
mous opinion. Also, the Casitas case was decided in the Court of Federal Claims by Judge
Wiese. Wiese had earlier adopted the physical invasion approach in Tulare Lake Basin Water
Storage District v. United States, 49 Fed. Cl. 313 (Fed. Cl. 2001). Due to the Supreme Court’s
decision in Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 535 U.S.
302 (2002), Judge Wiese changed position and rejected the physical invasion analysis to find

27. Casitas itself did not result in a recovery for the water user because, on remand, Judge
Wiese found no interference with the state law property right and dismissed the case without

28. The seminal case on this issue is Lucas v. South Carolina Coastal Council, 505 U.S.

29. The balancing test that is considered to be the standard is drawn from Penn Central
claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. A “taking” may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.30

In both the flood control context and the water shortage context, it is easy to imagine governmental actions that could trigger regulatory takings claims. For example, in an effort to increase the flood storage in anticipation of more frequent, extreme storm events, a federal dam operator could, depending on reservoir conditions, release water in larger quantities than the historic norm, resulting in some marginal inundation of downstream areas that had remained dry in the past.31 Similarly, in an effort to protect fisheries, prevent excessive sedimentation, and enhance other riparian values and uses, a state might set and enforce a minimum flow requirement; the effect of which is to prevent water users from withdrawing as much water as they would otherwise be allowed to withdraw in the absence of the minimum flow protection.32

C. Exactions

These claims arise when the government requires a property owner to pay a fee, or dedicate a portion of the property to public use, as a condition for receiving governmental permission to engage in regulated land development activity. In exactions cases, the courts make a two-pronged inquiry that measures, first, the “essential nexus”

30. Id. at 124 (citations omitted).
31. This scenario reflects several features of the AG&FC case, Ark. Game & Fish Comm’n v. United States, 568 U.S. 23 (2012). The purpose of the changed flow regime in AG&FC, however, was a response to a request from a group suffering water inundation losses that could be avoided by altering the release pattern, while the changed flow regime raised in the scenario being presented in the text is a part of an overarching regional flood control strategy.
32. There are no cases directly on point, but there are some cases where minimum flow requirements have triggered more indirect impacts that have been challenged as takings by property owners. See Whatcom Cty. v. Hirst, 186 Wash. 2d 648 (2016) (regarding the prevention of residential development due to the inability to pump a quantity of groundwater that was otherwise exempt from regulation due to the hydrologic link to a stream having a minimum flow requirement that was not being met).
between the condition and the underlying purpose of the regulatory regime giving rise to the exaction,\textsuperscript{33} and second, whether the burden on the parcel is roughly proportionate to the projected impacts of the proposed development.\textsuperscript{34} To date, there are no governmental responses to hydroclimate stresses that have resulted in takings claims based on an excessive exaction theory.\textsuperscript{35}

IV. THE VIEW FROM THE FEDERAL DAM OPERATOR’S PERSPECTIVE

For the moment, do not consider legislated purposes and policies that may act as a constraint on how dams are operated.\textsuperscript{36} Instead, set as the object of the dam operator the maximization of the total net social benefit of the dam as an asset of the nation. In charting an operations plan, the focus would be on events that have the potential to have the greatest impact financially and socially on the citizenry. Droughts and floods, because of the broad regionally disruptive impacts they cause, are the two starting points in building an initial, somewhat simplistic operating plan.

Operators of the dam would (1) seek to maximize the amount of water retained behind the dam in anticipation of drought conditions, to be able to release the water to ameliorate shortfalls in municipal, industrial, irrigation, and environmental supplies. Contrastingly, those same dam operators would (2) seek to reduce the amount of

\begin{enumerate}
\item Dolan v. City of Tigard, 512 U.S. 374 (1994).
\item Hypotheticals raising such a claim can be constructed. For example, if a state sought to increase instream flows by conditioning approval of a water user’s change request based on a dedication of a portion of the water right to instream flow, an exactions taking claim might be lodged. Such an exaction would seem to easily satisfy the nexus prong and, depending on the proportion of water dedicated to instream flow, likely to withstand the proportionality test as well. In the wake of Hurricane Harvey, it seems plausible, if not likely, that exactions for flood control may be levied due to the exacerbation of flooding attributable to hardening of the flood plain caused by the developmental activity. See, e.g., C. P. Conrad, Effects of Urban Development on Floods, USGS: U.S. Geological Survey, Fact Sheet 076-03 (Nov. 29, 2016), https://pubs.usgs.gov/fs/fs07603/ (study of the effects of flood plain hardening by development).
\item Federally funded dams built by the U.S. Army Corps of Engineers are congressionally authorized to serve particular purposes that often include flood control. A dam authorized for flood control also may include additional authorized purposes, such as navigation or municipal supply. Disputes over the authorized purposes can have immensely important consequences, such as in resolving whether municipal supply was an authorized purpose of the Buford Dam and its reservoir, Lake Lanier, which had become the mainstay of Atlanta’s water supply. See In re MDL-1824 Tri-State Water Rights Litigation, 644 F.3d 1160 (11th Cir. 2011).
\end{enumerate}
water retained behind the dam in anticipation of potential flood events, thereby providing storage capacity to be able to capture water that otherwise risks flood damage. Seasonally and historically, many locales follow a general strategy of lowering storage in winter to prepare for snow melt and spring rains and then, once the risk of flooding lessens, of retaining as much of the spring runoff as possible for release in late summer if supplies are short. Treat that pattern as the historic status quo that those owning parcels downstream of the dam have come to expect. Recalling the stationarity discussion set out at the very beginning of this Article, when the dam was built the assumption was that rainfall patterns would be variable from year to year, but the variations would be within predictable limits of storage capacity and ability to release water that the dam was engineered to handle.

In the current period of hydroclimate instability, a period that includes more severe storms and more protracted droughts, the old pattern of storage and release very likely is no longer appropriate. The winter and early spring releases might need to be greater to ensure that space is available to store more water, to be prepared in case a spring storm is more extreme than historic highs. At the same time, however, there will be a countervailing pressure of wanting to increase the amount of water held in storage to hedge against more intense droughts than have occurred in past years. Due to the difficulty of accurately predicting the weather as climate variability increases, the dam operator is going to respond in more extreme ways to short-term weather phenomena—knowing that a storm system might be more severe than in the past, for example, the dam operator would release water faster than under the old pattern of releases. When that water is released, it has to go somewhere and that somewhere is downstream in greater quantities than the historic norm. That alteration in releases may mean that the greater volume of water inundates downstream areas that had not flooded at that time of year in the past, giving rise to claims that the dam operator is taking the property of the downstream landowners whose parcels flood as a result.\(^{37}\) At the opposite end of the spectrum, refusing to deliver

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\(^{37}\) Although the reasons for the change in the release pattern were not associated with the loss of stationarity, the timing and duration of downstream flooding in the wake of a changed release pattern was what precipitated the takings claim in *Ark. Game & Fish Comm’n v. United States*, 568 U.S. 23 (2012).
water to irrigators in a time of anticipated (or actual) extreme drought interferes with the activities of those who had benefitted from the releases of that water in the past.\footnote{38}{See, e.g., Casitas Mun. Water Dist. v. United States, 543 F.3d 1276 (Fed. Cir. 2008).}

Now factor in additional benefits that can be obtained from the dam. These include maintaining navigation channels, hydropower generation, recreation, and support of the environment. Only a moment’s reflection will reveal that a release pattern optimizing flood- and drought-amelioration operations differs from a release pattern optimizing other forms of benefits. Navigation tends to require releases to supplement low flows in the natural hydrograph to maintain water levels downstream. Navigation may also require water retention to ensure navigability of areas above the dam.\footnote{39}{The USACE operation of the Missouri River dams to support navigation was a major point of controversy raised by the upstream states’ desire to operate the system for recreational benefits and the environmentalists’ desire to protect endangered species. This resulted in extensive litigation. The most recent judicial opinion reviewing the USACE’s Master Manual for the Missouri River and the choices made by the operating plan gives great deference to the USACE. See In re Operation of the Missouri River System Litigation, 421 F.3d 618 (8th Cir. 2005), cert. denied, 547 U.S. 1097 (2006).} That flow pattern competes with upstream flatwater recreation and maximizing or minimizing storage as a hedge against high- and low-water extremes. Hydropower tends to be maximized by keeping the water level behind the dam high, to increase head, and timing the releases to align with power peaking, which is the time the price obtainable on the market is highest.\footnote{40}{This aspect of dam operations was an important element in the Apalachicola-Chattahoochee-Flint (“ACF”) controversy. In the dam’s planning process and throughout virtually all of the project’s existence, a small minimum off-peak flow from the Buford Dam was set at a mere six hundred cubic feet per second to retain as much water as possible in storage, to be released when power generation would be most advantageous. See In re MDL-1824 Tri-State Water Rights Litig., 644 F.3d 1160, 1168 (2011). One of Florida’s key litigation objectives was to increase the volume of the continuous release as a means to increase flows in the Apalachicola River.}

The most obvious conflicts are between environmental protection and all other purposes, with the possible exception of recreation. Environmental values, especially when endangered species are present, often are enhanced by trying to maintain the river’s historic hydrograph (the disruption of which may have been caused by the dam’s presence). This will mean reducing large volume human diversions from already low water in droughts and having high spring pulse flows that clear sediment and flood some riparian lands to ensure
appropriate breeding and sheltering habitats that the native species have adapted to over the millennia. Yet, those very same actions, however, reduce the water still in storage just as the traditionally higher water demand summer months are approaching. These conflicts are the ones seen in highest relief both in the ESA-irrigation conflict situations and in the return to more natural conditions pursued by the USACE on the Missouri River.

When more extreme highs and lows are added by the changed weather patterns, the difficulty of designing an operating plan that strikes the proper balance among all of the competing interests increases. This is seen in AF&GC, where a change in the release pattern caused extended seasonal inundation 115 miles downriver, making any change in the release pattern run the risk of adversely affecting some downstream interests. Recognizing that dam operations inevitably involve trade-offs among the many purposes that might be served, every decision by a dam operator regarding release patterns will likely advantage some users of the resource complex and disadvantage others. It would seem odd, however, for takings law to transform the dam operator into a guarantor of all reliance interests that might be disrupted by a failure to maintain a particular release pattern. This realization affects the reasonableness of property owners’ expectations, particularly when they insist on maintaining the status quo that provides them with an advantage but reduces the benefits to others that could have been realized by changes in dam operations.

It is time to add another consideration to the calculus facing the federal dam operator—the choices regarding the policies to be pursued are constrained significantly by the statutory directives issued by Congress to the dam operator and by the statutes that authorized


42. See Ideker Farms v. United States, 2018 WL 1282417 (Fed. Cl.) (takings challenge to changes in Missouri River flood-management operations). In the Ideker Farms example, some of the changes in USACE operations were ESA-mandated changes that sought to mimic the natural hydrograph for the benefit of the endangered pallid sturgeon and restore portions of the floodplain to more natural conditions that would improve sturgeon breeding and create endangered bird-species habitat. To a degree, those purposes compete with obtaining absolutely maximal flood protection. The USACE contends that the extraordinary precipitation pattern in the time period covered by the lawsuit would have resulted in the flooding of the claimants’ lands even in the absence of the changes in operations.
the construction of the dam. The federal dam operator has only the authority Congress has given and must follow congressional directives. Using the Missouri River basin as an example, for several decades the congressional mandate was largely monochromatic, making flood control the first priority and navigation the second. Beginning in 1973, the USACE, together with the rest of the federal government, was required to fulfill its duties in conformity with the Endangered Species Act (“ESA”). Even if the USACE did not have to go back and revisit its pre-1973 dam building and flood protection actions under that law, all actions taken after passage of the ESA are subject to its strictures. This would include any revisions to the Master Manual for the Missouri River, controlling dam operations and any construction projects undertaken, even projects that had been approved prior to the passage of the Act.43

Section 7 of the ESA requires all federal agencies to ensure that any action authorized, funded, or carried out “is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species.”44 In the 1980s, the United States Fish and Wildlife Service (“FWS”) listed three species in portions of the Missouri River basin as threatened or endangered. The listings had the effect of requiring compliance with the ESA, which resulted in consultation under Section 7 of the ESA and eventually took the form of providing suitable habitat for those species, set out as the Reasonable and

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43. See, e.g., TVA v. Hill, 437 U.S. 153 (1978) (finding that the dam that had been authorized and started prior to the passage of the ESA was subject to ESA for remaining stages of construction). Even before ESA jeopardy opinions imposed habitat-supportive requirements on the USACE, Section 601 of the Water Resource Development Act of 1986 had launched the Corps on the path of habitat restoration for the damage caused by the Bank Stabilization and Navigation Project, which had been an ongoing aspect of the federal flood control program for seven decades.


45. In re Operation of Missouri River Sys. Litig., 421 F.3d 618, 631 (8th Cir. 2005) (finding Section 7 of the ESA applies where USACE is able to exercise its discretion in determining how best to fulfill the statutory purposes of the Flood Control Act of 1944, 16 U.S.C.A. § 460d (2018)). Case law involving the Bureau of Reclamation dams has ruled that whenever the action being taken by the agency is an action to which the agency has no discretion, the agency need not comply with the ESA. Compare Nat. Res. Def. Council v. Houston, 146 F.3d 1118, 1125–26 (9th Cir. 1998) (finding no discretion and no ESA obligation), with Nat. Res. Def. Council v. Jewell, 749 F.3d 776, 785 (9th Cir. 2014) (finding that Section 7 of the ESA applies where the Bureau of Reclamation has some discretion in negotiating renewal of contracts with water rights holders).
Prudent Alternatives ("RPAs") in FWS biological opinions. This additional legal requirement that supplemented the authority granted by the Flood Control Act put the agency in a potentially awkward position. Despite its flood control mandate, some of the steps required by the ESA could reduce the flood control protection previously provided.

As would be expected, the role of Congress in shaping flood control, navigation, and environmental protection in the Missouri River basin is central: the USACE is empowered to do only what Congress authorizes. Congress, the legislative branch, sets the policy to be followed by the agency. Of particular concern in this setting are American constitutional norms, which subject the implementation of those policy decisions to judicial review to ensure compliance with the congressional command, and to ensure that private property is not taken for public use without just compensation. Policy choices that rationally prefer one activity over another are given a wide berth by the Supreme Court. The leading case is *Miller v. Schoene.* In that case, cedar trees were carriers for cedar-apple rust, a fungal disease that was harmless to cedar trees but fatal to apple trees. The Virginia legislature opted to protect the apple trees, literally at the expense of the owners of cedar trees. The legislation required the owners of cedar trees to cut and dispose of cedar trees on their own property at their own expense to protect the state’s apple growers. The Court perceived this as a triage nuisance decision and ruled unequivocally that a reasonable policy choice in a triage situation is not a taking of property:

> When forced to such a choice the state does not exceed its constitutional powers by deciding upon the destruction of one class of property to save another which, in the judgment of the legislature, is of greater value to the public. It will not do to say that the case is merely one of a conflict of two private interests and that the misfortune of apple growers may not be shifted to cedar owners by ordering the destruction of their property; for it is obvious that there may be, and that here there is, a preponderant public concern in the preservation of the one interest over the other. And where the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property.

We need not weigh with nicety the question whether the infected cedars constitute a nuisance according to the common law; or whether they may be so declared by statute. For where, as here, the choice is unavoidable, we cannot say that its exercise, controlled by considerations of social policy which are not unreasonable, involves any denial of due process.47

*Miller v. Schoene*, though not widely cited, is not an outlier in Supreme Court takings jurisprudence. Cases where a building and its contents are sacrificed to prevent further spreading of a fire have long been acknowledged as not giving rise to governmental liability.48 The logic of these cases militates strongly for a finding that governmental responses to climate extremes are unlikely to be easily categorized as takings of property. This especially is the case when the claimed property damage comes about as a result of the changed operations of a water control facility responding to climate extremes that were not anticipated when the projects were being built.

The deference given to governmental triage decisions by the Supreme Court has not blunted the efforts to seek takings redress for flooding events occurring in the Missouri River basin after the ESA impelled changes in USACE flood control operations. A recent, pending case presents precisely those issues. In *Ideker Farms v. United States*,49 claimants’ lands had not previously suffered major flood damage in the decades when the USACE had single-mindedly pursued flood control and navigation. Those lands, however, experienced major flooding and, in some cases, sand deposition during and after extreme weather events in the years after the USACE began to pursue Missouri River habitat restoration. *Ideker Farms* is an outgrowth of *AG&FC* in two regards. First, and correctly, the *Ideker Farms* claimants rely on the holding of the *AG&FC* case that removes the barrier to takings recovery for flooding that is not permanent. Second, and less certainly correct, the *Ideker Farms* court relied on the theory that takings liability can be based on a foreseeability standard rather than an intentionality standard.50 That approach grows principally out of overbroad language in the decision of the Federal

47. *Id.* at 279–80 (citations omitted).
50. *Id.* at *16.
Circuit opinion in *AG&FC* on remand. The standard applied by the Federal Circuit is essentially that of negligence; that is to say, the government is liable for inundation damage when that damage is a foreseeable consequence of the government’s action. Were that the standard, the USACE would become a de facto guarantor of all such losses, even though the actions were taken for a public purpose. Congress has clearly proscribed tort recovery for flood control operations by granting broad immunity for those operations. The intentionality standard that has been applied in takings cases requires what Professor Sandra B. Zellmer has termed, “substantial certainty.” There is absolutely no indication that *AG&FC* intended to change that. Justice Ginsburg’s unanimous opinion flatly states:

We rule today, simply and only, that government-induced flooding temporary in duration gains no automatic exemption from Takings Clause inspection. When regulation or temporary physical

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51. In an earlier article, this author has described the overbroad language of the Federal Circuit in *AG&FC* following the remand from the Supreme Court (Ark. Game & Fish Comm’n v. United States, 736 F.3d 1364 (Fed. Cir. 2013)) as follows:

The Federal Circuit finding of a taking on remand adopted broad language that tended to obscure the absence of issues not preserved due to the Corps’ litigation strategy that might have averted a successful takings claim. As written, the Federal Circuit opinion suggests that an inundation claimant can recover for a taking of property by proving only an objective and foreseeable harm due to increased flooding linked to a pattern of releases that confers a benefit of lesser flooding on others situated below a dam. The Federal Circuit’s use of foreseeability badly misstates the rules laid down by the precedents upon which it relied.


52. On April 20, 2018, shortly after the *Ideker Farms* decision, the U.S. Court of Appeals for the Federal Circuit handed down its decision in *St. Bernard Parish v. United States*, 887 F.3d 1354, 2018 U.S. App. LEXIS 10023, in which claimants’ standard of proof on the issue of causation was set out in a manner that may require reconsideration of that issue in the ongoing portions of *Ideker Farms*. That court, in the context of flooding attributed to the Mississippi River Gulf Outlet during Hurricane Katrina stated, “the correct legal standard [requires] that the causation analysis account for government flood control projects that reduced the risk of flooding.” *Id.* at *2. To properly apply that standard, the governmental actions must be viewed in their entirety, including consideration of the parcel’s propensity to flood before any governmental action. *Id.* at *16. In *Ideker Farms*, that will require proof of historic conditions that obtained before any federal activities were taken to prevent flooding on the Missouri.


invasion by government interferes with private property, our decisions recognize, time is indeed a factor in determining the existence vel non of a compensable taking.56

V. THE EVOLUTIONARY IMPETUS OF CHANGED PHYSICAL CONDITIONS ON PROPERTY LAW

Property law evolves to meet the needs of society. Water law is one of the best proving grounds for that proposition as its legal doctrines change instrumentally to meet the most pressing needs of society.57 Take a traditional property right as fundamental as the right to exclude others from one’s land. When protection of that sacrosanct principle in the water law arena became sufficiently antithetical to the public good, it was jettisoned with barely a second thought by the Supreme Court of the Colorado Territory in 1872. The state was in its early phases of settlement, and the settlers locating on the east slope of the Rockies in the region known on the maps as the “Great American Desert” were faced with arid conditions that made dry-land farming untenable. The region’s streams and rivers were spaced far apart, meaning that water could not be diverted from rivers and brought to the non-riparian lands for irrigation without trespassing on the lands of riparians and others located closer to the watercourse. That meant vast tracts of land would be uninhabitable until the invention of the centripetal pump made large volume groundwater pumping technologically feasible roughly seventy-five years hence. The law recognized the conditions and changed. The court summed it up in a single sentence:

In a dry and thirsty land it is necessary to divert the waters of streams from their natural channels, in order to obtain the fruits of the soil, and this necessity is so universal and imperious that it claims recognition of the law.58

57. See, e.g., Robert Abrams, Charting the Course of Riparianism: An Instrumentalist Theory of Change, 35 WAYNE L. REV. 1381 (1989). The Google online dictionary defines instrumentalism as “a pragmatic philosophical approach that regards an activity (such as science, law, or education) chiefly as an instrument or tool for some practical purpose, rather than in more absolute or ideal terms, in particular.” Instrumentalism, GOOGLE ONLINE DICTIONARY, https://www.google.com/search?q=google+online+dictionary&ie=utf-8&oe=utf-8&client=firefox-b#dobs=instrumentalism.
The holding in that case allowed private condemnation of an easement over the objection of the landowner across whose land the canal would run. With equal aplomb, many of the states of the West that had initially recognized riparianism as their water law legislatively abolished riparianism in favor of prior appropriation. That radical revision of property rights was not found to be a taking of the rights of the riparians.59

What is today’s reality? What are the pressing interests of the community at large? Are the extraordinarily strong property rights being claimed by prior appropriators suitably viewed as inviolable without being a taking of property, or can they be adjusted instrumentally as a response to new understandings of ecology and hydroclimate instability? Keep in mind, here, that changes in conditions and attitudes are not always one-way ratchets that expand public rights at the expense of private property. *AG&FC* added protection of private property by discarding an older Supreme Court precedent, *Sanguinetti v. United States*,60 which had required that inundations be permanent to qualify as takings.61 At the same time, however, *AG&FC* required non-permanent inundations to be analyzed using *Penn Central* principles, rather than *Loretto* principles. By a parity of logic, *AG&FC* extends to the water shortage situation and calls for using the *Penn Central* balancing tests and not the permanent physical invasion rubric that would treat them as per se takings. This is particularly appropriate in the case of analyzing temporary governmental reductions in water deliveries, which are far less physically invasive than the deposit of flood waters. Beyond that, the newly emergent exigencies of hydroclimate instability bring the *Miller v. Schoene* principles into play.

Looking at the water shortage aspects of this discussion, the property rights being claimed are quite extraordinary. Consider, first, the

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59. See, e.g., Hough v. Porter, 95 P. 732 (Ore. 1908). On the topic of how the western states justified the renunciation of riparianism, see A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES §§ 5.5–5.10 (2017). Only Oklahoma has found that the elimination of residual (unexercised) riparian rights, to make use of water, constitutionally problematic. See Franco-American Charolaise Ltd. v. Okla. Water Res. Board, 855 P.2d 568 (Okla. 1990). California and Nebraska have what are considered dual systems that address the issue in less than fully satisfying ways. See TARLOCK, supra § 5.13.


61. That was the holding below, in *AG&FC*. See Ark. Game & Fish Comm’n v. United States, 637 F.3d 1366 (Fed. Cir. 2011), rev’d, 568 U.S. 23 (2012).
The unusual nature of the rights claimed to have been taken in cases like *Tulare Lake*, *Klamath*, and *Casitas*. The entire prior appropriation system operates as a perpetual grant of public resources for the benefit of holders of appropriative rights, the vast majority of whom are private parties profiting from the use, without paying anything for the right to use the water resource itself. Once established, there is no time limit on the right—it functions as a permanent alienation by the government of a portion of each year's available water. The effect of treating even a temporary interruption of the right to divert water, in order to protect important public interests, as a physical invasion is also quite extraordinary. The prior appropriation system awards rights to take that water in a priority order and on a perpetual basis with no concern for the potentially harmful impacts of that activity on the resource base and the interest of the general public. That absolute private control of the water is claimed even when its exercise results in significant public harms. Throughout the West, streams have been dewatered by the actions of prior appropriators, at times harming threatened and endangered species and other riparian ecosystem values. Moreover, the resource over which the private owners are claiming dominion is a publicly owned public resource, which the state administers as a trustee for the benefit of all of its citizens.

Recalling the background principles of property and nuisance law, these rights not only should be, but are subject to reasonable regulation without takings liability under either the public trust or nuisance prevention doctrines. Assume, momentarily, that *Tulare Lake* and *Klamath* properly state the law, that is to say, that interference with those appropriative rights are governed by the rule for physical invasion cases and are takings of property. In effect, under that rule, the usufructuary rights of appropriators are perpetual and immune to government regulation for the public interest. Due to the perpetual nature of the appropriative rights and their immunity to regulation in the public interest, there could scarcely be a more concrete example that contravenes the doctrine established by *Illinois Central*, which

65. The doctrines of abandonment and forfeiture place a minimal burden on the water user to ensure that the rights granted be exercised and not go unused for a period of time. See *Barton Thompson, Jr., John Leshy & Robert Abrams, Legal Control of Water Resources* 356 (5th ed. 2013).
announced, as the core public trust principle, that government cannot abdicate its authority to govern public trust resources for the benefit of the public. That is not to say that the state cannot validly opt to honor appropriative rights due to their importance to the predictability and stability of the persons relying on the uses made of the water—that is one of the teachings of the famous Mono Lake decision.67 What Illinois Central does say, however, is that the reasonable restriction of those rights in exigent circumstances remains in the power of the state, and operates as an inherent limitation on private rights in trust property and is not a taking if that restrictive power is exercised.

The next point to be made is the unrealistic idea that the water rights themselves are immutable. As already noted, the instrumental nature of water law has seen major changes in property rights accomplished without takings liability. The case can readily be made for establishing the importance of live streams to regional ecology, regional economy, and the public welfare. Like hydroclimate instability, changed understandings call for changes in the law. In fact, this is not a new and radical realization in the water community. More than forty years ago, in 1973, in an influential report suggesting numerous changes in water law, the National Water Commission stated, “The people of the United States give far greater weight to environmental and aesthetic values than they did when the nation was young and less settled.”68 As Garrett Hardin said in his very famous article The Tragedy of the Commons, “The morality of an act is a function of the state of the system at the time it is performed.”69 The state of the system, due to the stresses imposed by hydroclimate instability, has changed. The collective stresses of droughts and over-appropriation in many parts of the West is literally destroying riparian ecosystems to the detriment of all, including the water-user community. As was recognized by the Colorado Supreme Court, a court known for its commitment to the fundamental principles of the prior appropriation doctrine, it is no longer reasonable for appropriators to expect to utilize every last drop of water.70

Takings law itself has seen outcomes in cases change with the times and with the perceptions about the extent and importance

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68. NAT’L WATER COMM’N, NEW DIRECTIONS IN U. S. WATER POLICY 5 (1973).
69. Garrett Hardin, The Tragedy of the Commons, 162 SCIENCE 1243, 1245 (1968).
of the injury to be avoided by the challenged regulation. Just as the bright-line test of Sanguinetti gave way to the possibility of a Penn Central–based analysis in AG&FC, the outcome in the famous regulatory takings case Pennsylvania Coal Co. v. Mahon was disregarded on almost indistinguishable facts sixty-five years later in Keystone Bituminous Coal Association v. DeBenedictis, where the nuisance prevention rationale was applied to coal mining–induced subsidence prevention laws. The change vindicated the words of Justice Brandeis, dissenting in Mahon:

[T]he right of the owner to use his land is not absolute. He may not so use it as to create a public nuisance, and uses, once harmless, may, owing to changed conditions, seriously threaten the public welfare. Whenever they do, the Legislature has power to prohibit such uses without paying compensation; and the power to prohibit extends alike to the manner, the character and the purpose of the use.

Under current conditions of increased water scarcity and better knowledge of the consequences of dewatering ecosystems, states and the federal government have the power to regulate appropriators to protect minimum flows and levels (“MFLs”) and endangered species as incidents of nuisance prevention without takings liability. Applied in the takings arena, changed understandings about the ecological effects of dewatering streams and the need for the government to be able to address more frequent drought scenarios, not anticipated when the nation’s major water control structures were built, vitiates all possibility that it is reasonable for water rights holders to expect that their appropriative rights are, or should remain, unregulated and “unregulable” without takings liability.

It is equally doubtful that governmental dam operations can be expected to be immutable in the face of both the increased ecological understanding and the pressure of hydroclimate instability. Under a tort standard, governmental liability for unreasonable choices might otherwise be available, but Congress intentionally granted a broad tort immunity to be sure that its flood control projects would not be subject to review on that basis. What is left is takings law, but even

73. 260 U.S. 393, 417 (1922) (Brandeis, J., dissenting).
after the lowering of the barrier to inundations caused by the operation of flood control dams in AG&FC, there is still more required than mere tort foreseeability before a recovery for a taking can be obtained.

In sum, it is already apparent that hydroclimate instability is creating a new normal. In that universe, government operators of water control structures are ever more frequently being pressed to make decisions charting a course among competing perils. When reasonable choices are made, properly analyzed, those actions are neither torts nor takings. That has long been the case, and the Supreme Court’s ruling in AG&FC is not to the contrary. Even as the Court removed the requirement that a flooding invasion must be permanent to support a takings claim, the Court did not find a temporary, physical invasion of property to be a per se taking. The Court called for the use of Penn Central balancing, one key element of which is the reasonable, investment-backed expectations of the landowner. In an era of hydroclimate instability, surely those expectations are shaped by the climate and the physical capabilities of dam and reservoir systems built with reference to assumptions that are no longer operative. Applying the principles of takings law, principles that expressly were left unchanged by AG&FC, when reasonably made in response to fraught choices, the actions of dam operators in controlling flood waters or responding to drought conditions will seldom, if ever, run afoul of the prohibition against takings of property.
MUDDYING THE WATERS: SIXTY-ONE YEARS OF DOCTRINAL UNCERTAINTY IN MONTANA WATER LAW

ERIC ALSTON* & JOHN STAFFORD**

INTRODUCTION

The development of water law in the western United States is an important case study of the refinement and abrogation of the common law in the face of existing practices and their comparative suitability to the unique climactic and institutional conditions in the arid West. Just as climate and industrial demands from agriculture and mining defined institutions in a bottom-up fashion along the western frontier, federal land policy also influenced the definition of institutions in a top-down fashion. We show how, in the context of Montana, the courts played an important role in the process of transitioning the state from an informal to a formal legal system, balancing the tensions created by conflicting statutory and case precedents, as well as by predominant industrial and agricultural uses of water along the frontier.

In the most arid of western states, this transition meant that the prevailing legal doctrine governing water rights became prior appropriation, although the means by and time at which this change occurred varied from state to state. Adoption of the doctrine of prior appropriation required the abrogation of the common-law riparian doctrine in place in the eastern United States. This change has been linked to both an economic and an institutional explanation. The economic rationale holds that a doctrine suited to the orderly disposition of the majority of water rights in areas where water was abundant did not map well to places where competing demands for water outstripped the available supply. The institutional explanation

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depends, instead, on the fact that the predominant uses of public land in the western states required resolution of water claims where the water user did not hold title to the land itself. This meant the riparian doctrine, which granted holders of a land title the rights to running water on or adjacent to their property, could not be directly applied to cases involving the rights to water appurtenant to uses of public land, such as mining. This question—whether the choice of institutions by ranchers and miners or the incompatibility of public lands with riparian water rights led to the emergence of the prior appropriation doctrine—is one we consider in the context of Montana. Montana ultimately took sixty-one years to settle the question definitively as to whether the riparian or prior appropriation doctrine governed the disposition of water rights in the state.

This sixty-one-year period provides an extended context to view the iterative process by which the formal water-rights regime eventually evolved into the prior appropriation doctrine. Unlike other western states such as Colorado, the Montana territorial and state legislatures provided an unclear statutory backdrop for the courts regarding the contexts in which prior appropriation and riparian-rights systems applied. This meant the Montana Supreme Court was presented with a series of cases that required the court to clarify territorial and state laws surrounding water rights. As the court interpreted the muddied statutory and case precedent, it avoided having to abrogate one doctrine in favor of another, in keeping with the notions of judicial deference that animate the canon of avoidance of legal conflict. However, in reconciling conflicting claims to water rights, the court slowly removed certain definitional components of the riparian doctrine in favor of those that, in contrast, defined the doctrine of prior appropriation. By the time the Montana Supreme Court stated with finality in 1921 that prior appropriation was the only doctrine governing water rights in the state, the court’s previous decisions, and the bulk of water-rights users’ choice for prior appropriation as reflected in the vast majority of cases, had already made the riparian doctrine of water rights dead-letter law.

Our analysis proceeds as follows. In Part I, we discuss the literature surrounding formalization of property rights regimes along frontiers, especially in the context of water rights in the United States West. In Part II, we detail the territorial, state, and federal statutes that governed the disposition of lands along the western
Property rights in the West developed in a complex dynamic in which prior, informal practices existed in varying degrees of tension with the application of a formal system of law and policies. In cases where the de facto uses of cattle ranches were at odds with the rights granted to individual settlers under the Homestead Act, the de facto uses tended to carry the day because of the comparative ability of the ranchers to exercise collective enforcement. Although the threat of violence was rarely carried out, significant rents were dissipated as ranches consolidated range rights through fraud and employee claims, and continued to engage in self-enforcement. The imposition of federal law surrounding mining was less distortionary, in that it recognized the informal practices and written codes that had emerged among mining camps to govern disputes surrounding claim locations long before the imposition of a formal authority governing these claims. These granular studies of the emergence of rights to land and minerals shed important light on the specific ways in which rights to property in frontier contexts have emerged in

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response to shocks that make resources comparatively scarcer. Our analysis studies the incremental definition of water rights in a context where statutory and case law were decidedly ambiguous as to certain critical aspects of the doctrine governing water claims.

However, the fact that formal law, at best, imperfectly corresponded to informal practices meant that the rules governing the uses of resources relied to some extent on self-definition and self-enforcement. Several studies have emphasized how bottom-up, collectively enforced institutions resolved disputes over property resources with relatively minimal conflict. One such study suggests that lawlessness, in a variety of contexts along the western frontier, was much less than suggested by popular depictions of the period. Another study examined cattle ranchers in Shasta County, California, in a more modern context and showed how enforcement patterns tended to rely on informal, individual practices, as opposed to the requirements created by formal authorities. Studies of the development of mineral law, surrounding one of the most valuable claims to that date in U.S. history, the Comstock Lode, emphasize how mining interests played a role in the statutory and judicial definition of mineral rights and how these same mining interests were more incentivized to do so as the value of minerals in question increased. The U.S. West was particularly likely to display this blend of customary and legal remedies in part because settlement of the frontier preceded the arrival of formal authorities in many places. In such a context, self-definition and self-enforcement led to the emergence of practices well-suited to the contextual demands of the frontier.

One example of such a practice, the extralateral right in mineral claims, displays the way in which institutions defined from the bottom-up can vary significantly from practices that emerged under the common law of Britain, the colonies, and the eastern states. The application of the common law over time can lead to jurisdictional variation due to the distinct fact patterns that emerge in each unique

context. However, the adoption of the common law from one context to an entirely new one is likely to generate areas where the existing law is so unsuited to the new context that gradual judicial clarification may be insufficient to overcome the problems created by the mismatch. The extralateral right in mineral claims was one such area; given the different valuable minerals that were deposited in the eastern as opposed to western states, mineral claims in the West were more likely to develop precious metals like gold and silver, which typically did not lay “flat,” vertically or horizontally. This is in part due to the nature of metallic deposits, but also because the western states, in contrast to those in the East, present much more topographical variation as a result of the underlying tectonic forces that thrust the mountains upwards. This means mineral deposits typically do not lie horizontally or vertically but instead tend to run diagonally, following the fall line of whatever mountain slope within which they are deposited. This led to the emergence of a practice that allowed the first locator of a lode to follow the lode until it terminated, provided the lode reached its apex within that claimant’s location. This customary practice was first institutionalized into mining-camp codes, and was eventually codified into law and judicial precedent in a number of western states. By taking into account the nature of mining in the mountainous West, the extralateral right reduced conflict by guaranteeing to a successful lode locator the right to follow the lode in any direction, provided they had located the point where the lode came closest to the surface. This reduced the potential for opportunistic claimants to locate their claim adjacent to an already productive lode and, instead, incentivized new claimants to discover original lodes to which they would be fully entitled.

The emergence of the extralateral right displays a number of general lessons surrounding the development of property rights along the western frontier. First, the federal, territorial, and state governments were typically confronting groups of resource and land users who had already developed a de facto set of rights governing their

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11. See Van Wagenen, supra note 8.
uses. To the extent that these uses did not conflict with larger legislative priorities, the informal practices presented one margin along which to reduce the costs of imposing formal, legal authority for the first time. These customary practices were especially cost reducing when they reflected climactic or geological constraints that made existing rights regimes less likely to function well. Similarly, the way in which the extralateral right encouraged the discovery of new lodes, as opposed to a legal conflict over the rights to an existing lode, both reduced the conflict likelihood and incentivized the productive development of the underlying resources in question. We argue that the emergence of the prior appropriation doctrine in Montana reflects these underlying patterns within a statutory context that did not directly reflect these existing practices. In particular, the climate and topography of Montana meant that the prior appropriation doctrine was better suited to the comparative scarcity of water and the need to irrigate far from a given water source.

In an environment of comparative scarcity like Montana, uses of water were more likely to come into conflict, but the law can itself create comparatively more or less conflict, depending on the clarity it provides to the participants governed by it. Competing resource uses that are given legal force will generate conflict, as rights holders under opposing doctrines seek to better settle their rights to justify investment and facilitate associated loans and sales. This is a specific expression of the general problem created by cases of legal conflict, which has led to a observable tendency on the part of courts to interpret cases in a way that avoids legal conflict between different statutes currently in force, both of which bear upon a given case in question and present potentially opposing interpretations of the issue in question.12 The tendency for conflict under opposing legal regimes becomes more pronounced as scarcity increases. A resource user faced with a choice between a resource with a competing claimant

12. Where courts are confronted with potential legal conflict, they have been observed to employ a similar technique to the canon of avoidance of reaching a constitutional question when a case can otherwise be decided based upon factual, procedural, or legal factors. In cases of legal conflict, courts frequently seek to employ an interpretation of potentially conflicting statutes in a way that reconciles the law to prevent actual conflict between the possibly competing legal requirements of different statutes. See Carolos E. Gonzalez, The Logic of Legal Conflict: The Perplexing Combination of Formalism and Anti-Formalism in Adjudication of Conflicting Legal Norms, 80 OR. L. REV. 447 (2001).
or an unclaimed resource, with the same underlying costs to use, will choose the latter option due to the reduced legal costs associated with the specification and enforcement of the rights to the resource. The increasing value surrounding the definition and enforcement of a right as the underlying resource becomes scarcer directly implies that as the cost of an underlying resource use increases so, too, does the sensitivity of this use to imperfections and uncertainties in the rights structure surrounding its use and sale. In sum, in a context of resource scarcity where self-definition and self-enforcement of property rights preceded formal authorities, the extent to which the first laws of these authorities diverge from existing practices can create a direct possibility for legal conflict in ensuing periods.

II. RIGHTS TO WATER IN THE UNITED STATES WEST

In order to understand the fundamental ways in which these rights regimes differ, a brief discussion of prior appropriation and riparian-rights doctrines is warranted. The doctrine of prior appropriation is entirely distinct from the common-law doctrine of riparian rights. Unlike the common-law doctrine, the doctrine of prior appropriation depends fundamentally upon the principle of “first-in-time, prior-in-right.” This doctrine holds that one who appropriates the waters prior to another appropriator, and puts the water to beneficial use, has obtained an exclusive right to that amount of water.

The doctrine of [prior] appropriation extends the right to the use of the waters flowing in a natural stream to riparian and non-riparian lands alike, and it is immaterial whether the lands to which the waters are applied are within or without the watershed of the stream from which the waters are taken.14

Thus, under prior appropriation, the right to water is not contingent on the location of the land where the water is being used. The right to water instead depends upon the date of appropriation and whether the appropriated water is put to beneficial use. Beneficial use requires that those waters that were appropriated must be used for productive

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13. ROBERT G. DUNBAR, FORGING NEW RIGHTS IN WESTERN WATERS (University of Nebraska Press 1983).
purposes.\textsuperscript{15} Finally, once an appropriation has been made and put to beneficial use, abandonment can occur. Abandonment occurs when there is explicit evidence of intention to no longer use the waters. When there is abandonment, the water right reverts to public property and is then subject to appropriation or allotment to existing junior appropriators.\textsuperscript{16} As we will discuss subsequently, prior appropriation’s characteristics of “first-in-time, prior-in-right,” beneficial use, and abandonment provide a much more precise definition of the rights to water than the riparian doctrine does. This level of definition becomes increasingly beneficial as water is comparatively scarcer, a pattern in line with Harold Demsetz’s insights regarding the development of property rights more generally.\textsuperscript{17} The English common law did not develop in contexts in which water was sufficiently scarce to warrant the additional costs of specifying and enforcing rights under a system like prior appropriation, which meant the vaguer and more flexible standard that the riparian doctrine provided was sufficient.

The common-law riparian doctrine creates a completely different rights regime for water. The riparian doctrine is derived from English jurisprudence, in which waters were “accustomed to flow . . . [neither] in a lower, or a higher, or a thinner, or a more rapid stream than before, or . . . diminished in any way.”\textsuperscript{18} This system of water law was applied to the eastern United States through the application of the English common law in the original colonies. In this region, one water user’s practice was unlikely to detract from another’s, at least in terms of volume.\textsuperscript{19} In a context of such comparative abundance,

\begin{itemize}
\item[15.] MONT. REV. STAT. § 12 (1881).
\item[16.] See Power v. Switzer, 21 Mont. 523 (1898); Barkley v. Tielke, 2 Mont. 594 (1877).
\item[17.] Harold Demsetz, Some Aspects of Property Rights, 9 J. LAW & ECON. (1966); See also Harold Demsetz, Toward a Theory of Property Rights, 57 AM. ECON. R. (1967).
\item[18.] HENRY DE BRACTON, DE LEGIBUS ET CONSUETU DINIBUS ANGLAIE, (Travers Twiss, ed., Cambridge University Press 2012) (1880); ROBERT G. DUNBAR, FORGING NEW RIGHTS IN WESTERN WATERS (University of Nebraska Press 1983); see also Earl F. Murphy, English Water Law Doctrines Before 1400, 1 AM. J. LEGAL HIST.103.
\item[19.] With the industrialization of the nineteenth century, some economic uses of water in the East began to exceed the level that was considered “reasonable” under the riparian doctrine, which led to the judicial clarification of the common law in the East surrounding when industrial users could appropriate in excess of this amount. See DONALD PISANI, WATER, LAND, AND LAW IN THE WEST: THE LIMITS OF PUBLIC POLICY, 1850–1920 (University Press of Kansas 1996). Nonetheless, for the purposes of our analysis, the riparian doctrine as we define it remains accurate to describe how legislators and courts in the West understood the doctrine as a whole.
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a standard that allowed for any reasonable use up to the point where other users’ amounts were affected was more than sufficient to govern water users’ rights disputes. The Montana Supreme Court’s consideration of this doctrine aptly summarizes the underlying intent: “[H]e who owned land upon the banks of a running stream, or land over which the same flowed, had the right to have the waters thereof flow down, to or over his land, undiminished, materially, in quantity or quality.”

The common-law doctrine of riparian rights grants relatively unfettered access to water rights to those landowners directly adjacent to the waters. Those landowners can appropriate and use those waters for their desired needs so long as these uses do not detract from the ability of other riparian rights holders to do the same. The riparian doctrine does not include the prior appropriation requirement of beneficial use; there must only be “reasonable use.”

This standard gives the riparian rights holder comparatively expansive liberty in the use of the waters. Unlike prior appropriation, which affirmatively requires the beneficial use of waters, riparian rights holders can use or not use waters to the extent they desire, limited only by those unlikely instances where the volume or nature of their use impinges upon the ability of others to act similarly.

As between these two doctrines of water rights, what about prior appropriation made it well-suited to conditions in the arid West? Two distinct explanations have formed surrounding the emergence of prior appropriation in the face of an existing doctrine that was well-established in the eastern states, whose legal systems served as templates for their more junior, western cousins in many other areas of substantive law. The first surrounds the economic benefits associated with the prior appropriation doctrine in climates where water was scarce. The second has to do with the specific nature of the law underlying land and water rights in the arid West.

The comparative scarcity of water in the West and the need to irrigate land far from a given watercourse implied significant economic benefits to prior appropriation. The doctrine facilitated coordination and created lower levels of disputes, as compared to the

20. Thorp v. Freed, 1 Mont. 651, 653 (1872).
riparian doctrine’s vaguer standard of “reasonable use.” Coordination among users (and between users and landholders, whose lands were needed for an irrigation right of way) was required due to the scale of construction, expense, and manpower that many irrigation projects in the arid West entailed. For example, one early case in Montana involved an irrigation canal whose construction cost over $23,000 (greater than $320,000 in 2015), which serviced mining claims valued at $15,000 and $20,000, respectively.

These high financial and coordination costs have an important implication. Both from a static and dynamic perspective, coordination over which water-rights regime to employ would reduce the transaction costs to participants within the industry. From a static perspective, coordinating two incompatible rights regimes would reduce the potential for costly disputes. In the frontier context, the use of prior appropriation before the formal adoption of a water allocation system meant that this was likely to be the least costly regime. Furthermore, from a dynamic perspective, subsequent entrants along the frontier, even if presented with a choice between legal regimes for water, faced costs associated with choosing a less dominant rights regime, especially in a context of scarcity, where it became increasingly likely that all water rights had prior claimants in times of drought.

The amount of public land in the West, and the inability of mineral claimants to own the land they mined meant the riparian doctrine was fundamentally incompatible with existing federal law governing public lands in the West. Riparian water rights vested with title to land adjoining or containing a watercourse. However, many of the uses of public lands, such as mining and forestry, did not grant the land user title to the land itself; instead, these individuals were granted a use right to extract mineral or timber as against other claimants. This meant that any individual seeking to use water in the process of extracting and refining minerals could not obtain rights to water they needed under the riparian doctrine because of their “defect” in title from the perspective of the riparian doctrine. Furthermore, the nature of settlement on the western frontier

demanded an allocative regime to water that did not depend on the underlying title to the land. Water disputes among settlers who were technically trespassing on public lands prior to the passage of the Preemption Law were customarily resolved according to prior appropriation, which played a large part in the federal statutory recognition of customary practices preceding the creation of law governing public lands in the West.  

In Montana, water rights, especially early on in the territory’s history, necessarily depended on a blend of self-definition and self-enforcement. This makes Montana, like many frontier contexts, one where participants had a significant role in the definition of the rights regimes governing their resource uses. The most readily evident example of this is when the frontier government recognized informal practices, such as mining-camp codes and customs, which also received federal and state statutory recognition in a number of western states. In contrast, the Montana legislature did not unambiguously recognize existing practices relating to water. However, this does not mean the actions of settlers in Montana could no longer influence the definition of formal law when it came to water rights. We will argue subsequently that the choice of water-rights regimes by settlers actually influenced the incremental definition of which rights regime would prevail in the Montana courts, an outcome consistent with the role participants played in defining the rights regimes governing resource use along the western frontier, both before and after the imposition of formal territorial and state control.

III. LAND AND WATER LAW IN THE TERRITORY AND STATE OF MONTANA

Prior to the creation of territorial and state authorities, settlers arriving on the western frontier were confronted with two institutional

regimes governing the disposition of land, resources, and water. The first of these were the informal practices that frontier communities developed to clarify rights to resources and land and to resolve associated disputes. However, the presence of informal practices did not mean that there were no laws governing the disposition of federal lands, prior to the definition of these public lands as a territory or a state. Three federal land laws, for example, played an important role in the settlement of Montana. The Preemption Act of 1841,28 passed September 4th of that year, is the first federal law that defined the rights of settlers in obtaining public lands from the federal government. This Act allowed any head of the family, widow, or single male over the age of twenty-one, who settled upon public lands by inhabiting and making improvements upon the land, to be authorized to purchase title to the land for $1.25 an acre, for up to 160 acres.29 The passage of the Preemption Act is significant in the history of U. S. public land law, for it was the first time the federal government formally recognized the rights to land for individual settlers in the West. Preemption allowed a formal means to secure a title to previously owned public lands and as such is the first piece of the patchwork of federal law that influenced the patterns of settlement on western lands.

The second federal land law is the Homestead Act of 1862,30 which was passed on May 20th of that year. This law provided any person the right to claim up to 160 acres of public lands. In order to formalize the right to land, a settler first had to file an application in the local land office prior to entry upon the land, affirming that he or she was the head of the family, twenty-one years of age, and a citizen of the United States. Upon filing and payment, the settler was permitted to enter the land and was subsequently required to cultivate the land for five years, after which period the title to the land passed to the landowner.31 This Act expanded upon the Preemption Act of 1841 by allowing a straightforward method to formalize lands intended to incentivize settlers to move west. Even more so than the Preemption Act, the Homestead Act of 1862 greatly defined the settlement of the western territories during this period.

29. Id.
31. Id.
The last federal land law that aided in the settlement of western lands was the Desert Land Act, formally known as the Act of March 3, 1877. The Act provided any person, who was a requisite age, the ability to purchase title to desert lands for up to 140 acres at $0.25 per acre. Because the Desert Land Act required successful irrigation of the land in order to obtain title, the Act allowed for the appropriation of water, which in practice required prior appropriation on federal lands. The significantly discounted price reflects the government’s growing recognition of the unique challenges that the arid climates of the West posed to agriculture and industry. The ability to obtain lands under the Desert Land Act can be understood as another step in the gradual refinement of rights to public lands begun by the Preemption Act and Homestead Act.

Federal mining laws also aided in the settlement of western lands. Three federal laws passed from 1866 to 1872 defined the extraction of minerals from western lands. On July 26, 1866, Congress passed the Lode Law of 1866, which is the first federal statute with substantive influence regarding mining, water, and claimants to land. This law declared the public domain free and open to all citizens of the United States for the exploration and production of minerals. In order to secure water for the purpose of mining, the Lode Act stipulated,

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\text{[W]henever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same recognized by the local customs, laws, and the decision of the courts . . . owners of such vested rights shall be maintained and protected the same; and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed.}\]

The Act also incorporated the basic rules and customs of the mining districts and gave congressional approval for protected mining rights on public land. The Lode Act was subsequently codified with the

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33. Id.
34. An Act Granting Right of Way to Ditch and Canal Owners Over Public Lands, and for Other Purposes, § 2-9, 15 Stat. 251, 251 (1866) [hereinafter the Lode Act] (the Lode Act is the colloquial understanding of this Act).
35. Id.
36. Despite the Lode Act’s granting of public lands for mineral exploration, the law did not authorize the patenting of placer claims; it instead only treated claims over lodes or veins.
placer mine legislation in the Mining Law of 1872.\textsuperscript{37} This law then became the defining federal law governing mineral extraction on public lands through the end of our analysis in 1921.

In the subsequent section, our detailed case survey from 1865 to 1921 shows that land users made claims either under mining laws, the Homestead Act, or the Preemption Act—to the extent that the factual record in a given case contains such a detail. One example serves to display how the patchwork of federal laws created the possibility for significant uncertainty surrounding the rights to land and water. Claims made under the Preemption Act were seen as legitimizing a trespass on federal lands, but this very trespass raised a question as to who had a right to the water this trespasser was using.\textsuperscript{38} The same reasoning that caused the Preemption Act to formalize the “claims” of de jure trespassers led to the recognition of the right to the water that these trespassers had been utilizing for beneficial uses as against any other users on the public lands, who would also have been be trespassers, as both were using the land prior to federal recognition of the legality of doing so.\textsuperscript{39} The extension of this prior water right to include cases of irrigation\textsuperscript{40} follows directly from the contexts found in the arid West where the appropriated water’s most economically productive use was often far from the rugged ravines and canyons where the water flowed. In cases where claims were instead being made under the various mineral laws, depending upon when a specific mineral claim was located, a similar result obtained, but for different reasons. Because title to

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\textsuperscript{38} Thorp v. Freed, 1 Mont. 651, 667 (1872).
\textsuperscript{39} See id.; see also Parks v. Barclay, 1 Mont. 514, 517 (1872).
\textsuperscript{40} The right to appropriate water for mining or milling purposes, resting in this country before the act of congress above referred to, upon the grounds that no one owns the property, and that the appropriation is for a beneficial purpose, establishes a principle that certainly ought to allow the appropriation of water for the purposes of irrigation. In this latter case no one, it would be presumed, owned the water, and the appropriation would be for a beneficial use.

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the land itself did not vest with a mineral appropriator, no right to water could vest along with title. This created a variety of means by which economic activities on public lands, whether they were agricultural or mineral, were construed to require prior appropriation. The federal land laws, and the existing, customary prior appropriation practices, thus played an important role in determining the rights to water for those users claiming rights. This also created a margin that influenced the rights of private land users, both in the coordinative sense we describe in earlier sections and also to the extent that a private landholder, whether making their claim under the riparian or prior appropriation doctrine, had to contend with a set of users on federal and formerly federal lands who claimed the prior right to water under federal law.

With the preceding federal laws providing a backdrop for defining the rights of resource users on public lands and the means of acquiring public lands, Montana water-law statutes developed in stages. The Bannack Statutes were the first territorial legislation to address the issue of water. The Bannack Statutes provided

> any owner or holder of a possessory right or title to land on the bank or margin of a stream, or in the neighborhood of any stream, should be entitled to the use of the water of such stream for the purpose of irrigation, and to a right of way for his ditch, if necessary, over intervening property.41

These statutes asserted both prior appropriation and the incongruous requirement for equitable apportionment by specially appointed county commissioners in times when water was scarce. The Bannack Statutes not only created a confused version of the doctrine of prior appropriation but also stated that the “common law of England, so far as the same is applicable and of the general nature, and not in conflict with the special enactments of this Territory, shall be the law and rule of decision, and shall be considered as of full force until repealed by the legislative authority.”42 Absent a specific abrogation of the riparian doctrine contained within the common law adopted by the territorial legislature, these statutes necessarily recognized both doctrines of water law.

Given the extent to which fundamental characteristics of the two doctrines are at odds with one another, this very recognition caused legal uncertainty. As a result, these statutes were replaced in 1869 by the Act to Repeal the Act of January 12th, 1865. This Act allowed anyone holding valid title to land the right to the use of waters for the purpose of irrigation; and in instances where the water in question was claimed under prior appropriation, those appropriations were to be considered valid. The Act of 1870 became codified in the Revised Statutes of 1872. However, it should be noted that despite this clarification in the water law, the Legislative Assembly never explicitly abrogated the common-law doctrine of riparian rights, an oversight that would take the court decades to overcome.

It was not until 1885 that the legislature made a distinctive departure from the riparian doctrine. In An Act Relative to Water Rights, the legislature endorsed the definitional components of prior appropriation including “first-in-time, prior-in-right”; beneficial use; time of appropriation; and the proper filing of an appropriation. This Act was a significant alteration in the legislative definition of the doctrine of prior appropriation rights, but with it the legislature omitted once again to abrogate the doctrine, whose legal applicability in the state the courts had already long interpreted as being a necessary consequence of the territorial legislature’s adoption of the common law in 1865. The statutory timeline of Montana, from the Bannack Statute’s ill-defined water-rights regime to the Act of 1885’s more explicit water-rights regime, exposes the evolving influence statutes had on the development of water rights in the State of Montana.

43. [A]ny person or persons, corporation or company, who may have or hold a title, or possessory right or title, to any agricultural lands within the limits of this Territory, as defined by the organic act thereof, shall be entitled to the use and enjoyment of the waters of the streams and creeks in said Territory for the purposes of irrigation and making said land available for agricultural purposes to the full extent of the soil thereof. Provided, That in all cases where by virtue of prior appropriation, any person may have diverted all the water of any stream, or to such an extent that there shall not be an amount sufficient let therein for those having a subsequent right to the waters of such stream for the such purpose of irrigation.


45. See Bailey v. Tintinger, 45 Mont. 154 (1912).
It is within this muddied statutory context that the supreme court of Montana interpreted conflicting water-rights claims, a question we turn to in detail in the following section.

IV. MONTANA CASES DEALING WITH RIPARIAN DOCTRINE

The importance of water to industrial and agricultural development along the western frontier is clear. Whether it was raising crops on a homestead, watering cattle on a ranch, or processing ore at a mine, the predominant economic activities along the frontier all required water. Given climatological conditions in the West, there was simply not enough water available to satisfy every potential water user’s demands. In legal and economic terms, the comparative scarcity of water meant disputes surrounding the use of water were more likely, which led to the development of the prior appropriation doctrine in many western states. This scarcity and, hence, the significant economic value of water, also meant water rights were (and are) a perennial topic of litigation in the West. In Montana, the supreme court was confronted with these types of disputes nearly from its inception.46 In this section, we treat every example from the record of the supreme court of Montana where the court considered the competing water-rights doctrines that persisted in the state until 1921. The court, in avoiding overt conflict between the competing doctrines, gradually reconciled the cases in a way that whittled away at core components of the riparian doctrine, until there was so little left to distinguish it that by 1921 the court abrogated the riparian doctrine outright.

The first time the court treated both the riparian and prior appropriation doctrines came in 1870 with the case of Thorp v. Woolman.47 Both Thorp and Woolman owned a ranch on the same creek, and following a drought in 1869, their irrigative uses became more than the creek could supply. In resolving the competing claims presented in the case, the court recognized that both landholders adjoining a given stream had the right to use water, a determination entirely consistent with the riparian doctrine.48 However, the court also decided the case by awarding the adjacent landholder with an older

46. See Caruthers v. Pemberton, 1 Mont. 111 (1869).
47. Thorp v. Woolman, 1 Mont. 168 (1870).
48. Id. at 171.
water claim the right to use it as against the competing claimant.\textsuperscript{49} In a jurisdiction governed unambiguously by the riparian doctrine, such an outcome would be entirely at odds with the requirement that no adjacent landholder’s use materially affects the use of another. In a climate where there was not nearly enough water to go around, the riparian requirement quickly fell before the reality that the first user to settle upon a stream had an equitable expectation to the use of the water, sufficient for the economic purposes that supported his or her settlement there. The case also noted another existing controversy pertaining to whether the prior appropriation doctrine applied to private as well as public lands, but given that the prior appropriation doctrine required the same result, it was “not necessary for the court to determine, in this case, whether or not the doctrine of appropriation applies to ranchmen as well as to miners, concerning water rights.”\textsuperscript{50} The distinction between ranchmen and miners directly suggests private versus public lands because miners were, necessarily, entrants upon the public lands whereas ranchers were, much more commonly, titled land holders, which meant the riparian doctrine could apply to them in theory, at least from a formal, legal perspective. This latter question as to the applicability of the prior appropriation doctrine on private versus public lands is one that remained unresolved until the case we consider from 1912.

Just two years later in 1872, the court again confronted the conflicted state of land and water laws in \textit{Thorp v. Freed}.\textsuperscript{51} Of the three justices on the court, one recused himself from the case and the other two reached opposing conclusions about the intent of the legislature and the state of water law in the territory. This case illustrates a clear example of the costs of legal conflict: when judges cannot reach a unified conclusion on how to resolve legal ambiguity, such judicial conflict can itself further obscure the law for those governed by it. On the one hand, in considering the conflicting authorities surrounding water law in the territory, Justice Knowles recognized the classic explanations regarding the development of property and natural-resource law on the western frontier in those instances where it departed from the existing doctrine in the East.\textsuperscript{52} Justice

\textsuperscript{49} Id.  
\textsuperscript{50} Id.  
\textsuperscript{51} Thorp v. Freed, 1 Mont. 651 (1872).  
\textsuperscript{52} Id. at 654, 656.
Knowles stressed both the unique topography in the West as well as more general concerns of welfare and equity animating the prior appropriation doctrine’s emergence. However, Justice Knowles ultimately adopted a position of judicial deference, noting that: “the question of whether or not a law is for the good of the people in our Territory, is a matter for legislative, and not judicial, consideration.”

In contrast, Justice Wade looked at the 1865 territorial statute and concluded that “looking at the whole statute, we say most unhesitatingly, that the whole purpose of the statute was to utterly abolish and annihilate the doctrine of prior appropriation, and to establish an equal distribution of the waters of any given stream in the agricultural districts of the territory.” Justice Wade also concluded that “so in this arid country should the waters of any given stream be divided equally among the farmers for purposes of irrigation,” notwithstanding the impossibility of such a requirement given the scarcity of water in the arid West. *Thorp v. Freed*, without a clear holding and with stark opposition between the positions of the two judges, deepened the uncertainty as to the applicability of the riparian doctrine in Montana in the face of prior appropriation.

Following *Thorp v. Freed*, the court was not presented with another case requiring treatment of the riparian doctrine until 1899 in *Haggin v. Saile*. This case was an action for an injunction to restrain the defendants from diverting water that the plaintiff claimed, based upon having settled in the canyon in 1883 when plaintiff Saile first began using the adjacent waters. However, sometime that same year the plaintiff ceased to use the waters, which led the defendant to claim abandonment of the earlier riparian claim. In deciding the

53. Surely the climatic and physical conditions of this country cannot be such to create a law so at variance with natural equity and so fatal to the improvement and prosperity of our best agricultural districts. It must be apparent to all that the best agricultural lands in this Territory are not at the sources of the streams. Our broad valleys, as a rule, are better adapted by nature for settlement and agriculture than our narrow and rocky canons and mountain gorges. *Id.* at 654.

54. “[C]onsiderations of the general welfare of the country and the principles of natural equity should guaranty to the prior appropriator of water for such use the first right to the use of the same . . . .” *Id.* at 654–55.

55. *Id.* at 653.

56. *Id.* at 668.

57. *Id.* at 676.

issue, the court employed a beneficial use calculus to consider the opposing water rights of the two parties, ultimately determining that the riparian right holder had effectively abandoned any claim they had to the water through non-use. A finding that a riparian right holder can abandon his or her right through non-use is at odds with the riparian standard of reasonable use determined by the right holder, which is governed only by the requirement that such use (or non-use) not materially impair the water to which other riparian rights holders are similarly entitled. Thus, the case effectively imposed a beneficial use requirement upon those instances when Montana water users believed their rights emanated from the riparian doctrine. Like the earlier case that found riparian landowners’ water claims were governed by “first-in-time, prior-in-right,” Haggin transformed one of the definitional components of the riparian doctrine from the reasonable use requirement to the beneficial use requirement of the prior appropriation doctrine.

One year later, the court again examined the tension between the riparian and prior appropriation doctrines in Smith v. Denniff. Smith’s appropriation of water from the public domain to nonriparian lands presented the question of whether riparian land subsequently granted to a railroad created a superior right to the one Smith had created through appropriation from the public domain. This case is notable because the court summarized the water laws in the state, to that point. In weighing the requirements under each doctrine, the court noted how the right to prior appropriation for beneficial purposes was necessarily at odds with the reasonable use granted to every adjacent landholder, and the State’s preference for beneficial use meant that “to this extent the doctrine of prior appropriation

59. “The suggestion that the plaintiff has rights as a riparian holder can have no force as against defendant Saile, who in June, 1883, actually diverted and appropriated water for beneficial uses under the statutes of the territory recognizing the right of appropriation.” Id. at 381.

60. A voluntary user of water by a purchaser of a water right, without any intention to resume use thereof, and without the assertion of possession or title for a number of years after purchase, and where such a purchaser has permitted the water to be taken, appropriated and used by others adversely for a period of years, warranted an inference of abandonment.

61. See Wiel supra note 21.

may be said to have abrogated the common law rule.\textsuperscript{63} The court also noted that any vested prior appropriation right necessarily created a servitude upon upstream riparian lands, a clear subjugation of riparian rights in the face of prior appropriation statutes and practice.\textsuperscript{64} Despite the case not fully abrogating the riparian doctrine, due to the court preserving the right of prior riparian landholders to the waters of a given stream, the partial abrogation in Smith speaks volumes as to the extent to which the court’s periodic avoidance of legal conflict had ultimately vitiated one doctrine in favor of another.

The final barrier that remained separating the heavily modified and weakened riparian doctrine from the system of prior appropriation rights was removed by the court in the 1912 case of \textit{Bailey v. Tintinger}.\textsuperscript{65} This was the issue that had persisted since the court tried to reconcile what it interpreted as the common-law requirement of private riparian land ownership with the problems that such a requirement created in the context of water use by mineral claimants on public lands. An extensive amount of lands irrigated by several companies forced this suit, to determine the relative rights of the parties to the waters.\textsuperscript{66} In Bailey, the court determined that the right to appropriate water does not depend on the land on which the appropriated water is being used. The court, at the same time, declared that all water rights prior to 1885 were governed by the rules and customs of settlers,\textsuperscript{67} effectively ignoring and overwriting the first two decades of statutory and judicial treatment that we consider in our analysis, here. In so doing, the court held that ownership of the

\textsuperscript{63} The doctrine of `prior appropriation’ confers up n a riparian owner, or one having title to a water right by grant from him, the right to a use of the water of a stream which would be unreasonable at the common law, and to this extent the doctrine of prior appropriation may be said to have abrogated the common-law rule.

\textit{Id.} at 23.

\textsuperscript{64} \textit{Id.} at 25.

\textsuperscript{65} Bailey v. Tintinger, 45 Mont. 155 (1912).

\textsuperscript{66} \textit{Id.} 160–61.

\textsuperscript{67} “[T]he time from the earliest settlement to 1885, during which period the rights were determined exclusively by the rules and customs of settlers . . . .” \textit{Id.} at 167;

In other words during the first period of our history above, there was but one method of making an appropriation, and that was by complying with the rules and customs of the pioneer settlers; while during the period since 1885, two distinct methods are prescribed, the first by complying with the rules and customs of the early settlers, and the second by complying with the terms of the statute.

\textit{Id.} at 172.
land upon which water was used was irrelevant to the application of the governing doctrine and so removed the last component distinguishing a riparian right from a prior appropriation right in the State of Montana. Perhaps unsurprisingly, the court noted outright, upon surveying the bulk of precedent before it, that “[i]t is impossible to harmonize the decisions of the courts upon the subjects presented.”

This understandable sentiment presages the final time the court considered the question of the riparian doctrine in Montana. In *Mettler v. Ames Realty Co.*, the court held that: “[t]he common-law doctrine of riparian rights has never prevailed in Montana since the enactment of the Bannack Statutes in 1865.” A drought in 1919 caused Ames Realty Company, the prior appropriator to the waters of Prickly Pear Creek, to change its place of diversion. The new point of diversion caused Anna Mettler, who claimed the right to the waters through the riparian doctrine, to be below the place of diversion, resulting in a severe diminution in the quantity to which she had been accustomed to use in her ranch. As a result, she sued Ames Realty Company to return the flow of the waters, undiminished in quantity. Given that the court outright abrogated the riparian doctrine from the date of territorial formation onwards in the case, Mettler’s claim went unrecognized in the face of Ames Realty’s prior right. In one fell swoop, absent legislative repudiation of the doctrine, riparian rights were formally abandoned in favor of prior appropriation. More potently, the court stated with finality that the prior appropriation doctrine had always been the letter of the law in the state, notwithstanding the conflicted sixty-one years of statutes and case law that we survey here. Upon first blush, the court’s interpretation of the preceding sixty-one years of precedent appears quite bold. However, when the set of cases are taken into account that slowly hollowed out the riparian doctrine until it was a mere legal fiction resting on top of the underlying reality of prior appropriation, the court’s action in *Mettler* appears more like a formality than a sweeping abrogation.

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68. The court construed the holding in Smith by defining “that the appropriator need not be either an owner or in possession of land in order to make a valid appropriation for irrigation purposes.” *Id.* at 175.

69. *Id.* at 177.


71. *Id.* at 170–71.
These cases display a number of factors that constrained or influenced the decisions of the Montana Supreme Court when rights under the riparian doctrine would have conflicted with water rights under the prior appropriation doctrine. Just as territorial, state, and federal statutes influenced the court, so too did the existing practices of settlers along the frontier, based in the economic realities created by the unique topography and aridity of the West. Operating within these constraints, the court slowly reconciled the conflicting doctrines until prior appropriation carried the day in law as well as in practice.

First of all, the statutes that the Montana territorial and state legislatures passed regarding the disposition of water rights unsurprisingly played a large role in the court’s treatment of disputes that emerged surrounding claims to water.\(^\text{72}\) Every case we analyze, in detail, contains a reference to the statutory backdrop governing these claims. However, as our analysis displays, the statutes more often created confusion than provided clear guidance to the court as to how to handle claims emerging from conflicting water-rights doctrines. Nonetheless, animated by a desire to avoid overt legal conflict, the court took the existing statutory requirements seriously when balancing the different statutes whose conflicting requirements did not provide sufficient guidance to water users in Montana.

\(^{72}\) For example, the court in Bailey tried to briefly summarize the existing statutes governing water within the state:

In 1870 our legislature passed an Act (Laws 1869–1870, p. 57) which apparently undertook to limit the right to appropriate water for irrigation purposes to persons or corporations having title to, or possession of, agricultural lands. (Tucker v. Jones, 8 Mont. 225, 19 Pac. 571.) The act recognized the rights acquired or to be acquired under the rules and customs of the early settlers; but there was not any attempt made to prescribe any other method by which such rights might be secured. By an act of February 1877, the right of a person or association of persons or a corporation to appropriate water to sell, rent, or otherwise dispose to others was authorized. In 1885, however, there was a distinct departure made by the Legislature in enacting a statute under the title, “An act relating to water rights.” These several acts were carried forward in the compilation of 1887, as chapter 74, Fifth Division, Compiled Statutes, and with some modifications into the Civil Code of 1895, as title 8, division 2, part 4; and again, with slight amendments and additions, into the Revised Codes of 1907, as sections 4840–4891, and now constitute the law of appropriation of water so far as controlled by legislation. Bailey v. Tintinger, 45 Mont. 154, 166–67 (1912).
Second, the cases clearly display the court’s deference to the common law, which the Montana territorial legislature adopted in 1865. Due to the legislature not clearly abrogating the riparian doctrine (if this had even been the intent of the legislature, given their unclear statutory treatment of water law in 1865), the Montana Supreme Court wrestled with how to square a common-law requirement for riparian water rights with federal and territorial statutes that referred to elements of the prior appropriation doctrine. For example, in *Thorp v. Freed*, the rigorous debate between Justice Knowles and Justice Wade on the application of the Bannack Statutes exposes the court’s difficulty in squaring conflicting water-rights doctrines. Justice Knowles’s opinion supports the notion that the legislative intent was to create the right to prior appropriation.73 On the other hand, Justice Wade argued in his opposing opinion that the Bannack Statutes demand “equal distribution of the waters of a stream among all the parties concerned in such waters.”74 This juxtaposition between the two justices’ opinions as to the appropriate way to interpret the requirements of the Bannack Statutes highlights the difficulty inherent in squaring conflicting elements of water rights under unclear statutory requirements. Years later, in *Smith v. Denniff*, the court again wrestled with the interpretation of the riparian doctrine within the confines of existing prior appropriative requirements. The court in *Smith* actually went to great lengths to square the riparian doctrine with prior appropriation rights granted by statute, construing the riparian right holder to be the state or federal government, whose permission to appropriate water was the equivalent of transferring the riparian right to the prior appropriator who did not own land on the banks of a water source.75

73. This statute, as far as it could, established and recognized the right of appropriation of water for agricultural purposes. . . . If it is claimed that this statute does not recognize the doctrine of “prior in time, prior in right,” the answer to this is, that when the law gives a man the right to divert water from a stream to irrigate his land to the full extent of the soil thereof, and in pursuance of this law he goes and digs a ditch, or constructs machinery for the purpose of taking water from a stream for this purpose at a great expense, the principles of equity come in and say that no other man can come in and divert this water away from him. That he is prior in time in availing himself of the benefits of such a statute, and his rights are prior to any subsequent appropriator.

74. *Id.* at 668.

75. “[Person] A. has absolute title in fee to riparian land. Under the statutes of Montana he is clothed with the right, by compliance with the provisions of the statute, to appropriate
It is also quite clear from the case law that the incompatibility of federal lands with the riparian doctrine influenced the court’s definition of water law in Montana. As early as 1870, the court noted how

[t]here are many reasons for holding that this very statute recognizes or establishes the doctrine of appropriation of water for irrigation, limiting, however, the right to appropriate to persons owning land upon the banks of the stream from which the same is taken, and also limiting the quantity of water he can appropriate to what is necessary to irrigate his land.76

This indicates that although the common law and statutes created a legal conflict surrounding rights to water on private lands, the prior appropriation doctrine had legal influence within the territory and state from 1865 onwards, due to the incompatibility of riparian rights with federal land uses that did not grant title of the land itself to the natural-resource user. This tension appears again in Smith v. Denniff, when the court ultimately interpreted the state and federal governments as the riparian rights holders on all lands that had not passed into private hands; any water appropriated on such property to irrigate lands further away necessarily made subsequent upstream, riparian-rights claims subservient to it.77 Furthermore, federal law afforded some recognition of customary practices that had existed prior to federal, territorial, or state statutory treatment of water rights on lands in the arid West, due to the reality that people had settled on federal land as trespassers long before federal land law caught up to the realities on the ground. This meant that the prevalence of prior appropriation as a customary practice played a role beyond the court’s recognition of the practice; the very nature of claims brought before the court, often emanating from claims to water on public lands, partially determined the predominant doctrine within the state.

The cases we survey above where the two doctrines were given explicit consideration by the court also display the concerns of economic efficiency and the specific demands of productive activity in

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76. Thorp v. Woolman, 1 Mont. 168, 171 (1870) (emphasis added).
77. Smith v. Denniff, 24 Mont. 20, 25 (1900).
the dry and rugged, arid West, which have long been argued to have led to the emergence of the prior appropriation doctrine. The court’s early arguments in favor of the prior appropriation doctrine were typically justified through an appeal to equity. 78 However, even at these early stages the court recognized that the unique climate, topography, economic efficiency, and legal certainty of the state were critically important in animating the characterization of prior appropriation, while simultaneously being faithful to the principles of equity. 79 Recognition of the value of water to economic pursuits along the frontier persists throughout the period we survey, 80 and the court closes the period in which the riparian doctrine tenuously existed with a clear appeal to both the economic and climactic arguments, as underlying the fundamental preference for the prior appropriation doctrine in the arid West. 81

78. Any tribunal, governed by the established principles of law, making an apportionment of water in accordance with what is just and equitable, would be compelled to hold that the one who first located the land, and claimed the water, was entitled to sufficient to irrigate his land; for equity declares that he who is first in time is first in right.


If we were called upon to say what were the necessities of this country, in regard to the use of water for the purposes of irrigation, we should reply that there was a demand that water should be used for that purpose, and that the considerations of the general welfare of the country and the principles of natural equity should guaranty to the prior appropriation of water for such use the first right to the use of the same, to the extent of his necessities for domestic purposes, the quenching of the thirst of himself or animals, and for agricultural purposes.


79. Surely the climatic and physical conditions of this country cannot be such as to create a law so at variance with natural equity and so fatal to the improvement and prosperity of our best agricultural districts. It must be apparent to all that the best agricultural lands in this Territory are not at the sources of the streams.

Thorpe v. Freed, 1 Mont 651, 654 (1872).

80. The opinions in both Haggin and Smith highlight how the beneficial-use requirement was tied to productive economic activity. Smith v. Denniff, 24 Mont. 20, 29–30 (1900); Haggin v. Saile, 23 Mont. 371, 380 (1899). Furthermore, the decision in Smith rested in part on the right of a given right holder to sell to another who proceeded to put the water to a different beneficial use, a principle designed to increase the likelihood that water was being applied to its highest-valued uses. Bailey also displays these considerations, in that the case distinguishes the right to water—as vesting with irrigation companies—upon the time of completion of irrigation-ditch construction, not at the time water was actually put to beneficial use, as was the case in a number of other western states. Bailey v. Tintinger, 45 Mont. 154, 164–65 (1912).

81. [T]he common-law doctrine of riparian rights is unsuited to the conditions prevailing in the arid or semi-arid states of the Rocky Mountain region, and for
Out of sixty-one years of jurisprudence defining water doctrine in Montana, only six of 109 cases treat riparian rights to the extent of defining them or their interaction with other statutory requirements or customary practices. Mettler also directly indicates that it took until a drought in 1919 for a riparian right to come into direct conflict with a prior appropriation right.82 In comparison to the extensive amount of clarification that the prior appropriation doctrine required,83 riparian rights did not appear to have generated significant controversy within the state and never required treatment beyond the cases we analyze in detail, here. The notion that difficult cases are much more likely to make it to the highest court of a given jurisdiction84 further supports our interpretation that water rights holders within the State of Montana very infrequently operated under the assumption that they had riparian rights to water. Unfortunately, the lower-court record upon which the cases were determined is not available for our analysis. Thus, we are unable to examine the question of whether claimants appear to have believed in good faith that they had a riparian right to the water, or if they


82. Id. at 157
83. The Montana jurisprudence begins by defining the basic canons of prior appropriation rights to appropriate waters governed by the Bannack statutes. Tucker v. Jones, 8 Mont. 225 (1888); Thorp v. Woolman, 1 Mont. 168 (1870). The court later held that dates of appropriation are determined by the earliest appropriator. Columbia Mining Co. v. Holter, 1 Mont. 296 (1871). The court also held that appropriations can be made for mining purposes. Taylor v. Stewart, 1 Mont. 316 (1871). The court also held the concepts of abandonment. Gassert v. Noyes, 18 Mont. 216 (1896); Middle Creek Ditch Co. v. Henley, 15 Mont. 558 (1895); Atchison v. Peterson, 1 Mont. 561 (1872). Similarly, the centrality of irrigation to productive use of water in Montana meant that over the same period, the court defined a variety of legal principles related irrigation under prior appropriation. The court held that change of diversion cannot deprive subsequent appropriators. Gassert v. Noyes, 18 Mont. 216 (1896). Congruently, the right of way has been recognized by the Constitution of the State of Montana and the compiled statutes of 1887. Glass v. Basin Mining & Concentrating Co., 22 Mont. 151 (1899); Ellinghouse v. Taylor, 19 Mont. 462 (1897). Lastly, the court defined an appurtenance as anything used and related to the thing to which it appended. Hays v. Buzzard, 31 Mont. 74 (1904); Donnell v. Humphreys, 1 Mont. 518 (1872).

raised the claim opportunistically because of the ambiguity created by Montana’s statutory and case-law precedent.

Furthermore, a doctrine like riparian rights to water would have required significant clarification in an arid state like Montana, given the impossibility of productive uses along a watercourse never interfering with one another, especially in times of drought. A dearth of cases treating riparian rights indicates water claimants self-selected into prior appropriation. This supports the arguments surrounding the comparative economic efficiency of prior appropriation given the scarce nature of water in the West and the need for allocative certainty, which was required by the high coordination and investment costs of irrigation projects. This suggests there were significant gains to coordinating a rights regime in an environment where self-definition and self-enforcement of property was at least partially the norm.

In summary, a comprehensive picture of the disposition of water-rights claims early in Montana’s history requires an understanding of the variety of factors that constrained or influenced the supreme court of Montana as it adjudicated these claims. First, the court was constrained by federal law governing the disposition of public resources and lands as well as the statutory backdrop created by the territorial and state legislatures. Notably, this statutory backdrop included the adoption of the common law, which contained the riparian doctrine, whose incompatibility with public land uses influenced the development of the relevant case law. Similarly, given the unique climate and topography of the arid West, concerns of equity and economic efficiency also animated the court as it navigated potentially conflicting doctrines in light of the facts of each case. The court’s deference to the common law alongside statutory requirements created a doctrine of water rights that in practice was defined by both the court’s gradual reconciliation of legal conflict as well as coordination among water users themselves around the doctrine of prior appropriation. These dual means of doctrinal development are both apparent in the Territory and State’s supreme court water-rights jurisprudence throughout the period we have surveyed.

CONCLUSION

The territory and State of Montana was confronted with an institutional problem similar to that facing many arid, western states: the riparian doctrine was simply incompatible with realities in the
West and so was modified or abrogated entirely in favor of the prior appropriation doctrine. Our analysis of case law from the supreme court of Montana supports this contention. In the context of Montana, both prevailing explanations for the abandonment of the riparian doctrine are apparent. The doctrine was incompatible with pre-existing and predominant uses of public lands, given that these lands were already governed by prior appropriation in a de facto sense and given that title to public lands did not pass to mineral claimants, a requisite for the application of the riparian doctrine. Furthermore, the riparian doctrine was ill suited to an area where water was sufficiently scarce such that all participants could not use water without detracting significantly from the uses of other, competing settlers. However, unlike some western states, Montana did not settle definitely upon the prior appropriation doctrine until 1921; in the interim, the court was presented with a muddied set of statutory and case law that forced it to repeatedly consider the conflict between the water-rights doctrines. In resolving cases in a manner faithful to statutory intent, equitable resolution for the interests of the participants, and the canon of avoidance of legal conflict, the court slowly removed core components of the riparian doctrine until prior appropriation was the de facto law of the land. It was only after the conclusion of this process that the court abrogated the riparian doctrine entirely.

The Montana example carries a number of lessons regarding the development of property rights along frontiers. The case law clearly displays how scarcity drives changes in property rights, for a number of the cases we analyze in detail were only brought to court once a drought made two competing settlers’ uses of water incompatible. Also, unclear or internally inconsistent statutes can take a long time to unravel, for the court ultimately took sixty-one years to whittle away at the riparian doctrine before abrogating it, something the legislature of the Montana Territory could have done at the outset in 1865. Similarly, even when directly indicative of avoidance of legal conflict, judicial reconciliation of conflicting law can ultimately rewrite the law itself. In cases where this conflict emerged, the court slowly removed components of the riparian doctrine in the face of the hard truth that not every landowner in the territory and state could use water in a way that did not detract from others’ uses. Finally, our analysis of the entirety of the case law treating water
rights from 1865 to 1921 suggests that participants along frontiers can directly influence the definition of the law through their choices within a context of doctrinal ambiguity. The vast majority of disputes treating water rights that made it to the supreme court of Montana required clarification of the prior appropriation doctrine, as opposed to reconciliation between the competing riparian and prior appropriation doctrines.

Thus, our analysis is situated in a historical context that sheds light on a number of questions of interest to legal scholars. The Montana Supreme Court’s treatment of water law over sixty-one years displays elements of both legal-formalist and legal-realist understandings in the development of law. The letter of federal law clearly influenced the development of water law through the court’s recognition of the incompatibility of public lands with the riparian doctrine. The federal law (and conflicting state statutory treatment) had an effect but ultimately fell to the comparative prevalence of use of one doctrine over another. Similarly, the court repeatedly recognized arguments taking into account the comparative scarcity of water in the West and how the riparian doctrine was insufficient to resolve claims surrounding competing uses of water when there was not enough water to go around. In sum, both institutional and economic explanations for the emergence of the prior appropriation doctrine hold water in Montana.
In *Murr v. Wisconsin*, the Supreme Court finally answered the “denominator” question that had been lurking beneath Takings Clause jurisprudence for decades. The Court’s answer was a multi-factor test that, although nominally a middle position between the two extremes offered by the litigants, is in practice likely to be a big win for regulators. Under this test, conventional forms of land use regulation that affect owners of multiple, contiguous lots, in ordinary circumstances, are unlikely to be deemed regulatory takings, even if the regulation has severe effects on one of those lots.

The outcome of *Murr* was an unpleasant surprise for property rights advocates, who had good reasons to expect a victory. The Court granted the Murrs’ certiorari petition despite the absence of any published opinions from the courts below. The Wisconsin Supreme Court had denied review, and the Wisconsin Court of Appeals had written an unpublished opinion. When the Court grants certiorari in such circumstances, it is usually with an eye toward reversing. The certiorari grant thus strongly suggested that there were at least five votes in the Murrs’ favor. One of those votes presumably belonged to Justice Scalia, who died a few weeks after certiorari was granted. The Court then declined to schedule oral argument for a remarkably long time. The Murrs filed their reply brief in July 2016. In the normal course, the case would have been argued in October. But the Court did not schedule argument until March 2017, most likely in the hope that Justice Scalia’s successor would be confirmed so the Court could avoid a four-four tie. The delay likewise suggested that even without Justice Scalia there would be four votes in the Murrs’ favor. As it happened, Justice Gorsuch was not confirmed until April, so the Court had only eight Justices for *Murr*, and a four-four tie was widely thought to be a probable outcome.

Why did the government win? I would like to suggest that one important reason was the sheer ordinariness of the land use regulation

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2. *Id.* at 1945.
at issue in the case. The ordinance that the Murrs alleged to be a taking was a “merger” provision, which allows the development of a substandard lot only if the lot is in separate ownership from adjacent lots. Merger provisions are very common. Merger has been a standard tool of land use regulation for decades. That turned out to be important, for two reasons.

First, although defining the denominator is in principle a separate question from whether a taking has occurred, in practice the two questions are often inseparable. Answering the denominator question is often outcome-determinative. Picking the smaller denominator would imply that the regulation at issue is a taking; picking the larger denominator would imply that it is not.

Second, most of the Court’s regulatory takings cases can be grasped intuitively by asking a simple question: is the regulation being challenged a normal part of the regulatory landscape, or is it exceptional? Is it a restriction that everyone should expect, or is it an unfair surprise? At bottom, the point of regulatory takings doctrine is to protect the reasonable expectations of property owners. A regulation that seems to come from out of the blue or affects the property of only a small number of people is far more likely to be a taking than a regulation that is familiar and affects everyone. Merger is in the latter category. It is a familiar part of zoning ordinances throughout the country. No well-informed lawyer could be surprised by a merger provision.

Because merger is so ordinary and because picking the smaller denominator favored by the Murrs would have invalidated merger provisions, the Court refused to pick the smaller denominator. As a strategic matter, *Murr v. Wisconsin* turned out to be the wrong case for property rights advocates to take to the Supreme Court.

I. THE DENOMINATOR QUESTION

One important component of regulatory takings doctrine has always been the extent to which regulation reduces the value of property. If we consider two regulations, one of which causes the value of property to fall by one percent and the other of which causes the
value of property to fall by ninety-nine percent, it is obvious that the second regulation is a far more serious incursion on property rights than the first. It would be hard to imagine any coherent regulatory takings doctrine that does not take into account the economic impact of regulation.

But one percent or ninety-nine percent of what? How to define the denominator of this fraction has always posed a puzzle. The property owner wants the denominator to be as small as possible, to make the diminution in value look bigger. The government has the opposite incentive. This debate took place as early as Pennsylvania Coal v. Mahon, which is conventionally said to be the Supreme Court’s first regulatory takings case. The case involved a state law banning underground coal mining that would cause the subsidence of a house on the surface. Justice Holmes, writing for the majority, defined the denominator as the coal company’s subsurface rights to the coal (the company had sold the surface rights to the homeowners and had retained only the subsurface rights). With the denominator so defined, the state law took away virtually one hundred percent of the coal company’s property. As Holmes put it, “[T]he extent of the taking is great. It purports to abolish what is recognized in Pennsylvania as an estate in land—a very valuable estate . . . .” In dissent, Justice Brandeis argued that the denominator should be the value of the entire parcel of land, including the subsurface, the surface, and the air rights. He explained:

If we are to consider the value of the coal kept in place by the restriction, we should compare it with the value of all other parts of the land. That is, with the value not of the coal alone, but with the value of the whole property. The rights of an owner as against the public are not increased by dividing the interests in his property into surface and subsoil. The sum of the rights in the parts can not be greater than the rights in the whole. The estate of an owner in land is grandiloquently described as extending ab orco usque ad coelum [from Hades up to heaven]. But I suppose no one would contend that by selling his interest above 100 feet from the surface he could prevent the state from limiting, by the

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5. Id. at 413–14.
6. Id. at 414.
Brandeis recognized that the denominator can be manipulated by the landowner to make the impact of the regulation look more severe. His examples involved the vertical division of property, because those were the facts of *Pennsylvania Coal*, but his concern applies equally well to the horizontal division of property. For example, a landowner who is not allowed to build within six feet of the property line might, if he is allowed to choose his own denominator, claim a one hundred percent reduction in the value of that six-foot strip.

The problem never went away. In *Penn Central*, the 1978 case that marked the origin of contemporary regulatory takings jurisprudence, Justice Brennan’s majority opinion insisted that the denominator was not just the air rights above the train station, which the Penn Central Railroad wanted to lease to a company that would build a skyscraper, but rather the entire parcel on which the train station was located. The New York Court of Appeals, the court below, had defined the denominator even more broadly to include other parcels of land near the train station that were also owned by Penn Central, on the theory that the train station made those parcels more valuable than they would otherwise have been. A few years later, in another case involving a coal-mining statute, the Court effectively overruled *Pennsylvania Coal* on the denominator question, defining it as the whole parcel, not just the underground coal. In subsequent cases, the Court noted the existence of the question without attempting to resolve it.

The difficulty of the denominator question, as it existed prior to *Murr*, is perhaps most easily seen with a stylized example. Imagine a landowner who owns ten equally sized, contiguous parcels, numbered one through ten. Parcel six has an environmental feature, such as a wetlands or an endangered species, that causes the government to prohibit building on parcel six, which renders parcel six

7. *Id.* at 419 (Brandeis, J., dissenting).
worthless. Has the landowner lost one hundred percent of the value of parcel six? Or has he lost ten percent of the value of his land as a whole? Or consider a more realistic example. A real estate developer purchases a large tract of undeveloped land. She plans to subdivide the tract into fifty residential parcels, to build a house on each parcel, and to sell the parcels to fifty different purchasers. If, before the subdivision takes place, the government prohibits building on the area that was intended to be residential parcel thirty-three, the value of the tract will decline by two percent. What if the government prohibits building in that area after the subdivision takes place, but before any of the fifty parcels is sold? Has the developer lost one hundred percent of parcel thirty-three? Or only two percent of the combined area of all fifty parcels?

In principle, defining the denominator is a separate and prior question from deciding whether a taking has occurred. In practice, however, the questions blend together because a very small diminution in value is virtually never a taking, while a very large diminution in value is quite likely to be a taking and complete diminution in value, except in certain circumstances, is always a taking. Choosing a denominator thus often means deciding whether a taking has occurred. The debate is sometimes couched as a technical question of defining the scope of a claimant’s property right, but everyone realizes that it is often a debate over outcomes rather than methods.

The debate has been colored by the awareness that either party, the property owner or the government, has some ability to manipulate the size of the denominator. A property owner anticipating regulation that will affect part of his land may be able to divide one parcel into two or more, while the government may be able to combine two or more parcels into one. Empirical examples of these strategies seem to be rare, but the possibility that they might be implemented has counseled against any rule that would give either the property owner or the government the unilateral ability to define the denominator. On one side, if the denominator were a matter of personal choice, it would be open to manipulation by the property owner. On the other, if the denominator were a matter of state or local law, it would be open to manipulation by the state or local government.

12. See Lucas, 505 U.S. at 1003.
Murr presented the denominator question in the context of a merger provision. The Murrs owned two adjacent lots, Lot E and Lot F, along the St. Croix River in Wisconsin. There was a cabin on Lot F. Lot E was undeveloped. Both lots were too small to build on, under a county ordinance requiring at least one acre of buildable land. Because both lots were in existence before the enactment of the ordinance, both were “nonconforming” lots—that is, they benefited from a grandfather clause that allowed building despite their size. But the grandfather clause included a merger provision: it applied only to lots in separate ownership from adjacent lots. If two adjacent lots were owned by the same person and the combined area of the two lots was large enough to build on, the grandfather clause did not apply to either of the individual lots. The merger provision did not literally merge the lots, but it required treating them as a single lot for the purpose of the lot size requirement.

Because of this merger provision, it was unlawful to develop Lot E separately. The Murrs alleged that this was a regulatory taking. Here was where the denominator question arose: in evaluating the economic impact of the St. Croix County ordinance, which was the appropriate denominator, Lot E alone, or Lots E and F combined? If the answer was Lot E, the Murrs would have a strong takings claim because they were completely denied the ability to develop Lot E. But if the answer was Lot E and F combined, their takings claim would be considerably weaker. They were allowed to develop Lots E and F combined, and they lost only about ten percent of the lots’ combined value by not being allowed to develop both lots separately. The Wisconsin courts held that the appropriate denominator was Lots E and F combined.

II. MERGER PROVISIONS

If one had to predict the outcome of the Court’s regulatory takings cases in recent times with knowledge of only a single fact about each
case, perhaps the most useful fact to know would be whether the regulation at issue is common or unusual. Regulations that the Court has found to be takings have tended to fall unfairly on one person or a small number of people. In *Lucas v. South Carolina Coastal Council*, the challenged statute had the effect of preventing a single beachfront landowner from building a house after all his neighbors had already been allowed to build one.20 By contrast, the Court has found no taking where property owners challenged the sort of ordinary, ubiquitous regulations that affect large numbers of people, such as the historic landmark ordinance in *Penn Central*.21 Most regulation falls somewhere between these two extremes, and although people can disagree about how commonplace any particular sort of regulation actually is, this is still a useful generalization. Ordinary zoning ordinances, of the sort that exist in most cities of any size, are very unlikely to be regulatory takings. It would be very surprising if the Court were to use the Takings Clause to upset the expectations of millions of homeowners.

The merger provision at issue in *Murr* is not quite as commonplace as, say, the separation of commercial and residential uses in a normal zoning ordinance, but it is closer to that than any regulation the Court has considered in any of its previous takings cases. According to their brief, the Murrs were “flabbergasted”22 when they learned, too late, about the merger provision. If so, it is because they received poor legal advice when they placed the two parcels into common ownership. Merger provisions are such normal features of zoning ordinances that any competent real estate lawyer would know about them. Merger provisions are common because they serve an important purpose: they reconcile the community’s interest in preventing the harms caused by congestion with the landowner’s interest in developing a substandard lot.

Minimum lot size requirements have long been the standard way of preventing the harms caused by congestion. Since the advent of zoning, state and local governments have sought to regulate the density of development, in order to prevent overcrowding, to avoid depleting natural resources, to preserve the character of communities,

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and to sustain property values. Minimum lot size requirements “are by far the most common form of density control in zoning ordinances.”23 Today, lot size requirements can be “found in virtually all zoning ordinances.”24

Courts have consistently recognized that minimum lot size requirements serve important public purposes, including preventing the evils of overcrowding and the ill effects of urbanization, control of traffic, protection of property values, protection of aesthetics and the character of an area, protection of open space, the provision of adequate public facilities, protection of the water supply, preventing erosion and providing emergency access, preventing water pollution, preservation of agricultural lands, and the protection of environmentally sensitive areas including wildlife habitat.25

As early as 1926, the Court noted that “[t]here is no serious difference of opinion in respect of the validity of laws and regulations fixing . . . the adjoining area which must be left open, in order to minimize the danger of fire or collapse, the evils of overcrowding and the like.”26 More recently, the Court observed that minimum lot size requirements are a way of protecting a town’s residents “from the ill effects of urbanization.”27 The state courts have likewise emphasized the value of lot size restrictions in limiting traffic congestion,28 safeguarding the environment,29 conserving the water supply,30 and sustaining neighboring property values.31

Merger has long been recognized as the most reasonable way to reconcile the landowner’s interest in developing a nonconforming lot with the community’s interest in preventing congestion. A “nonconforming” lot is one that was of lawful size before the enactment

of a minimum lot size requirement but is now too small. Nonconforming lots are analogous to nonconforming uses—that is, uses of land that were once lawful but do not comply with a new zoning restriction, as when a business finds itself located within an area newly zoned for residential use. Nonconforming lots and nonconforming uses are allowed to continue because of the obvious unfairness in forcing them to terminate immediately.

But there is one major difference between nonconforming lots and nonconforming uses. Nonconforming uses are typically phased out over time. Zoning ordinances often establish an “amortization” period, which “simply designates a period of time granted to owners of nonconforming uses during which they may phase out their operations as they see fit and make other arrangements.” Provided the amortization period is long enough to allow the owner to recoup his investment, courts have generally concluded that amortization strikes an appropriate balance between the landowner’s reasonable expectations and the public’s interest in advancing the goals served by the zoning ordinance.

Amortization will not work for nonconforming lots, however, because the size of a lot cannot be phased out over time. Most nonconforming lots are thus grandfathered in permanently; they are forever exempt from the minimum lot size requirement that would otherwise be applicable. But this outcome limits the community’s ability to accomplish the goals that the lot size requirement was intended to serve. Because of the impossibility of amortizing nonconforming lots, local governments have sought some other way to strike a sensible balance between private and public interests.

The solution has been merger. Where the owner of an undeveloped, nonconforming lot also owns another contiguous lot, and where the two lots together would be large enough to comply with the lot size minimum, ordinances often treat the two lots as one for this purpose. Typically, the lots are not literally merged. The sole effect of most “merger” provisions is simply that the exemption for nonconforming lots is denied to a landowner who also owns an adjacent lot.

35. Id. § 12:12.
36. See, e.g., EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 25:179.6,
Such merger provisions have been features of local zoning ordinances for a very long time. Great Neck Estates, New York, enacted one in 1926.37 Bayville, New York, enacted one in 1927.38 Nahant, Massachusetts, enacted one in 1940.39 Attleboro, Massachusetts, enacted one in 1942.40 Skokie, Illinois, enacted one in 1946.41 Hempstead, New York, and Wellesley, Massachusetts, both enacted theirs in 1951.42 Weston, Connecticut, enacted one in 1953.43 Berlin, Connecticut, enacted one in 1954.44 Redford, Michigan, enacted one sometime before 1957.45 Old Lyme, Connecticut, enacted one in 1957.46

By 1960, merger provisions were so common that the American Society of Planning Officials included one in The Text of a Model Zoning Ordinance it published for the benefit of local governments nationwide.47 A few years later, the leading zoning treatise of the era explained that the owner of a nonconforming lot

is entitled to an exception only if his lot is isolated. If the owner of such a lot owns another lot adjacent to it, he is not entitled to an exception. Rather, he must combine the two lots to form one which will meet, or more closely approximate, the frontage and area requirements of the ordinance.48

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Westlaw (3d ed. 2017) (“Municipalities often have ordinances which treat commonly owned, contiguous lots, one or more of which are nonconforming, as one conforming lot.”); Jock v. Zoning Bd. of Adjustment, 878 A.2d 785, 794 (N.J. 2005) (“The term ‘merger’ is used in zoning law to describe the combination of two or more contiguous lots of substandard size, that are held in common ownership, in order to meet the requirements of a particular zoning regulation.”).

48. 2 ROBERT M. ANDERSON, AMERICAN LAW OF ZONING § 8.49 (1968). See also John R. McGill, Note, Substandard Lots and the Exception Clause—“Checkerboarding” as a Means of Circumvention, 16 SYRACUSE L. REV. 612, 614 (1965) (“[M]ost ordinances include a section which exempts substandard lots in existence at the time the ordinance is enacted (or amended) provided they are held in single, separate ownership.”).
Merger provisions became common because local governments and state courts recognized that they represent an appropriate middle ground between two unattractive extremes—prohibiting the development of substandard lots, which would be a hardship to their owners, and allowing the development of all substandard lots, which would be a hardship to neighbors and the community. As the Maine Supreme Court explained, a merger provision “is designed to strike a balance between a municipality’s interest in abolishing nonconformities and the interests of property owners in maintaining land uses that were allowed when they purchased their property.”

On one side of the balance, the public has an interest in “the reduction of nonconforming lots,” which exacerbate the congestion that motivated the enactment of the lot size minimum. “Otherwise, subdivisions in their infancy could perpetuate for years the problems zoning was designed to eliminate.” On the other side of the balance, while any restriction on development will have some effect on the owner of property, “the financial hardship on the owner in complying is not nearly as great [where he is able] to conform by enlarging lot sizes or combining two lots into one.” The state courts have thus widely recognized that merger provisions “operate to decrease congestion in the streets and to prevent the overcrowding of land” without imposing unreasonable burdens on individual landowners.

For this reason, countless ordinances all over the country include merger provisions like the one challenged by the Murrs. Several states have enacted statutes specifically authorizing local governments to include merger provisions in their zoning ordinances.


52. Id.


54. See, e.g., CAL. GOVT. CODE § 66451.11 (Deering 2018) (“A local agency may, by ordinance which conforms to and implements the procedures prescribed by this article, provide for the merger of a parcel or unit with a contiguous parcel or unit held by the same owner if any one of the contiguous parcels or units held by the same owner does not conform to standards for minimum parcel size . . . .”); MASS. GEN. LAWS. ch. 40A, § 6 (2018) (providing that lot size minimum requirements shall not apply to a nonconforming lot that “was not held in common ownership with any adjoining land”); MINN. STAT. § 394.36(5)(d) (2017) (providing that nonconforming lots “must be combined with the one or more contiguous lots so they equal one
some states, merger is a common-law doctrine that can apply even in the absence of a local ordinance requiring it. In other states, local governments enact merger provisions pursuant to general legislative grants of zoning authority. Many municipalities have merger provisions in their zoning ordinances, including, just to name a few, Charlotte, El Paso, Miami, Minneapolis, New Orleans, Palm Springs, Pittsburgh, and Tampa.

With just a few minutes of research, one can find many periodicals and web pages explaining that the purchaser of a vacant, nonconforming lot should be careful to ascertain whether the lot is governed by a merger provision. Practice guides for attorneys likewise advise...
that local zoning ordinances may treat a nonconforming lot as merged with an adjoining lot in common ownership.59 In short, a well-advised owner or purchaser of land should expect that the land may be governed by a lot size minimum and an associated merger provision. These are common zoning rules that are well within the reasonable expectations of landowners and their lawyers.

In deciding Murr, the Court seems to have been influenced by how common these merger provisions are. Near the beginning of oral argument, Justice Ginsburg asked: “[T]hese merger rules have a long history. Many States have them. So why isn’t that background State law that . . . would apply?”60 Justice Kennedy worried that if the Murrs prevailed, “all of those other State regulations are also invalid”—that is, the Court would be invalidating merger provisions in towns all over the country. Kennedy repeated this concern in his opinion for the Court. “The merger provision here,” he observed, is “a legitimate exercise of government power, as reflected by its consistency with a long history of state and local merger regulations that originated nearly a century ago.”62 He noted that the Murrs’ proposed rule “would frustrate municipalities’ ability to implement minimum lot size regulations by casting doubt on the many merger provisions that exist today.”63

The sheer ordinariness of the merger provision at issue in Murr thus played an important part in the Court’s decision to adopt a government-friendly standard for identifying the appropriate denominator in regulatory takings cases. Of course, that was not the only consideration in the case. This issue has been around for so long

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59. See, e.g., 28 MICHAEL PILL, ET AL., MASSACHUSETTS PRACTICE, REAL ESTATE LAW § 23.6, Westlaw (4th ed. 2017) (“Always check the local zoning bylaw or ordinance . . . [B]uilding lots which do not meet current zoning dimensional requirements, and which came into common ownership or control subsequent to the zoning change that rendered them nonconforming, are merged into a single lot for zoning purposes . . . .”); 36 DAVID J. FRIZZELL & RONALD D. CUCCHIAVO, NEW JERSEY PRACTICE: LAND USE LAW § 15.7, Westlaw (3d ed. 2017) (suggesting that merger can be easily avoided by titling adjacent nonconforming parcels in different entities, because “[s]o long as the legal titles are kept separate, the doctrine will not be used to merge lots that are under a single ‘dominion and control.’”); 9B ROBERT A. FULLER, CONNECTICUT PRACTICE: LAND USE LAW & PRACTICE § 53:6, Westlaw (4th ed. 2017) (“[T]here can be lot merger . . . where the zoning regulations contain a merger provision for nonconforming contiguous lots.”).


61. Id. at 12.


63. Id. at 1947–48.
that there are many standard arguments on both sides, all of which were duly made by the parties and their many amici. But one has to wonder whether the Court would have reached the same result in a case involving a limitation on land use that was not so normal. If the denominator issue had been litigated in a case involving a regulation that was an unfair surprise, one that upset a landowner’s reasonable expectations, perhaps the result would have been different.
The Fifth Amendment Takings Clause was interpreted through the nineteenth century as referring only to physical takings or ousters of possession. Justice Holmes’s enigmatic 1922 opinion in Pennsylvania Coal Co. v. Mahon was the genesis of the contemporary “regulatory takings” doctrine, which reached full expression in 1978 in Penn Central Transportation Co. v. City of New York. The ad hoc, three-factor test of Penn Central, generally deemed incoherent and chaotic, focused on regulatory burdens placed upon landowners, not with respect to specific rights but rather with regard to a specified relevant parcel (“parcel as a whole”). In 2017, in Murr v. Wisconsin, the Court conflated the elements of what constitutes the relevant parcel and the three factors pertaining to whether that parcel had been taken.

This Article discusses theories of “property,” the merits of balancing tests versus more objective rules, and how these play out in the Murr majority opinion and dissents. It also treats the importance of Murr’s mandate to internalize those externalities that were irrelevant prior to regulation. Given the universal unhappiness with regulatory takings jurisprudence, this Article also considers arguments for reconsidering regulatory takings as due process deprivations.
C. The “Relevant Parcel” Test and “Parcel as a Whole” ..... 213
   1. A History of “Parcel as a Whole” .......................... 214
   2. Variations on Rules for a “Relevant Parcel” .......... 216
   3. Severance—But Also Agglomeration .................. 217

D. The Murr Litigation ........................................ 218
   1. The Basic Facts ........................................ 219
   2. Murr in the Supreme Court .............................. 221
   3. Murr Conflates Ownership and Regulation .......... 222
   4. Internalizing Those Externalities Irrelevant Prior to Regulation ...................... 224
   5. Envisioning a Minimalist Murr Opinion .......................... 226

II. DESTABILIZING PRIVATE PROPERTY .......................... 228
   A. Lockean and Governance Property .................. 229
      1. Lockean and Natural-Rights Perspectives ............. 229
      2. Governance Property .................................. 230
      3. Productive-Labor Theory .............................. 232
      4. The Civic Republican Tradition ...................... 232
      5. Property as the “Law of Things” .................. 233
   B. The Continuing Debate over Bright-Line Rules ....... 234
      1. Kennedy and Scalia Debate Bright-Line Rules .... 234
      2. The Tendency Towards Circularity ................. 238
   C. Murr Intensifies Concerns Regarding Government Overreach ........................................ 240
      1. The Gerrymandering of Property ..................... 241
      2. Property Rights and Rent-Seeking ................. 242
      3. The Creep of Expectations .......................... 243
      4. Conflation of the Police Power and Takings ........ 244
   D. The Poor Fit Between the Takings Clause and Regulatory Takings ........................................ 246
      1. Practical Difficulties ................................ 246
      2. Constitutional Infirmities .......................... 249
   E. Alternatives to Present Takings Doctrine ............. 252
      1. Substantive Due Process ............................ 252
      2. Justice Kennedy and the Extension of Due Process Analysis ........................................ 256
      3. Privileges or Immunities ................................ 258

CONCLUSION ........................................ 260
INTRODUCTION

Traditional takings doctrine, based as it is on the indicia of physical occupation of land, does not fit easily into the issues that arose with the emergence of the regulatory state.

Judge S. Jay Plager

During the past forty years, the United States Supreme Court has developed a doctrinal structure for adjudicating inverse condemnation claims respecting property in land. Permanent government arrogations of possession are compensable, as are permanent deprivations of all economic value. Other deprivations of rights in land are evaluated using an ad hoc, multifactor test and are compensable if sufficiently severe. Claims are evaluated based on the Takings Clause and not other constitutional provisions such as the Due Process Clause.

However, closer inspection indicates that judicial formulations regarding claims based on other than arrogations of land—referred to as “regulatory takings”—rest on an insecure foundation. It was a statute that literally drew lines on coastal sands that led to the dueling opinions of Justices Scalia and Kennedy a quarter century ago in *Lucas v. South Carolina Coastal Council*.2 It was a statute obliterating property lines along scenic river shores that, in 2017, gave rise to *Murr v. Wisconsin*.3 There, Justice Kennedy maintained his earlier views, while the late Justice Scalia’s quest for bright-line stability was picked up by Chief Justice Roberts.

Justice Kennedy’s opinion for the Court in *Murr* held fast to *Penn Central Transportation Co. v. City of New York*,4 where the Court developed the outlines of its ad hoc, multifactor approach to regulatory takings. Indeed, Kennedy took the Court’s muddled, ad hoc approach and conflated it with antecedent considerations of property ownership. Chief Justice Roberts, however, decried that the Court now was drawing into its *Penn Central* multifactor web the very definition of property itself.

For some, *Murr* reflects changing notions of property and environmental awareness, and vindicates Heraclitus’ admonition: “No man

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ever steps in the same river twice, for it's not the same river and he's
not the same man.”

5 For others, redefining property rights in light of
social pressures is reminiscent of Senator Daniel Patrick Moynihan’s
famous admonition that American society eliminates dissonance by
diminishing norms.

In a broader sense, *Penn Central*, *Lucas*, and now *Murr* reflect the
tension between two fundamental goals. On the one hand, “property” is an undifferentiated attribute of the *individuals* who
enter into society.

7 The protection of property rights in things
counters overreaching by government and is essential to individual liberty.

9 On the other hand, the Constitution’s framers and their
generation primarily have conceived of a society imbued not by
individualism but with the need for, and promise of, civic virtue.

Deprivations of ownership in things seem a natural fit with the
Takings Clause, whereas placing unfair burdens on individuals
largely invokes substantive due process.

12 Assertions of republicanism

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5. HERACLITUS, FRAGMENTS, at xii, 27 (Brooks Haxton trans., Viking Adult 2001).

which attempted to test the theory of Émile Durkheim’s *The Rules of the Sociological Method* (W.D. Halls trans., The Free Press 1982) (1895). The theory, in Erickson’s words, hypothesized that “the number of deviant offenders a community can afford to recognize is likely to remain stable over time.” Id. at 19.


8. See, e.g., RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 281 (1985) (“[T]he Takings Clause is designed to control rent seeking and political faction. It is those practices, and only those practices, that it reaches.”).


11. U.S. CONST. amend. V (“[N]or shall private property be taken for public use without just compensation.”). The Clause is applicable to the states through the Fourteenth Amendment and *Chicago, Burlington & Quincy R.R. v. City of Chicago*, 166 U.S. 226 (1897).

12. See infra Section II.E.1 for discussion.
and civic virtue engender a reaction of distrust of government, largely manifested in what Justice Alito described in *Koontz v. St. Johns River Water Management District* as “extortionate demands” that “impermissibly burden the right not to have property taken without just compensation.”

Another challenge is finding an appropriate baseline for legal inquiry. Among the inflection points in American takings law are the following: the expansion beyond explicit condemnation in *Pumpelly v. Green Bay Co.*; the inclusion of takings by regulation in *Pennsylvania Coal Co. v. Mahon*; the rise of loosely constrained judicial review based largely on perceived owners’ “expectations” in *Penn Central*; and the articulation of a bright-line test in *Lucas*. Now *Murr* promises to further blur the distinction between property and its regulation.

This Article asserts that the concept of property as a tool for societal governance remains ascendant; that the traditional view of property rights as protecting owners’ autonomy is an impediment to this progression; and that, to paraphrase Senator Moynihan, this results in a government inclination to define property down. This occurs in *Murr* through the Court’s recognition of a four-factor *Penn Central* regulatory takings test, which interacts in indeterminate ways with a new “relevant parcel” test, loosely tethered to ownership of a specific parcel.

I. *PENN CENTRAL’S INCOHERENCE IS EXACERBATED BY MURR*

In *Murr v. Wisconsin*, the petitioners maintained that the boundaries of an individually deeded parcel that they owned were definitive. Under the applicable Wisconsin merger regulation, that parcel was

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14. *Id.* at 2595–96.
consolidated with another, which petitioners asserted deprived them of all rights to develop it. The State maintained that its merger regulation was definitive.

Justice Kennedy, writing for the majority, 23 found that neither the boundaries of the deeded parcel nor the merger statute were definitive. Instead, he employed a loose formulation that at the same time subjects a “relevant parcel” to regulatory takings analysis and uses the elements of regulatory takings analysis to help determine the relevant parcel to be analyzed. 24

As I previously asserted, 25 the judicial career of Penn Central’s “parcel as a whole” analysis, albeit textually separate from its treatment of the three other considerations, made it clear that the case had functionally laid out a four-factor test. Murr confirmed this understanding, and laid out that the “parcel as a whole” was both separate from and interrelated to the other factors. Murr thus both exacerbated existing problems with Penn Central and weakened the Court’s understanding of “property.” 26

This Part summarizes the Penn Central litigation and analyzes the Supreme Court’s ad hoc, multifactor test for adjudicating regulatory takings. It examines how the takings framework conventionally described as the “three-factor” Penn Central test was incoherent even before Murr.

Justice Brennan’s Penn Central opinion for the Court 27 remains, after four decades, the “polestar” of the Supreme Court’s regulatory takings jurisprudence. 28 Penn Central has been the subject of voluminous scholarly commentary. 29 Although the case has become

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23. Justice Kennedy was joined by Justices Ginsberg, Breyer, Sotomayor, and Kagan. Chief Justice Roberts wrote the principal dissent, joined by Justices Thomas (who also wrote a separate dissent) and Alito. Justice Gorsuch, who joined the Court subsequent to oral argument, did not participate.
26. See infra Part II.
regarded as pre-eminent, at the time it was written there was little
inkling that it would be important at all.\textsuperscript{30}

\textit{A. The Penn Central Litigation}

Grand Central Terminal, opened in 1913, was described by the
Supreme Court as a “magnificent example of the French beaux-arts
style.”\textsuperscript{31} Eventually, it was designated as a landmark by the New
York City Landmarks Preservation Commission, which meant that
the commission’s permission was required for exterior alterations or
site improvements. In 1968, Penn Central, desirous of augmenting
its income, entered into a long-term lease of air rights that would
involve the construction of a fifty-five-story office building above the
terminal. There was no dispute that the building would meet all
zoning and building requirements, but the commission denied a re-
quired “certificate of appropriateness” because it deemed the project
an “aesthetic joke.”\textsuperscript{32}

The railroad sued, and the New York trial court found that the
commission’s denial constituted a compensable taking.\textsuperscript{33} The intermediate appellate court reversed, finding that the railroad could earn a
reasonable rate of return,\textsuperscript{34} and its decision was affirmed in a very
sweping opinion by the New York Court of Appeals that emphasized
the public’s role in creating the terminal’s value.\textsuperscript{35} Justice Brennan’s
Supreme Court opinion did not refer to that analysis but rather

\begin{itemize}
\item \textit{Central Test and Tensions in Liberal Property Theory}, 30 HARV. ENVTL. L. REV. 339 (2006);
\item Christopher Serkin, Penn Central Take Two, 92 NOTRE DAME L. REV. 913 (2016).
\item Transcript, Looking Back on Penn Central: A Panel Discussion with the Supreme Court Litigators, 15 FORDHAM ENVTL. L. REV. 287 (2004) [hereinafter Transcript, Looking Back] (noting that, in order to hold a majority, clerks in other chambers warned that “the opinion better not say very much,” and, after the draft was circulated, “Justice Stewart’s clerk read it and said he was pretty sure it doesn’t say anything at all. [Laughter]” (comment of David Carpenter, who worked on the opinion as Justice Brennan’s judicial clerk)).
\item Id. at 117–18.
\item (noting the unpublished order of the New York court).
\item Id.
\item Penn Cent. Transp. Co. v. City of New York, 366 N.E.2d 1271 (N.Y. 1977), aff’d, 438
\item U.S. 104 (1978). In determining the base upon which the rate of return was calculated, Chief Judge Charles Breitel subtracted “that ingredient of property value created not so much by the efforts of the property owner, but instead by the accumulated indirect social and direct
governmental investment in the physical property, its functions, and its surroundings.” \textit{Id.}
at 272–73. See also Steven J. Eagle, Public Use in the Dirigiste Tradition, 38 FORDHAM URB.
\end{itemize}
broadly deemed that the landmark regulation “benefit[ed] all New York citizens and all structures.” The opinion further declared, contrary to the gravamen of then-Justice Rehnquist’s dissent, that “we cannot conclude that the owners of the Terminal have in no sense been benefitted by the Landmarks Law.”36

The Court applied its three-factor test to the tax block on which the terminal was located37 and determined that there had been no taking. I will summarize the Court’s analysis in *Penn Central* briefly, but I have discussed it at greater length elsewhere.38

B. The Penn Central Ad Hoc, Multifactor Takings Test

In 1978, the Court developed in *Penn Central*39 the outlines of an ad hoc, multifactor approach to regulatory takings that it subsequently expanded upon.40 Justice Brennan enunciated the standard for the Court’s inquiry:

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37. See infra Section I.C.1.


40. The principal cases expanding upon *Penn Central* include the following: Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005) (finding that “does not substantially advance legitimate state interests” is not a valid takings test, but rather a substantive due process test); Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency, 535 U.S. 302 (2002) (deciding whether a temporary moratoria on all economic use is a taking that must be evaluated on *Penn Central* factors); Palazzolo v. Rhode Island, 533 U.S. 606 (2001) (deciding that a takings claim is not barred by acquisition of title subsequent to the effective date of regulation); Dolan v. City of Tigard, 512 U.S. 374 (1994) (finding that conditions imposed on an administrative permit not based on an individualized determination of the “rough proportionality” between the conditions and the police-power burdens resulting from development constitute a taking); Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992) (noting that a complete deprivation of economic use constitutes a taking); Nollan v. Cal. Coastal Comm’n, 483 U.S. 825 (1987) (deeming the imposition of a development-permit condition without any nexus to permissible regulatory purposes a taking); First English Evangelical Lutheran Church of Glendale v. Cty. of Los Angeles, 482 U.S. 304 (1987) (ordering that compensation must be paid where a regulation constituted a taking for the time during which the taking was effective, despite the government’s subsequent withdrawal or invalidation of the regulation then in effect); Williamson Cty. Reg’l Planning Comm’n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985) (stating that takings claims against state or local governments are not “ripe” for federal court adjudication without (1) a final decision regarding the type and intensity of development permitted and (2) the exhaustion of available state procedures for compensation); Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) (finding that the public disclosure of trade secrets in violation of a statutory promise of confidentiality constitutes a taking); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (finding that permanent physical occupations constitute per se takings).
In engaging in these essentially ad hoc, factual inquiries, the Court’s decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. A “taking” may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.41

At the outset, it is useful to discuss whether the Penn Central regulatory takings factors were intended to be talismanic, and also whether they are useful in predicting legal determinations.

Conventionally, Penn Central is described as a three-factor test,42 examining (1) the economic impact on the property owner, (2) interference with the owner’s distinct investment-backed expectations, and (3) the character of the regulation. It is not clear, however, why this formulation should be definitive. Logically, perhaps the test should be comprised of two factors since “investment-backed expectations” seems a subset of “economic impact,” or, perhaps truer to the overall tenor of the opinion, the first factor of the multifactor test should be “the impact of the challenged regulation on the claimant, viewed in light of the claimant’s investment-backed expectations.”43 That said, the Court specified, in Kaiser Aetna v. United States, that expectations constituted a separate factor.44

More broadly, the fact that the Court had “identified several factors that have particular significance” seems to suggest that there are factors either of lesser importance or not yet identified. The Supreme Court of California included the three Penn Central factors in its list of thirteen factors, which it described as “not a comprehensive enumeration.”45 This dispute over the proper taxonomy seems

41. Id. at 124 (citations omitted).
reminiscent of French Prime Minister Georges Clemenceau’s dismissive comment that while President Woodrow Wilson had Fourteen Points, “God Almighty has only Ten!” In fact, the ad hoc nature of the Penn Central inquiry might preclude any definitive list of factors, and “it is far from obvious” that Penn Central “actually intended this enumeration of ‘significant’ factors to define a determinative, free-standing test” at all. The three conventional Penn Central factors are as follows.

1. Economic Impact

In Mahon, Justice Holmes acknowledged that “[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.” He added, however, that regulation “must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution [in value].” The Penn Central economic-impact factor of the regulation test might have been designed to incorporate diminution-in-value as a rough measure of harm and therefore a coarse screening device. As the Supreme Court later put it, the “common touchstone” of its regulatory takings tests are that they “aim to identify regulatory actions that are functionally equivalent to a [government] appropriation . . . or ouster.”

Where a regulation strips property of “all economically beneficial uses,” its economic impact is conclusive under Lucas v. South Carolina Coastal Council and constitutes a categorical taking not requiring Penn Central balancing.
United States,\footnote{Lost Tree Vill. Corp. v. United States, 787 F.3d 1111 (Fed. Cir. 2015), cert. denied, 137 S. Ct. 2325 (2017).} the U. S. Court of Appeals for the Federal Circuit made clear that “economic use” was the key, and that the existence of market value predicated on speculative regulatory changes or potential future uses was not relevant.\footnote{Id. at 1117.}

On the other hand, the Court in \textit{Lucas} noted that it had “frequently . . . held that, in some circumstances, a law that renders property valueless may nonetheless not constitute a taking” if the action was necessary to protect the public health, safety, and welfare.\footnote{Lucas, 505 U.S. at 1064 (citing cases).} Similarly, in \textit{Consolidated Rock Products Co. v. City of Los Angeles},\footnote{Consol. Rock Products Co. v. City of Los Angeles, 370 P.2d 342 (Cal. 1962).} the California Supreme Court upheld a zoning ordinance that required the cessation of the company’s sand and gravel excavation even though the parcel had substantial value in those uses and otherwise its value was “relatively small if not minimal.”\footnote{Id. at 351.} The U.S. Supreme Court dismissed the appeal for want of a substantial federal question.\footnote{Consol. Rock Products Co. v. City of Los Angeles, 371 U.S. 36 (1962) (dismissing appeal).}

The “economic impact” factor of \textit{Penn Central} seems to be accorded a role secondary to “investment-backed expectations.”\footnote{See infra note 63 and accompanying text.} In any event, impact is difficult to ascertain given that there are contesting methodological approaches to valuation.\footnote{See generally Steven J. Eagle, “Economic Impact” in Regulatory Takings Law, 19 Hastings W.-Nw. J. Envtl. L. & Pol’y 407 (2013).}

2. Investment-Backed Expectations

“Investment-backed expectations” has been the most important of the \textit{Penn Central} factors.\footnote{See, e.g., Guggenheim v. City of Goleta, 638 F.3d 1111, 1120 (9th Cir. 2010) (describing it as the “primary factor”); Steven J. Eagle, \textit{The Rise and Rise of “Investment-Backed Expectations,”} 32 Urb. Law. 437 (2000) (noting a trend towards treating investment-backed expectations as an “absolute requirement,” and citing cases); Serkin, supra note 29, at 924 (describing it as the “most important” factor).} In his seminal article \textit{Property, Utility, and Fairness},\footnote{Frank I. Michelman, \textit{Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law}, 80 Harv. L. Rev. 1165 (1967).} Professor Frank Michelman referred to the importance of a “distinctly perceived, sharply crystallized, investment-backed expectation.”\footnote{Id. at 1233.} The concept was derived from Michelman’s desire to
protect an owner whose particular land uses were predicated on then-existing regulations, as opposed to a speculator who might be open to many possibilities for the land’s use. Justice Brennan’s use of “investment-backed expectations” came directly from Professor Michelman’s article.

Without the slightest explanation, in Kaiser Aetna v. United States the Court changed the phrase “distinct investment-backed expectations” to “reasonable investment-backed expectations.” The effect was to change the inquiry from whether the landowner’s expectations were sincere albeit perhaps idiosyncratic to whether they were both sincere and ostensibly objective. While “expectations” seem personal and subjective, “reasonableness” is objective only in the sense that it is rooted in the context of the broader society’s expectations, which might be conflicting or indeterminate. The only thing clear is that the expectations of individuals and the society that regulates their conduct interact.

Justice Brennan cited Mahon as the “leading case for the proposition that a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a ‘taking.’” However, it is useful to recall that Mahon involved the arrogation of the company’s mineral estate, which was defined as a separate interest in land under Pennsylvania law. Thus, it involved not “general” state policies but rather a narrow policy transferring the rights from the holders of mineral interests to surface owners. Thus, Justice Holmes’s emphasis on regulations that go “too far” and on “diminution in value” seems like dicta on a grand scale.

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66. Id. at 1233–34. See also Eagle, supra note 63, at 437–42 (discussing the implementation of Michelman’s vision in Penn Central).

67. Transcript, Looking Back, supra note 30. “The concept of ‘investment backed expectations’ definitely came from Michelman’s article.” Id. at 309 (comment of David Carpenter, who worked on the opinion as Justice Brennan’s judicial clerk).


69. See infra Section II.B.2 (discussing circularity). See also Eagle, supra note 63, at 442).


72. See Keystone Bituminous Coal Ass’n v. DeBenedictis, 480 U.S. 470, 485 (1987) (upholding a statute designed, generally, to prevent subsidence, which, unlike the Kohler Act at issue in Pennsylvania Coal, “does not merely involve a balancing of the private economic interests of coal companies against the private interests of the surface owners.”).

The takings claim in *Penn Central* resulted from the rejection by the New York City Landmarks Preservation Commission of the railroad’s application to construct an office building above Grand Central Terminal.\(^7^4\) Justice Brennan, writing for the Supreme Court, upheld the New York Court of Appeals’ finding for the defendants.

Among the ironies surrounding *Penn Central* are that the air rights envelope, in which the building was to be constructed, already had been sold to UGP Properties, Inc., and plausibly might have been considered a separate parcel. However, Penn Central’s attorney thought in 1978 that air rights were novel, and thus chose not to raise the point.\(^7^5\) Also, the railroad failed to challenge the New York courts’ determination that it “could earn a ‘reasonable return’ on its investment in the Terminal,”\(^7^6\) although at that time passenger railroads faced a “fatal hardship” that soon led to the takeovers of Penn Central’s rail operations by the federal government and the Terminal by New York City.\(^7^7\) Finally, the assumption that Penn Central had no “investment-backed expectations” with respect to the airspace above the terminal seems belied by the Court’s fleeting recognition that its foundation “includes columns, which were built into it for the express purpose” of supporting an office building.\(^7^8\)

Ultimately, Professor Richard Epstein’s comment that “[n]either [Justice Brennan in *Penn Central*] nor anyone else offer[] any telling explanation of why this tantalizing notion of expectations is preferable to the words ‘private property’”\(^7^9\) remains much on point.

3. Character of the Regulation

It is not clear if the “character of the regulation” test has any contemporary meaning. While the Court in *Penn Central* contrasted a “physical invasion by government,” which was compensable, and “some public program adjusting the benefits and burdens of economic

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\(^7^4\). *Penn Cent.*, 438 U.S. at 117–18.

\(^7^5\). Transcript, *Looking Back*, supra note 30, at 288 (remarks of Daniel Gribbon, Esq.). Mr. Gribbon later stated that he thought he made a “mistake . . . in not arguing the notion that air rights are a very important and discrete part of a property interest.” *Id.*


\(^7^8\). *Penn Cent.*, 438 U.S. at 115 n.15 (1978).

life,” which was not, 80 that distinction fell away after only four years. Then, in Loretto v. Teleprompter Manhattan CATV Corp., 81 the Court held that a permanent physical invasion constituted a categorical taking without need for recourse to Penn Central balancing. If a government action is arbitrary or capricious, Lingle v. Chevron U.S.A. Inc. subsequently made it clear that it will fail muster for that reason alone, with no takings inquiry required. 82 On the other hand, if an action is vital to the public welfare, that does not excuse the failure to pay just compensation, since it is exactly the situation the Takings Clause contemplates. 83

In Eastern Enterprises v. Apfel, 84 a four-justice plurality of the Supreme Court found that a statute imposing severe and unexpected retroactive payment obligations triggered the need for declaratory relief. 85 Four other Justices concluded that the statute did not violate due process. 86 The swing vote, Justice Kennedy, agreed with the plurality that relief was required, but grounded his view in the Due Process Clause. 87 A few subsequent lower court opinions have indicated that if a regulation is of a character embodying severe retroactivity or if it targets a particular entity, it would suggest a taking. 88 However, no Supreme Court holding has been based on the “character” issue, and it remains to be seen whether it is relevant at all.

80. Penn Cent., 438 U.S. at 124.
82. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 543 (2005) (“[I]f a government action is found to be impermissible—for instance because it . . . is so arbitrary as to violate due process—that is the end of the inquiry. No amount of compensation can authorize such action.”).
84. Id.
85. Id. at 528–29.
86. Id. at 556–57 (Breyer, J., dissenting).
87. Id. at 540–46 (Kennedy, J., concurring in the judgment and dissenting in part).
88. See Arctic King Fisheries, Inc. v. United States, 59 Fed. Cl. 360, 381 (2004) (noting that “the Supreme Court, in Eastern Enterprises, suggested that in considering whether, under this factor, a regulation 'implicates [the] fundamental principles of fairness underlying the Takings Clause,' two other indicia are relevant: (i) the extent to which the action is retroactive; and (ii) whether the action targets a particular individual” (alteration in original) (citing E. Enter., 524 U.S. at 537)); Am. Pelagic Fishing Co. v. United States, 49 Fed. Cl. 36, 51 (2001) (holding that there is no property interest in a fishing permit and stating that “[t]he character of the governmental action here, because that action, in both purpose and effect, was retroactive and targeted at plaintiff, supports the finding of a taking”), rev’d on other grounds, 379 F.3d 1363 (Fed. Cir. 2004).
4. Observations Regarding Balancing Tests

Dean Anthony Kronman observed that “the act of balancing remains obscure,” and that balancing tests are “likely to be particularly attractive to those who by virtue of their inexperience feel unable to articulate the bases of their judgments, or who simply lack confidence in them and are therefore afraid to expose their own deliberations too nakedly.”89 In a well-known law review article,90 Justice Scalia adumbrated the fear of judicial discretion unfettered by a “law of rules.”

Three years after Penn Central was handed down, Judge James Oakes of the Second Circuit stated that “[t]he takings ‘jurisprudence’ of the Supreme Court is still in an unsatisfactory ad hoc stage, with a lack of development of analytical principle or reconciliation of conflicting lines of precedent.”91 The Penn Central taxonomy, as described by Professor Gary Lawson and others, consists of “three factors in search of meaning and relevance.”92

C. The “Relevant Parcel” Test and “Parcel as a Whole”

Justice Kennedy wrote in Murr, that

[b]ecause our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property “whose value is to furnish the denominator of the fraction.”93

Kennedy added that “the answer to this question may be outcome determinative.”94 Perhaps for that reason, determining the proper denominator in the takings fraction is a “difficult, persisting question.”95

94. Id. at 1944 (citing Eagle, Four-Factor, supra note 21, at 631).
1. A History of “Parcel as a Whole”

Professor Frank Michelman wrote that “to determine compensability one is expected to focus on the particular ‘thing’ injuriously affected and to inquire what proportion of its value is destroyed by the measure in question.”96 Furthermore, “[t]he difficulty is aggravated when the question is raised of how to define the ‘particular thing’ whose value is to furnish the denominator of the fraction.”97 As Professor Carol Rose later phrased the issue, Mahon not only failed to answer the most obvious question, “how much diminution in value is too much,” but also failed to answer its antecedent question, “how much of what?”98

Justice Brennan’s response in Penn Central was that the Court would focus on “the extent of the interference with rights in the parcel as a whole.”99 Alas, as Justice Kennedy observed in Murr v. Wisconsin, “the Court has not set forth specific guidance on how to identify the relevant parcel for the regulatory taking inquiry.”100 He indicated, however, that the Court had disclaimer two concepts, the first being “to limit the parcel in an artificial manner to the portion of property targeted by the challenged regulation.”101 The second approach Kennedy cautioned against was treating property rights under state law as “coextensive” with those rights under the Takings Clause, since “States do not have the unfettered authority to ‘shape and define property rights and reasonable investment-backed expectations,’ leaving landowners without recourse against unreasonable regulations.”102 He illustrated this point with a hypothetical example:

For example, a State might enact a law that consolidates non-adjacent property owned by a single person or entity in different

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96. Michelman, supra note 64, at 1192.
97. Id.
101. Id. at 1944 (providing, as examples, the Court’s refusal to limit the relevant parcel to the air rights above the Grand Central Terminal in Penn Central, 438 U.S. at 130, and the thirty-two-month duration of the development moratoria in Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 331 (2002)).
102. Id. at 1944–45 (quoting Palazzolo v. Rhode Island, 533 U.S. 606, 626 (2001) (emphasis added)).
parts of the State and then imposes development limits on the aggregate set. If a court defined the parcel according to the state law requiring consolidation, this improperly would fortify the state law against a takings claim, because the court would look to the retained value in the property as a whole rather than considering whether individual holdings had lost all value.103

A less extreme example might be the reasoning employed by the New York Court of Appeals’ Chief Judge Breitel in *Penn Central,* who asserted the relevant parcel to be all of the railroad’s holdings in the vicinity of Grand Central Terminal, on the grounds that private and public activity and spending in that broad area are what gave the terminal parcel its value.104 In *Lucas v. South Carolina Coastal Council,* Justice Scalia termed that analysis “extreme” and “unsupportable.” 105

Judge Breitel’s view might today claim justification in agglomeration theory, which states that clusters of productive people and innovative businesses tend to attract similar individuals and firms, making the parcels on which they work and live very valuable.106 Perhaps one could extend that reasoning further, to include the provisions of education, roads and ports, and other infrastructure, such that the State, in Professor William Fischel’s memorable words, would be “entitled to appropriate to itself all of the advantages of civilization.”107

In *Murr,* Justice Kennedy reiterated his earlier caution in *Palazzolo v. Rhode Island*108 that “States do not have the unfettered authority to ‘shape and define property rights and reasonable investment-backed expectations,’ leaving landowners without recourse against unreasonable regulations.”109 However, results such as those reached by Judge Breitel in *Penn Central* are not precludes

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103. *Id.* at 1945.  
if “property rights and reasonable investment-backed expectations” are regarded as one unit. As I will discuss later, Murr does just that.110

2. Variations on Rules for a “Relevant Parcel”

As Dwight Merriam observed in his classic article on the subject of the “relevant parcel,” “[e]ven a simplistic scheme, which collapses many categories into others, yields a dozen ways of thinking about property in the context of takings claims.”111 Among Merriam’s examples are the following: Does the purported relevant parcel contain subsurface mineral rights112 or air rights?113 Are consolidated operations conducted on contiguous parcels114 or noncontiguous parcels?115 Were parcels purchased at different times, perhaps before or after regulations were imposed?116 Are parcels held in fee or for a temporal duration?117 Might parcel ownership entail the ability to transfer air rights or development rights?118

In addition to the factors noted by Merriam having to do with parcels and their uses, questions of ownership are also important. One of the questions raised in the U.S. Court of Federal Claims’ first opinion in Lost Tree Village v. United States119 was whether the

110. See infra Section II.C.
114. See Forest Props. v. United States, 39 Fed. Cl. 56, 73 (1997) (treating lake bottom and uplands as a single parcel where they were a single-income-producing unit for financing, planning, and development).
116. See Forest Props., 39 Fed. Cl. at 73 (noting that the lake bottom and upland were purchased five months apart).
118. Suitum v. Tahoe Reg’l Planning Agency, 520 U.S. 725 (1997). See also Serkin, supra note 29 (describing how the contemporary owners of the air rights at issue in Penn Central claimed that the relaxation of restrictions on neighboring parcels, which gave the rights their value, constituted a taking).
119. Lost Tree Vill. v. United States, 100 Fed. Cl. 412, 427–30 (2011), rev’d, 707 F.3d 1286 (Fed. Cir. 2013) (holding that “relevant parcel” for purposes of takings analysis included only the plat that was the subject of the permit application, and not a neighboring plat or scattered wetlands owned by a developer in the area). The U.S. Federal Claims Court’s remand opinion, 115 Fed. Cl. 219 (2014), was reviewed by the U.S. Court of Appeals for the Federal Circuit, 787 F.3d 1111 (Fed. Cir. 2015), cert. denied, 137 S. Ct. 2325 (2017).
government was “aggregating separate parcels owned by legally separate entities.”

I have analyzed elsewhere that there are times when common-law principles justify the consolidation of parcels under different ownership. If A, B, and C are members of the ABC Partnership, or the sole shareholders of the XYZ Corporation, consolidation might be appropriate where the parties’ intent to share profits led them to appropriate their lands to the entity. There is nothing novel about this.

On the other hand, where separate owners intend merely to coordinate the use of their parcels for their separate benefits, aggregation is inappropriate. That was the issue in the California Sweetwater Mesa litigation where the California Coastal Commission staff asserted that such coordination (together with unsubstantiated suspicions of common ownership) sufficed for the consolidation, for development-permitting purposes, of five parcels that were separately deeded with no overlapping ownership. Where coordination can obliterate the difference between “property” and “regulation,” the scope of government authority is broad indeed.

3. Severance—but Also Agglomeration

Justice Kennedy’s statement in Murr about the necessity of “comparing the value that has been taken from the property with...
the value that remains in the property" suggests, as does Justice Brennan’s “parcel as a whole” formulation in Penn Central, that a court could discern through observation and judgment a natural starting point for the “relevant parcel” inquiry. The type of landowner manipulation that allegedly is implicit here and explicit in Tahoe-Sierra has placed the focus on what Professor Margaret Radin described as “conceptual severance.”

However, there are two sides to the manipulation story. The U.S. Claims Court has noted that while “a taking can appear to emerge if the property is viewed too narrowly” it is just as true that “[t]he effect of a taking can obviously be disguised if the property at issue is too broadly defined.” I have referred to such gamesmanship on the government side as “conceptual agglomeration.” A blatant example of this is the California Coastal Commission’s assertion of a “unity of ownership” theory, consolidating separately deeded and owned parcels for land use regulatory purposes.

D. The Murr Litigation

The Supreme Court granted certiorari in Murr v. Wisconsin upon the precise and carefully framed question presented by the petitioners: “In a regulatory taking case, does the ‘parcel as a whole’ concept as described in Penn Central Transportation Company v. City of New York establish a rule that two legally distinct, but commonly owned contiguous parcels, must be combined for takings analysis purposes?”

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132. STEVEN J. EAGLE, REGULATORY TAKINGS § 7-7(b)(2) (5th ed. 2012).
133. See Eagle, supra note 121. For discussion, see supra notes 118–25 and accompanying text.
The Court essentially answered that narrow question in the negative, as petitioners intended. It did so, however, only in the course of a far broader inquiry. Also, both the opinion of the Court and the principal dissent relied in part on appraisal estimates that had not been subjected to examination by lower courts hearing the case, nor briefed by the parties.  

In many respects, the Court treated *Murr* as an ordinary application of *Penn Central*, and even the dissenters did not object to its “bottom line” factual conclusion that treating the two parcels owned by the Murrs as one did not constitute a taking under the circumstances. The Court could have analyzed each lot as a separate relevant parcel and concluded that there was a taking of neither. The Court could have simply held that an inflexible statutory mandate for consolidation of contiguous parcels under common ownership was inconsistent with the ad hoc approach of *Penn Central*, and the case could have been remanded for the courts below to identify the relevant parcel. Instead, the Court applied *Penn Central* in a manner conflating property and its regulation.

1. The Basic Facts

The petitioners in *Murr* were two brothers and two sisters whose parents had arranged for them to acquire two lots along the scenic St. Croix River in Wisconsin. The parents had purchased Lot F in 1960, built a recreational cabin on it in that year, and the following year transferred title to their family plumbing business. In 1963, the parents acquired the adjoining Lot E, which they held in their own names. Each lot was about 1.25 acres in area and consisted of land along the river, a steep slope, and an upland area. Wisconsin law, and parallel local ordinances, limited construction to lots with one acre of buildable area. However, because of the steep slopes, Lots E

135. *See infra* note 309 and accompanying text.
137. *Id.* at 1956 (Roberts, C.J., dissenting).
and F, together, contained slightly less than one acre of buildable area.\textsuperscript{140} A grandfather clause “relaxed the restriction for standard lots which were ‘in separate ownership from abutting lands’ on January 1, 1976, the effective date of the regulation.”\textsuperscript{141} However, a merger provision provided that “adjacent lots under common ownership may not be ‘sold or developed as separate lots’ if they do not meet the size requirement.”\textsuperscript{142}

Lot F was transferred from the plumbing company to the petitioners in 1994, and Lot E was transferred to them from their parents the following year. A decade later, the petitioners wanted to relocate the cabin to a different part of Lot F, and also to sell Lot E to fund the project. After the Murrs learned that the lots were deemed consolidated when they came under their common ownership, they sought administrative variances to permit development on both, which were denied.\textsuperscript{143}

The Murrs then filed an action in state court, alleging that the state and county regulations effected a regulatory taking by depriving them of “all, or practically all, of the use of Lot E because the lot cannot be sold or developed as a separate lot.”\textsuperscript{144} Thus, the Murrs could neither sell Lot E nor build an additional structure on it.

A Wisconsin appellate court affirmed that when the petitioners acquired both lots the applicable state statute and local ordinance “effectively merged” them, so that petitioners “could only sell or build on the single larger lot.”\textsuperscript{145} Citing Zealy v. City of Waukesha,\textsuperscript{146} the Wisconsin Court of Appeals affirmed the circuit court’s summary judgment for the State.\textsuperscript{147}

Most saliently, the grandfather clause would have permitted structures to be built on both Lot E and Lot F had the lots remained under separate ownerships after the one-acre restriction was imposed in 1976. Thus, while different owners could have built on each lot, the Murrs could not.

\begin{itemize}
\item \textsuperscript{140} \textit{Id.} at 1940 (summarizing facts).
\item \textsuperscript{141} \textit{Id.} (quoting WIS. ADMIN. CODE NR § 118.08(4)(a)(1) (2017)).
\item \textsuperscript{142} \textit{Id.} (quoting WIS. ADMIN. CODE NR § 118.08(4)(a)(2) (2017)).
\item \textsuperscript{143} \textit{Id.} at 1941.
\item \textsuperscript{144} \textit{Id.} (quoting Murr v. State, No. 2013AP2828, 2014 WL 7271581, at *2 (Wis. Ct. App. Dec. 23, 2014)).
\item \textsuperscript{145} \textit{Id.} (quoting Murr v. St. Croix County Bd. of Adjustment, 796 N.W.2d 837, 841 (Wis. Ct. App. 2011)).
\item \textsuperscript{146} Zealy v. City of Waukesha, 548 N.W.2d 528, 533 (Wis. 1996).
\end{itemize}
2. Murr in the Supreme Court

Justice Kennedy wrote the Court’s 5–3 majority opinion in Murr, stressing that “[a] central dynamic of the Court’s regulatory takings jurisprudence . . . is its flexibility.” Chief Justice Roberts wrote the principal dissent, joined by Justices Thomas and Alito. He was troubled not by the majority’s “bottom-line conclusion,” given the facts of the case, but rather by its “new, malleable definition of ‘private property.’” Justice Thomas also wrote a brief, separate dissent, stressing the need to re-examine the grounding of regulatory takings in the Constitution.

Justice Kennedy’s opinion stated that “using [the Zealy] framework, the [Wisconsin] Court of Appeals concluded the merger regulations did not effect a taking” and its takings analysis “properly focused on the regulations’ effect ‘on the Murrs’ property as a whole’—that is, Lots E and F together.”

However, Zealy did not address the central issue of the mandatory, statutory merger of separately deeded parcels. Rather, Zealy was a classic case in which the landowner was attempting to sever part of an existing parcel for a separate regulatory takings examination. The appellate court had made it clear that “[t]he challenging landowner in this case primarily claims that when part of a parcel’s zoning classification is changed to conservancy, the courts should treat that portion as though it has been constructively taken and the government should pay accordingly.” It held that “compensation depends upon a case-by-case analysis of the landowner’s reasonably anticipated use of the property.”


149. Id. at 1937.

150. Id. at 1950 (Roberts, C.J., dissenting).

151. Id.

152. Id. at 1956 (Thomas, J., dissenting).

153. Id. at 1942.

154. Id. at 1941 (discussing Zealy v. City of Waukesha, 548 N.W.2d 528 (Wis. 1996), and Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 130–31 (1978)).


156. Id.
The Supreme Court of Wisconsin agreed that “the property at issue . . . is Zealy’s entire 10.4-acre parcel.”\textsuperscript{157} Thus, Zealy did not involve a determination of whether two separately deeded parcels merged by operation of law constituted the “parcel as a whole” but merely determined whether the landowner engaged in a conceptual severance of what legally had been one parcel.

Furthermore, it is useful to note that the phrase “parcel as a whole” was appropriate in \textit{Penn Central} given the railroad’s failure to argue that the air rights above Grand Central Terminal, which previously had been transferred, should be treated as a separate parcel.\textsuperscript{158} The agglomeration of separate parcels simply was not a factor.\textsuperscript{159}

Finally, the Court noted that the Murrs’ ownership resulted from “voluntary conduct in bringing the lots under common ownership after the regulations were enacted.”\textsuperscript{160} However, the “voluntary conduct” was by the petitioners’ parents,\textsuperscript{161} and, in any event, persons similarly situated to the petitioners often receive such ownerships through devise or operation of law.

3. Murr Conflates Ownership and Regulation

While citing Zealy in support of his analysis, Justice Kennedy in \textit{Murr} considered the effect of the State’s merger ordinance twice over—once as a factor in determining what constitutes the relevant parcel for regulatory takings analysis and once as a factor in determining whether the imposition of burdens with respect to the relevant parcel amounted to a regulatory taking.

Justice Kennedy summarized several reasons why the Murrs’ contiguous lots should be treated as one parcel. First, the lots were merged under state and local regulations, and the merger regulations were adopted “for a specific and legitimate purpose, consistent with the widespread understanding that lot lines are not dominant or controlling in every case.”\textsuperscript{162} However, as the Court noted, the fact that statutes are pre-existing does not make them determinative of

\footnotesize{\textsuperscript{157}} Zealy v. City of Waukesha, 548 N.W.2d 528, 533 (Wis. 1996).
\footnotesize{\textsuperscript{158}} See \textit{supra} note 75 and accompanying text (explaining that this was a tactical decision regretted by counsel in retrospect).
\footnotesize{\textsuperscript{159}} See \textit{supra} Section I.C for discussion.
\footnotesize{\textsuperscript{161}} \textit{Id.} at 1940 (2017) (noting that the transfer was “arranged for them”).
\footnotesize{\textsuperscript{162}} \textit{Id.} at 1948.
takings clause rights.\textsuperscript{163} Also, as Chief Justice Roberts noted, the issue was not whether parcel boundaries are controlling in every case but whether they should demarcate individual parcels “in all but the most exceptional circumstances.”\textsuperscript{164}

Justice Kennedy next stated that the physical characteristics of the lots “support [their] treatment as a unified parcel” and that this is enhanced by synergies of use, so that “[t]he special relationship of the lots is further shown by their combined valuation.”\textsuperscript{165} Moreover, Justice Kennedy explained,

\begin{quote}
[N]o single consideration can supply the exclusive test for determining the denominator. Instead, courts must consider a number of factors. These include the treatment of the land under state and local law; the physical characteristics of the land; and the prospective value of the regulated land. The endeavor should determine whether reasonable expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel, or, instead, as separate tracts. The inquiry is objective, and the reasonable expectations at issue derive from background customs and the whole of our legal tradition.\textsuperscript{166}
\end{quote}

Kennedy then invoked the Armstrong principle of “fairness and justice”\textsuperscript{167} and concluded: “Treating the lot in question as a single parcel is legitimate for purposes of this takings inquiry, and this supports the conclusion that no regulatory taking occurred here.”\textsuperscript{168}

Chief Justice Roberts especially attacked the last point, juxtaposing the role of the Takings Clause in securing “established property rights” with the majority’s “new, malleable definition of ‘private property’—adopted solely ‘for purposes of the takings inquiry’” and which “undermines that protection” the Takings Clause accords.\textsuperscript{169}

\begin{footnotes}
\item[163.] Id. at 1945.
\item[164.] Id. at 1953 (Roberts, C.J., dissenting).
\item[165.] Id. at 1949.
\item[166.] Id. at 1945.
\item[167.] Id. at 1950 (quoting Armstrong v. United States, 364 U.S. 40, 49). See infra notes 336–341 and accompanying text for a discussion of the materially different circumstances in Armstrong.
\item[168.] Id. (emphasis added).
\item[169.] Id. at 1950 (Roberts, C.J., dissenting).
\end{footnotes}
4. Internalizing Those Externalities Irrelevant Prior to Regulation

Externalities are harms or benefits conferred upon neighbors for which the owner does not have to account, or for which he or she could not charge.170 Externalities are irrelevant (“inframarginal”) when internalizing them would not affect the property owner’s behavior.171

An important aspect of Justice Kennedy’s *Murr* opinion, with which the dissenters apparently concurred,172 is its explicit recognition that the value of regulated parcels incorporates externalities that were irrelevant prior to their regulation.

[C]ourts should assess the value of the property under the challenged regulation, with special attention to the effect of burdened land on the value of other holdings. Though a use restriction may decrease the market value of the property, the effect may be tempered if the regulated land adds value to the remaining property, such as by increasing privacy, expanding recreational space, or preserving surrounding natural beauty.173

The epilogue of the *Lucas* case illustrates this point.174 The ultimate result of the litigation was that the South Carolina Coastal Commission paid Lucas, who had been denied development rights, $475,000 for each of his two lots. After the legislature refused to appropriate reimbursement, the commission sold each lot to a developer for $392,500. It later came out that an owner inland from one of the coastal lots had offered the commission $315,000 for the lot, subject to a restrictive easement precluding development. The neighbor wanted ownership of the lot simply to ensure perpetuation of his existing ocean view. Prior to the Beachfront Management Act, Lucas would not have sold the lot for this purpose, since it was worth considerably more as a building site. After the Act, satisfying the neighbor’s offer-backed desire for a clear vista would have been the lot’s most valuable use in light of the restrictions.175

171. See Fennell, *infra* note 170, at 1467.
172. See *infra* note 189 and accompanying text.
174. See *EAGLE*, *infra* note 132, § 7-3(b)(2) (providing more detail and citations).
175. The story of why the Coastal Council thought it appropriate that Lucas should lose his entire investment in the lot, but that the lot would be appropriate for building after the Council had acquired it, is one worthy of reflection. See *id.*
The internalization of externalities that were irrelevant prior to regulation has important implications for takings law. As the saga of David Lucas’s lot illustrates, value can reside in unlikely places. This affects both categorical regulatory takings under *Lucas*\(^{176}\) and partial regulatory takings under *Penn Central*.\(^{177}\) However, a few caveats are in order.

As noted previously,\(^{178}\) the Federal Circuit has held, in *Lost Tree Village Corp. v. United States*,\(^{179}\) that “economic use” does not include speculative value. It added that “[t]ypical economic uses enable a landowner to derive benefits from land ownership rather than requiring a landowner to sell the affected parcel.”\(^{180}\) Under the Supreme Court’s holding in *Murr* that both lots constitute one relevant parcel, both the benefits and burdens of prohibiting development on the second lot would automatically be internalized. The owner’s consequent inability to claim just compensation is consistent with the Court’s existing precedent.\(^{181}\)

However, if the lots were separate relevant parcels, it is possible that the benefit that the owner’s unrestricted parcel would have enjoyed from the restriction would have been no different than the benefit that would have been derived by neighbors. In the instance of a government condemnation of a part of a parcel, some states permit the locality to offset against just compensation only the amount of “special benefit” that the owner would have enjoyed as a result of the project for which the severed part was condemned, on the theory that it would be unfair for the owner to subsidize, both as taxpayer and also as condemnee, for benefits equally accruing to others.\(^{182}\) On the other hand, some states do permit an offset-added value resulting

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178. See *supra* notes 55–56.
180. *Id.*
181. See, e.g., *Bauman v. Ross*, 167 U.S. 548, 574 (1897) (“When, on the other hand, the part which he retains is specially and directly increased in value by the public improvement, the damages to the whole parcel by the appropriation of part of it are lessened”). See also *Eagle*, *supra* note 62, at 418–19.
182. See, e.g., *City of Maryland Heights v. Heitz*, 358 S.W.3d 98, 106 (Mo. 2011); United States v. 930.65 Acres of Land, 299 F. Supp. 673, 677–78 (D. Kan. 1968); Louisiana Highway Comm’n v. Hoell, 140 So. 485, 486 (La. 1932). (All example cases listed embody this reasoning.)
from “general benefits” to the entire neighborhood, most notably seen in New Jersey in *Borough of Harvey Cedars v. Karan*.183

More fundamentally, when the Federal Circuit in *Lost Tree Village* referred to “[t]ypical economic uses [that] enable a landowner to derive benefits from land ownership rather than requiring a landowner to sell the affected parcel,”184 it did not address condemnation, which is a forced sale. The issue then becomes: should the value of enjoyment of land that results only from the imposition of a severe government restriction be deemed an “economic use” for purposes of takings law?

While the Supreme Court denied certiorari in *Lost Tree Village*,185 these issues are quite germane to its takings jurisprudence.

### 5. Envisioning a Minimalist *Murr* Opinion

The Supreme Court in *Murr v. Wisconsin*186 did not have to reach the issue of how the relevant parcel in a regulatory takings case is to be determined. Its judgment in the case could have been premised on no more than restating that state law could not arbitrarily redefine existing parcels so as to preclude an asserted categorical taking, and that, treating *either* of the petitioners’ lots as the “relevant parcel” would not have resulted in a sufficient diminution in value so as to constitute a regulatory taking.187

As Chief Justice Roberts noted in his dissent, the very factors that the majority used to enunciate a new relevant parcel test for regulatory takings produced the same result that adherence to the lot lines of the deeded parcels would have reached.

If Lot E is a legally distinct parcel under state law, the Court of Appeals would have to perform the takings analysis anew, but could still consider many of the issues the majority finds important. The majority, for instance, notes that under the ordinance

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183. *Borough of Harvey Cedars v. Karan*, 70 A.3d 524 (N.J. 2013) (upholding offset for benefit owner would derive from increased safety from injury and property damage resulting from taking of easement along shore for construction of a high dune, but would remove owner’s valuable ocean view, although neighbors would enjoy same safety advantages).


187. *But see supra* notes 179–86 (discussing issues that might qualify this analysis).
the Murrs can use Lot E as “recreational space,” as the “location of any improvements,” and as a valuable addition to Lot F. These facts could be relevant to whether the “regulation denies all economically beneficial or productive use” of Lot E. Similarly, the majority touts the benefits of the ordinance and observes that the Murrs had little use for Lot E independent of Lot F and could have predicted that Lot E would be regulated. These facts speak to “the economic impact of the regulation,” interference with “investment-backed expectations,” and the “character of the governmental action”—all things we traditionally consider in the *Penn Central* analysis.\(^{188}\)

One might speculate about why the Court did not reach what apparently would have been a unanimous holding on this basis. Justice Kennedy, however, was the needed fifth vote, and his *Murr* opinion served largely to reiterate and extend his advocacy of balancing tests\(^{189}\) and also to affirm his concurrence in the judgment of *Lucas*.\(^{190}\)

Early scholarly reaction to Justice Kennedy’s majority opinion has been unenthusiastic. Professor Nicole Garnett pronounced that “the majority opinion transforms the ‘muddle’ of regulatory takings law into a mudslide that threatens to undermine the very foundation of property rights. Thus, all property owners—not just the Murrs—lost in the litigation.”\(^{191}\) Similarly, Professor Richard Epstein concluded that Chief Justice Roberts “had by far the better of the argument in insisting that state property lines should govern,” as opposed to Justice Kennedy’s “complex facts-and-circumstances test.”\(^ {192}\)

Professor Maureen Brady dubbed the new multifactor test “*Penn Central* squared,” which was not intended as a compliment.\(^ {193}\) She argued that *Murr* exacerbates problems with private property and federalism because “the Constitution protects different interests in

\(^{188}\) *Murr*, 137 S. Ct. at 1957 (internal citations omitted).

\(^{189}\) See infra Section II.E.2 for elaboration.

\(^{190}\) *Lucas* v. S.C. Coastal Council, 505 U.S. 1003, 1032 (Kennedy, J., concurring in the judgment).


different jurisdictions, depending on the content of state-specific law.” \(^ \text{194} \) Brady asserted, “Constitutional property federalism has generally been perceived as desirable, encouraging beneficial competition and innovation in property forms.” \(^ \text{195} \) However, \textit{Murr} “undermines the guarantee that the Constitution will protect this panoply of interests,” and “invites courts and litigants to define protected constitutional property by reference to the law and regulation of other states, undermining the security of interests that would otherwise appear stable under a single jurisdiction’s rules.” \(^ \text{196} \)

Also, building upon the suggestion in Justice Thomas’s separate \textit{Murr} dissent that regulatory takings jurisprudence might be grounded in the Privileges or Immunities Clause, \(^ \text{197} \) John Greil recently argued in favor of this approach based on “second-best originalism.” \(^ \text{198} \)

\section*{II. DESTABILIZING PRIVATE PROPERTY}

This Part expands upon the problems raised by Chief Justice Roberts in his dissent in \textit{Murr v. Wisconsin}. \(^ \text{199} \) I suggest that the essence of his disquiet, albeit unarticulated, is that the majority’s opinion reflects a movement from Lockean property towards governance property, which attenuates traditional notions of owners’ rights. I believe that it is in this sense that the Chief Justice writes that the majority “goes astray,” which implies more than technical fault. \(^ \text{200} \)

This Part also considers the more fundamental question, raised by Justice Thomas in his separate dissent, \(^ \text{201} \) of whether the Court’s regulatory takings doctrine is properly grounded in the Fifth Amendment’s Takings Clause, in the concept of substantive due process, \(^ \text{202} \)

\begin{itemize}
  \item \(^ {194} \) Id. at 56.
  \item \(^ {195} \) Id.
  \item \(^ {196} \) Id.
  \item \(^ {197} \) Murr v. Wisconsin, 137 S. Ct. 1933, 1957 (2017) (Thomas, J., dissenting). See infra Section II.E.3 for discussion.
  \item \(^ {198} \) John Greil, Note, \textit{Second-Best Originalism and Regulatory Takings}, 41 HARV. J.L. & PUB. POL’Y 373 (2018) (contending that the original public meaning of the Privileges or Immunities Clause did protect against regulatory takings). See infra notes 422–27 for discussion.
  \item \(^ {199} \) Murr, 137 S. Ct. at 1950 (Roberts, C.J., dissenting).
  \item \(^ {200} \) Id.
  \item \(^ {201} \) Id. at 1957 (Thomas, J., dissenting).
  \item \(^ {202} \) See infra Section II.B.
\end{itemize}
or, as Thomas intimates, in the Privileges or Immunities Clause of the Fourteenth Amendment. 203

A. Lockean and Governance Property

In many ways, the subtext of Murr was the distinction between Lockean property and governance property.

1. Lockean and Natural-Rights Perspectives

In a civil society stressing individual rights, it is imperative that individuals easily be able to distinguish what Chief Justice Roberts referred to as “meum and tuum,” what is mine, and what is not. 204 He added, with some understatement, that “[t]he question of who owns what is pretty important: The rules must provide a readily ascertainable definition of the land to which a particular bundle of rights attaches that does not vary depending upon the purpose at issue.” 205

An important reason to retain stable property rights is that they further individual autonomy. John Locke famously avowed, “Lives, Liberties, and Estates, which I call by the general Name, Property.” 206 Similarly, Justice Thurgood Marshall observed that “[t]he constitutional terms ‘life, liberty, and property’... have a normative dimension... establishing a sphere of private autonomy which government is bound to respect.” 207 Indeed, Justice Kennedy, in United States v. James Daniel Good Real Property, 208 applied what he termed “an essential principle: Individual freedom finds tangible expression in property rights.” 209 For conservative contractarians, economic efficiency is merely incidental to the role of contract and property in furthering private ordering. 210

203. See infra Section II.E.3.
205. Id.
209. Id. at 61.
From a utilitarian perspective, clearly defined property rights facilitate productive activity and exchange. Clear understandings of rights and duties might be achieved among a few individuals through a contract, which might be as complex as the signatories desire. However, property rights are in rem, meaning that everyone is bound by them and therefore should understand what belongs to others. This is why the forms of property must be simple. If “property” most fundamentally is a question of what is mine and what is thine, the fact that individuals chose to use their property in ways that are not nuisances, but may seem idiosyncratic and even annoying to others, should not be crucial.

2. Governance Property

The concept of “governance property,” as opposed to Lockean property, disestablishes the role of the landowner as the gatekeeper who decide which persons have access to his or her resources and for what purposes. In his article The Social-Obligation Norm in American Property Law, Professor Gregory Alexander asserted that, even under an exclusion regime, owners “owe far more responsibilities to others . . . than the conventional imagery of property rights suggests.”

211. See, e.g., David Millon, Communitarianism in Corporate Law: Foundations and Law Reform Strategies, in PROGRESSIVE CORPORATE LAW 1, 23 (Lawrence E. Mitchell ed., 1995) (asserting that “private ordering through contract is presumptively legitimate because it best serves [contractarians’] efficiency objective.”).

212. See Thomas W. Merrill & Henry E. Smith, The Property/Contract Interface, 101 COLUM. L. REV. 773 (2001). “Contract law typically permits free customization of the rights and duties of the respective parties . . . . Property law, in contrast, requires that the parties adopt one of a limited number of standard forms that define the legal dimensions of their relationship . . . .” Id. at 776.


216. Id. at 747.
Property rights and their correlative obligations are cognizable as social goods, worthy of vindication by the state, only insofar as they are consistent with community and human flourishing more generally. In the interest of human flourishing, the community, or more colloquially, the state, affords legal recognition to asserted claims to resources. Accordingly, the state does not take away when it abstains from legally vindicating asserted claims to resources that are inconsistent with human flourishing or with community itself.217

Professor Alexander extended his views in *Governance Property*,218 terming “distorted and misleading” the view that property law should be “built around the right to exclude” and should “concern[] itself primarily with the owner’s relationship with the rest of the world.”219

Professor Eric Rosser, in *The Ambition and Transformative Potential of Progressive Property*,220 noted that “pushback” against an expanded understanding of the social obligation of property took forms such as the movement into private common-interest communities, with gated access, private security guards, and recreational facilities that allow residents to insulate themselves from the rest of society.221

Similarly, Professor Lynda Butler asserted that the “management function” of property requires more than exclusion based on owners’ autonomy.222 “[W]hat is missing” from the exclusion property model, she wrote, “is an outward-regarding perspective that encompasses a broader sense of responsibility for the impacts of property use on society and nature, and that recognizes the role of collection action in managing the exercise of property rights.”223

All of this is quite different from what conventionally is recognized as the Lockean, natural-rights view, which envisions government as the protector of pre-political rights. George Mason’s *Virginia Declaration of Rights* is exemplary.224

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217. *Id.* at 749.
219. *Id.* at 1855.
221. *Id.* at 159–61.
223. *Id.* at 1220–21.
224. *Virginia Declaration of Rights* of 1776, art. 1 (June 12, 1776), http://avalon.law.yale.edu/18th_century/virginia.asp.
3. Productive-Labor Theory

In an attempt to present an alternative to both the exclusion and governance views of property, Professor Eric Claeys suggested a productive-labor theory, predicated on natural rights. Productive-labor theory “permits, justifies, and encourages exclusive rights when such rights seem practically likely to facilitate concurrent labor by different citizens for different goals.” Claeys noted John Locke’s famous passage, “all Men are naturally in . . . a State of perfect Freedom to order their Actions, and dispose of their Possessions and Persons, as they think fit, within the bounds of the Law of Nature, without asking leave, or depending upon the Will of any other Man.”

Taking Locke as an exemplar of his view, Claeys interpreted the phrase “within the bounds of the Law of Nature” as constraining individual freedom within the bounds of natural law.

4. The Civic Republican Tradition

Scholars such as Dean William Treanor have stressed that during the colonial and revolutionary periods the view that the State enjoyed broad powers to regulate and reorder property relations was pervasive.

According to Professor Cass Sunstein, the eminent domain provision and a number of other important provisions of the Constitution are “focused on a single underlying evil: the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to

226. Id. at 418 (2017).
227. Id. at 432 (quoting John Locke, Two Treatises of Government § II.4, at 269 (Peter Laslett Ed., 1988) (1698) (emphasis added)).
228. Id.
obtain what they want.” He added that “[t]he prohibition of naked preferences also reflects the Constitution’s roots in civil republicanism and accompanying conceptions of civic virtue.”

5. Property as the “Law of Things”

At its root, the fundamental insistence of Chief Justice Roberts in Murr is that the Court adhere to its “traditional approach” that “State law defines the boundaries of distinct parcels of land, and those boundaries should determine the ‘private property’ at issue in regulatory takings cases.” In part, this appears to be a reaction to views of law predicated upon the “disintegration of property.”

In Property as the Law of Things, Professor Henry Smith argued that property is a “platform for the rest of private law,” that the need for traditional baselines created by the law is important, and that “nowhere is this issue of baselines more salient than in property.” Property rights are rights “in rem,” which originally meant “in a thing” and are now taken as rights “availing against persons generally.”

Professor Smith noted that legal realists and their progeny insist that property is not about things, but rather that “property” is a bundle of rights and other legal relationships among persons, against which things are a “mere backdrop.” “[T]he benefits of tinkering with property [have been] expressed in bundle terms without a corresponding theory of the costs of that tinkering.” In some cases, Smith added, “the traditional baselines of the law were mocked, and the idea was to dethrone them in order to remove them as barriers to enlightened social engineering.”

231. Id. at 1690–91.
235. Id. at 1691.
236. Id.
237. Id.
238. Id. at 1697.
239. Id. (citing, as an example, Felix S. Cohen, Transcendental Nonsense and the Functional Approach, 35 COLUM. L. REV. 809, 833–49 (1935)).
From a perspective of traditional property law, as opposed to a governance-property perspective, “what is decisive is that which is taken, not that which is retained.”

If property is a unitary thing, so might be government. Although takings claims typically result from administrative determinations, and sometimes from legislation, acts constituting eminent domain are undertaken by the State or its political subdivision. Thus, there is a plausible claim that acts of judges that radically depart from established law might be “judicial takings.” A plurality opinion by Justice Scalia asserted that takings liability could arise from judicial acts in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection.* Likewise, in his dissent from the denial of certiorari in *California Building Industry Ass’n v. City of San Jose,* Justice Thomas reiterated his view in *Parking Ass’n of Georgia, Inc. v. City of Atlanta* that the “rough proportionality” and “individualized determination” tests for reviewing permit exactions, enunciated in *Dolan v. City of Tigard,* should apply to a “legislative determination” by the Atlanta City Council as much as to an administrative determination made by an agency official. “A city council can take property just as well as a planning commission can.”

**B. The Continuing Debate over Bright-Line Rules**

1. *Kennedy and Scalia Debate Bright-Line Rules*

In his well-known article *The Rule of Law as a Law of Rules,* Justice Scalia spelled out his strong preference for bright-line rules:

> Even in simpler times uncertainty has been regarded as incompatible with the Rule of Law. Rudimentary justice requires that those subject to the law must have the means of knowing what

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240. Epstein, *supra* note 8, at 58.
246. *Parking Ass’n of Ga.,* 515 U.S. at 1118 (Thomas, J., dissenting from denial of certiorari).
it prescribes. . . . As laws have become more numerous, and as people have become increasingly ready to punish their adversaries in the courts, we can less and less afford protracted uncertainty regarding what the law may mean. Predictability . . . is a needful characteristic of any law worthy of the name. There are times when even a bad rule is better than no rule at all.\textsuperscript{248}

Scalia added “it displays more judicial restraint to adopt [a general rule] than to announce that, ‘on balance,’ we think the law was violated here—leaving ourselves free to say in the next case that, ‘on balance,’ it was not.”\textsuperscript{249}

Beyond his general aversion to vague rules, quite possibly Justice Scalia was “irritated” by the “open-textured approach” emblematic of Penn Central, “as a matter of judicial function and aesthetics.”\textsuperscript{250}

On the other hand, balancing tests seem second nature to Justice Kennedy. An important illustration involves the Clean Water Act (“CWA”),\textsuperscript{251} which gave the Environmental Protection Agency (“EPA”) and the U.S. Army Corps of Engineers powers to authorize the discharge of pollutants into “navigable waters,” which the CWA defined as “the waters of the United States, including the territorial seas.”\textsuperscript{252}

The definition of “waters of the United States” remained unsettled, with the U.S. Court of Appeals for the Sixth Circuit ruling in \textit{Rapanos v. United States}\textsuperscript{253} that wetlands connected to navigable waters by only twenty miles of non-navigable tributaries were subject to the Corps of Engineers’ jurisdiction.

Justice Scalia’s plurality opinion took a narrow, dictionary-based approach and declared that the “only plausible interpretation” was that CWA jurisdiction extended only to “relatively permanent, standing or continuously flowing bodies of water.”\textsuperscript{254} The dissents of

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{248} \textit{Id.} at 1179.
\item \textsuperscript{249} \textit{Id.} at 1179–80.
\item \textsuperscript{250} J. Peter Byrne, \textit{A Hobbesian Bundle of Lockean Sticks: The Property Rights Legacy of Justice Scalia}, 41 VT. L. REV. 733, 743 (2017).
\item \textsuperscript{251} Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2012).
\item \textsuperscript{252} \textit{Rapanos} v. United States, 547 U.S. 715, 722 (plurality opinion) (quoting 33 U.S.C. § 1362(7)).
\item \textsuperscript{253} United States v. \textit{Rapanos}, 376 F.3d 629 (6th Cir. 2004), \textit{vacated and remanded sub. nom.} \textit{Rapanos} v. United States, 547 U.S. 715 (2006).
\item \textsuperscript{254} \textit{Rapanos}, 547 U.S. at 739 (quoting \textit{WEBSTER’S NEW INTERNATIONAL DICTIONARY} 2882 (2d ed. 1954)).
\end{enumerate}
\end{footnotesize}
Justices Stevens and Breyer, on the other hand, expressed a much broader view of the importance of environmental protection and of deference to the expertise of the EPA and the Corps of Engineers. Justice Kennedy, the swing vote, concurred only in the judgment. Although he gave the Corps considerable deference, he also strived to give “the term ‘navigable’ some meaning.” Thus, he adopted a heavily fact-based standard that determined that the existence of the required nexus depends on whether the wetlands at issue, perhaps in connection with others, significantly affects the integrity of waters “more readily understood as ‘navigable’.”

In a more germane case, Justice Kennedy declined to endorse Justice Scalia’s bright-line rule in *Lucas v. South Carolina Council* and instead concurred only in the judgment. Kennedy declared, “The finding of no value must be considered under the Takings Clause by reference to the owner’s reasonable, investment-backed expectations.”

In *Lucas*, Justice Scalia “stress[ed] that an affirmative decree eliminating all economically beneficial uses may be defended only if an objectively reasonable application of relevant precedents would exclude those beneficial uses in the circumstances in which the land is presently found.” For Justice Kennedy, on the other hand, the resolution of the case involved the need for a determination as to “whether petitioner had the intent and capacity to develop the property and failed to do so.” Justice Blackmun agreed, and his dissent asserted that the provenance of the Court’s per se rule was “unpersuasive.”

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255. *Id.* at 788 (Stevens, J., dissenting) (focusing on the “quality of our Nation’s waters”).
256. *Id.* at 811 (Breyer, J., dissenting) (expressing “no difficulty [in] finding that the wetlands at issue in these cases are within the Corps’ jurisdiction”).
257. *Id.* at 779 (Kennedy, J., concurring in the judgment).
258. *Id.* at 779–80.
260. *Id.* at 1032 (Kennedy, J., concurring in the judgment).
262. *Id.* at 1032 n.18.
263. *Id.* at 1032 (Kennedy, J., concurring in the judgment).
264. *Id.* at 1049 (Blackmun, J., dissenting).

The Court’s suggestion that *Agins v. City of Tiburon*, 447 U.S. 255, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980), a unanimous opinion, created a new *per se* rule, only now discovered, is unpersuasive. In *Agins*, the Court stated that “no precise rule determines when property has been taken” but instead that “the question necessarily requires a weighing of public and private interest.” *Id.* at 1049 n.11 (quoting *Agins*, 447 U.S. at 260–62).
While the majority had accepted the trial court’s finding that the Beachfront Management Act had left Lucas’s lots bereft of value, Kennedy noted that the trial court appeared to “presume that the property has no significant market value nor resale potential,” although he accepted the finding as the law of the case. He added, “Where a taking is alleged from regulations which deprive the property of all value, the test must be whether the deprivation is contrary to reasonable, investment-backed expectations.” However, similar to conflating “property” and “expectations,” this conflation of “value” and “expectations” invites circularity.

Justice Kennedy’s assertion that the per se rule enunciated by Justice Scalia in *Lucas* is subject to the owner’s investment-backed expectations has received only slender judicial support. In 1999, a Federal Circuit panel so held in *Good v. United States*. One year later, however, in *Palm Beach Isles Associates, Inc. v. United States*, another panel ruled that the per se rule in *Lucas* precluded consideration of owner expectations and that expressions to the contrary in *Good* were dicta, inconsistent with the law of the circuit court.

Subsequent decisions of the U.S. Court of Federal Claims and the Federal Circuit “unanimously endorsed the no-role-for-expectations view, almost always without discussion. Other courts, in broad prefatory descriptions of the takings tests, appear to assume the absence of a role for expectations in the total takings context.”

Thus, the *Penn Central* and *Lucas* tests “are mutually exclusive.” The Supreme Court recently declined to review this precise issue in

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265. Id. at 1033–34 (Kennedy, J., concurring in the judgment).
266. Id. at 1034 (Kennedy, J., concurring in the judgment).
267. See infra Section II.B.2.
270. Id. at 1357 (discussing Florida Rock Indus. v. United States, 18 F.3d 1560 (Fed.Cir.1994)). Florida Rock Industries “stated in summary fashion that “[i]f a regulation categorically prohibits all economically viable use of the land—destroying its economic value for private ownership—the regulation has an effect equivalent to a permanent physical occupation. There is, without more, a compensable taking.”” Id. (quoting Florida Rock Indus., 18 F.3d at 1564).
Lost Tree Village Corp. v. United States,\textsuperscript{273} where the Federal Circuit had concluded that “Lucas does not require a balancing of the Penn Central factors.”\textsuperscript{274}

The movement towards heavy reliance on expectations received a setback in 2015 in Horne v. Department of Agriculture.\textsuperscript{275} The Court’s opinion, by Chief Justice Roberts, held that the rule that a physical appropriation of property is a categorical taking applies to personal property as well as real property.\textsuperscript{276} He noted the dictum in Lucas stating that “while an owner of personal property ‘ought to be aware of the possibility that new regulation might even render his property economically worthless,’ such an ‘implied limitation’ was not reasonable in the case of land.”\textsuperscript{277} Roberts rejected this approach, noting that Lucas involved regulatory takings, and that its distinction between owner expectations regarding real and personal property would be cabined there and not applicable to physical appropriations.\textsuperscript{278}

2. The Tendency Towards Circularity

A quarter century before Murr, in his concurrence in the judgment of Lucas v. South Carolina Coastal Council,\textsuperscript{279} Justice Kennedy averred that whether a taking could exist would involve the interplay of government regulations and owner expectations. In such an inquiry, he recognized, elements would be mutually referential:

There is an inherent tendency towards circularity in this synthesis, of course; for if the owner’s reasonable expectations are shaped by what courts allow as a proper exercise of governmental authority, property tends to become what courts say it is. Some

\begin{itemize}
  \item \textsuperscript{273} Lost Tree Vill. Corp. v. United States, 787 F.3d 1111 (Fed. Cir. 2015), cert. denied, 137 S. Ct. 2325 (2017).
  \item \textsuperscript{274} Id. at 1119. The court also held that “Lucas does not suggest that a land sale qualifies as an economic use.” Id. at 1115.
  \item \textsuperscript{275} Horne v. U.S. Dep’t of Agric., 135 S. Ct. 2419, 2428 (2015) (holding that an appropriation of raisins in connection with a government marketing order was a categorical taking).
  \item \textsuperscript{276} Id. at 2427 (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982)).
  \item \textsuperscript{277} Id. (quoting Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027–28 (1992)).
  \item \textsuperscript{278} Id. at 2428 (citing Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency, 535 U.S. 302, 323, for differing treatments of government appropriations of property and regulation of property).
  \item \textsuperscript{279} Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).
\end{itemize}
circularity must be tolerated in these matters, however, as it is in other spheres. The definition, moreover, is not circular in its entirety. The expectations protected by the Constitution are based on objective rules and customs that can be understood as reason-
able by all parties involved.280

The definitional circularity employed in his Murr opinion might be viewed as an incremental extension of his Lucas takings analy-
sis. However, there is an essential and important difference. In Murr, the circularity was not limited to defining the various factors regarding the regulation of property but rather was expanded to bring within its ambit the definition of property itself.

Justice Scalia’s emphasis in Lucas was rooted in the more objective concept that, in order for regulations “prohibit[ing] all economical[] use of land” not to be “confiscatory,” they 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.”281

Justice Scalia’s formulation has been subject to excoriating criti-
cism. Professor Richard Epstein declared it “devoid of legal theory.”282 While Lucas involved the landowner’s entire parcel, it was clear to Justice Scalia that the “relevant parcel” issue would arise soon, and Professor Epstein accused Scalia simply of evading it.283

The essential problem with Justice Kennedy’s “inherent tendency towards circularity” was succinctly stated by Judge Stephen Williams:

Although the Takings Clause is meant to curb inefficient takings, such a notion of “reasonable investment-backed expectations”

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280. Lucas, 505 U.S. at 1034–35 (Kennedy, J., concurring in the judgment) (emphasis added).
281. Id. at 1029.
282. Epstein, supra note 79, at 1375.
283. Lucas, 505 U.S. at 1016 n.7.
284. Epstein, supra note 79, at 1375 (“Often the common law wisely proceeds incrementally, and the open-ended nature of the Eminent Domain Clause invites the Court to create a system of constitutional common law that is equally slow moving. It is one thing to issue restrained utterances when it is not clear what lies ahead; it is quite another to practice evasion in the name of cautious decisionmaking.”).
strips it of any constraining sense: except for a regulation of almost unimaginable abruptness, all regulation will build on prior regulation and hence be said to defeat any expectations. Thus regulation begets regulation.\textsuperscript{285}

Justice Scalia’s approach of “background principles” does have merit. I observed earlier that “[l]ike the sea anchor, background principles do not prevent gradual change, but do keep individual rights from being capsized by squalls of legislative passion.”\textsuperscript{286} Others have raised similar points.\textsuperscript{287}

In lauding the “flexibility” of the Court’s regulatory takings jurisprudence\textsuperscript{288} after setting out the elements of his “relevant parcel” test in \textit{Murr},\textsuperscript{289} Justice Kennedy soothingly added that “[t]he inquiry is objective, and the reasonable expectations at issue derive from background customs and the whole of our legal tradition.”\textsuperscript{280} He also reiterated his concurrence in the judgment in \textit{Lucas} that “a prospective enactment, such as a new zoning ordinance, can limit the value of land without effecting a taking because it can be understood as reasonable by all concerned.”\textsuperscript{291}

However, the virtue of “flexibility” is tested by Justice Kennedy’s conflation in \textit{Murr} of “what one owns,” for purposes of regulation, with how “what one owns” is regulated.\textsuperscript{292}

\textbf{C. Murr Intensifies Concerns Regarding Government Overreach}

Prior to \textit{Murr}, the ad hoc nature of the Court’s “parcel as a whole” formulation had been criticized as a source of great confusion that

\begin{itemize}
  \item \textsuperscript{285} Dist. Intown Props. Ltd. v. District of Columbia, 198 F.3d 874, 887 (D.C. Cir. 1999) (Williams, J., concurring) (emphasis added).
  \item \textsuperscript{286} Steven J. Eagle, \textit{The 1997 Regulatory Takings Quartet: Retreating From the “Rule of Law”}, 42 N.Y.L. SCH. L. REV. 345, 369 (1998).
  \item \textsuperscript{287} See, e.g., Merrill & Smith, supra note 213, at 64 (“A rule that has been around a long time and is relatively unchanging is more likely to be understood because actors . . . are more apt to have encountered the rule in the past and to have made some previous investment in comprehending the rule.”); \textit{Russell Kirk}, \textit{The Conservative Mind: From Burke To Eliot} 7–9 (7th ed. 2001) (1953) (“Custom, convention, and old prescription are checks upon both man’s anarchic impulse and upon the innovator’s lust for power.”).
  \item \textsuperscript{288} Steven J. Eagle, \textit{The 1997 Regulatory Takings Quartet: Retreating From the “Rule of Law”}, 42 N.Y.L. SCH. L. REV. 345, 369 (1998).
  \item \textsuperscript{289} See supra note 167 and accompanying text.
  \item \textsuperscript{290} Dist. Intown Props. Ltd. v. District of Columbia, 198 F.3d 874, 887 (D.C. Cir. 1999) (Williams, J., concurring) (emphasis added).
  \item \textsuperscript{286} Steven J. Eagle, \textit{The 1997 Regulatory Takings Quartet: Retreating From the “Rule of Law”}, 42 N.Y.L. SCH. L. REV. 345, 369 (1998).
  \item \textsuperscript{287} See, e.g., Merrill & Smith, supra note 213, at 64 (“A rule that has been around a long time and is relatively unchanging is more likely to be understood because actors . . . are more apt to have encountered the rule in the past and to have made some previous investment in comprehending the rule.”); \textit{Russell Kirk}, \textit{The Conservative Mind: From Burke To Eliot} 7–9 (7th ed. 2001) (1953) (“Custom, convention, and old prescription are checks upon both man’s anarchic impulse and upon the innovator’s lust for power.”).
  \item \textsuperscript{288} See supra note 167 and accompanying text.
  \item \textsuperscript{290} Dist. Intown Props. Ltd. v. District of Columbia, 198 F.3d 874, 887 (D.C. Cir. 1999) (Williams, J., concurring) (emphasis added).
  \item \textsuperscript{285} Dist. Intown Props. Ltd. v. District of Columbia, 198 F.3d 874, 887 (D.C. Cir. 1999) (Williams, J., concurring) (emphasis added).
  \item \textsuperscript{286} Steven J. Eagle, \textit{The 1997 Regulatory Takings Quartet: Retreating From the “Rule of Law”}, 42 N.Y.L. SCH. L. REV. 345, 369 (1998).
  \item \textsuperscript{287} See, e.g., Merrill & Smith, supra note 213, at 64 (“A rule that has been around a long time and is relatively unchanging is more likely to be understood because actors . . . are more apt to have encountered the rule in the past and to have made some previous investment in comprehending the rule.”); \textit{Russell Kirk}, \textit{The Conservative Mind: From Burke To Eliot} 7–9 (7th ed. 2001) (1953) (“Custom, convention, and old prescription are checks upon both man’s anarchic impulse and upon the innovator’s lust for power.”).
  \item \textsuperscript{288} See supra note 167 and accompanying text.
  \item \textsuperscript{290} Dist. Intown Props. Ltd. v. District of Columbia, 198 F.3d 874, 887 (D.C. Cir. 1999) (Williams, J., concurring) (emphasis added).
  \item \textsuperscript{285} Dist. Intown Props. Ltd. v. District of Columbia, 198 F.3d 874, 887 (D.C. Cir. 1999) (Williams, J., concurring) (emphasis added).
  \item \textsuperscript{286} Steven J. Eagle, \textit{The 1997 Regulatory Takings Quartet: Retreating From the “Rule of Law”}, 42 N.Y.L. SCH. L. REV. 345, 369 (1998).
  \item \textsuperscript{287} See, e.g., Merrill & Smith, supra note 213, at 64 (“A rule that has been around a long time and is relatively unchanging is more likely to be understood because actors . . . are more apt to have encountered the rule in the past and to have made some previous investment in comprehending the rule.”); \textit{Russell Kirk}, \textit{The Conservative Mind: From Burke To Eliot} 7–9 (7th ed. 2001) (1953) (“Custom, convention, and old prescription are checks upon both man’s anarchic impulse and upon the innovator’s lust for power.”).
  \item \textsuperscript{288} See supra note 167 and accompanying text.
  \item \textsuperscript{290} Dist. Intown Props. Ltd. v. District of Columbia, 198 F.3d 874, 887 (D.C. Cir. 1999) (Williams, J., concurring) (emphasis added).
places the development of a coherent jurisprudence of regulatory takings at the “mercy of diverse and at times idiosyncratic approaches” from various state and federal courts, resulting in a “Tower of Babel.”\footnote{Gideon Kanner, *Hunting the Snark Not the Quark: Has the U.S. Supreme Court Been Competent in Its Effort to Formulate Coherent Regulatory Takings Law?*, 30 Urb. Law. 307, 310–11 (1998).} Such a situation is rife with the possibility of government overreach.

1. The Gerrymandering of Property

The essence of Chief Justice Roberts’s complaint about the *Murr* majority opinion is that it “knocks the definition of ‘private property’ loose from its foundation on stable state law rules and throws it into the maelstrom of multiple factors that come into play at the second step of the takings analysis”; thus it “compromises the Takings Clause as a barrier between individuals and the press of the public interest.”\footnote{Murr, 137 S. Ct. at 1956 (2017) (Roberts, C.J., dissenting).}

To be sure, the Chief Justice is not claiming that the concept of property is disintegrating.\footnote{Compare Grey, supra note 233, with supra Section II.A.5.} Rather, he continued, the majority’s ad hoc approach to property—its “focus on the particular challenged regulation”—means that “two lots might be a single ‘parcel’ for one takings claim, but separate ‘parcels’ for another.”\footnote{Murr, 137 S. Ct. at 1956 (2017) (Roberts, C.J., dissenting).} Tellingly, he adds that “[t]his is just another opportunity to gerrymander the definition of ‘private property’ to defeat a takings claim.”\footnote{Id.}

It might be that the word “gerrymander” was on Roberts’s mind because, in the period prior to *Murr* being handed down, the Court had agreed to review claims of extreme partisan gerrymandering in *Gill v. Whitford*, a case involving Wisconsin election law.\footnote{Gill v. Whitford, 138 S. Ct. 1916 (2018).} “Gerrymandering” might seem an odd word to describe the general softening of property rights into a state of incoherence.

However, “gerrymandering” does bring to mind the possibility of agreements among local officials and developers that slice and divvy out development opportunities, utilizing parcel-
neighborhood-specific regulatory interpretations. Pursuant to these “grand bargains” among transient coalitions, local legislatures could then approve and entrench such arrangements and acquire parcels for their fulfillment through a combination of eminent domain and compelled sales from present owners who are subjected to infeasible development conditions.299

2. Property Rights and Rent-Seeking

“Rent-seeking” refers to efforts to obtain economic rents—payments for things that cost nothing to produce.300 A primary justification for eminent domain is to prevent rent-seeking behavior from landowners trying to capture large gains when their strategically located parcels are needed for public uses.301 In a broader sense, however, the framers viewed the Constitution as a means for securing property. According to Dean William Treanor, James Madison “anticipated” the country’s “enormous population growth,” that landowners would “become a minority,” that “landed property . . . was most threatened by majoritarian rule,” and that “the greater the number of the unpropertied, the more likely would they be to pass redistributive legislation.”302

Legislation or judicial interpretations that detract from well-defined property rights may have the effect of turning property and development into a common pool, with the allocation of rights within that pool being a negative-sum game, after taking into account the costs incurred in rent-seeking behavior.303

299. See Roderick M. Hills & David Schleicher, Planning an Affordable City, 101 IOWA L. REV. 91, 123–33 (2015) (outlining mechanisms for “citywide deals”). While the authors advocate the use of government “price sheets” and transparency, the potential for abuse is clear. See also Eagle, supra note 35, at 1078–81 (noting the relationship between information asymmetries, political exigencies, and cronyism in the development process).


303. Epstein, supra note 8, at 203.
In contemporary times, fear of majoritarian impulses leading to expropriation might undergird Armstrong’s exhortation that “[t]he Fifth Amendment’s guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”\textsuperscript{304} As Chief Justice Roberts put it in Murr, “[b]y securing such established property rights [i.e., rights established under existing state property law] the Takings Clause protects individuals from being forced to bear the full weight of actions that should be borne by the public at large.”\textsuperscript{305}

Similarly, Justice Alito’s concerns about local officials making “extortionate demands” on landowners seeking development approvals\textsuperscript{306} might express the fear that those with relatively deep pockets would be targets of opportunity. Land use development is marked by “zoning for dollars,”\textsuperscript{307} and the practice whereby developers are subjected to informal demands for exactions far from effective judicial review makes Justice Alito’s concerns entirely warranted.\textsuperscript{308}

3. The Creep of Expectations

Justice Kennedy asserted in Murr that Lots E and F could easily be put to a common use.\textsuperscript{309} However, U.S. Circuit Judge Stephen Williams countered that argument in a prescient opinion in District Intown Properties Ltd. P’ship v. District of Columbia.\textsuperscript{310} The case

\begin{itemize}
  \item \textsuperscript{304} Armstrong v. United States, 364 U.S. 40, 49 (1960) (emphasis added).
  \item \textsuperscript{305} Murr v. Wisconsin, 137 S. Ct. 1933, 1950 (2017) (Roberts, C.J., dissenting).
  \item \textsuperscript{306} Koontz v. St. Johns River Water Mgt. Dist., 133 S. Ct. 2586, 2596 (2013) (“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.”).
  \item \textsuperscript{308} See Steven J. Eagle, Koontz in the Mansion and the Gatehouse, 46 URB. LAW. 1 (2014) (describing how informal demands for exactions in the “gatehouse” of off-the-record conversations differ from documented formal demands that might be evaluated in the “mansion” of judicial review).
  \item \textsuperscript{309} Murr v. Wisconsin, 137 S. Ct. 1933, 1948–49 (2017).
  \item \textsuperscript{310} District Intown Props Ltd. P’ship v. District of Columbia, 198 F.3d 874, 884 (D.C. Cir. 1999) (Williams, J., concurring in the judgment).
\end{itemize}
involved the attempted repurposing of separately deeded lots that had served as the lawn of an old apartment building and that the court’s majority deemed were incorporated, in one relevant parcel, with the apartment property. Judge Williams began with the majority’s “apparent presumption that contiguous parcels under common ownership should be treated as one parcel for purposes of the takings analysis.” He noted that this presumption (as does the statutory consolidation of such parcels in Murr) “tends to reduce the likelihood that courts will order compensation.” He also noted that the majority’s focus on contiguity, simultaneous acquisition, on the past treatment of the lots as a single unit, and on the extent to which the restricted lots benefit the neighboring lot are “irrelevant,” since “[t]he majority’s focus on the property’s use prior to regulation tells us nothing about the value-producing opportunities foreclosed at the time of regulation.”

In Murr, on the other hand, the majority did look at prospective values, which obviously is relevant to the traditional three Penn Central factors. As Judge Williams might have anticipated, Murr did consider the restriction being mitigated “by the benefits of using the property as an integrated whole.” Unfortunately, the Murr opinions relied upon isolated data pertaining to values proffered by the parties. Those appraisals had not been subjected to judicial scrutiny earlier. The Court’s failure to remand in Murr meant that it justified a new test for relevant parcel while partially depending on self-serving, ex parte evidence.

4. Conflation of the Police Power and Takings

The application of the police power of the state, which is the sovereign’s inherent right to protect the public’s health, safety, and

311. Id. at 885.
312. Id.
317. Id. at 1941 (noting that the trial court decided the relevant parcel issue on summary judgment).
welfare, can result in great loss to property owners for which the remedy of “just compensation” is unavailable.\textsuperscript{318}

In \textit{Lucas v. South Carolina Council},\textsuperscript{319} Justice Scalia observed that “[t]he transition from our early focus on control of ‘noxious’ uses to our contemporary understanding of the broad realm within which 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.”\textsuperscript{320}

Scalia’s proffered replacement for this distinction, at least where there was a prohibition of “all economically beneficial use of land,” was to ascertain whether the limitation “inhere[d] in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership.”\textsuperscript{321} This more objective test was not too successful. This was because the Court later emphasized, in \textit{Lingle v. Chevron U.S.A.}, that the \textit{Lucas} categorical rule applied only to “total regulatory takings,”\textsuperscript{322} and also because regulators responded by ensuring that owners retained at least a modicum of beneficial use.\textsuperscript{323} Furthermore, by bringing “background principles” to the fore, \textit{Lucas} had the “unlikely legacy” of providing government defendants numerous defenses to takings claims.\textsuperscript{324}

Two particularly notable conflations of police power and takings power occurred in \textit{Berman v. Parker}\textsuperscript{325} and in \textit{Hawaii Housing Authority v. Midkiff},\textsuperscript{326} where the Court seemed to eliminate “public

\begin{itemize}
  \item \textsuperscript{318} See, e.g., \textit{Mugler v. Kansas}, 123 U.S. 623 (1887).
  \item \textsuperscript{320} \textit{Id.} at 1024.
  \item \textsuperscript{321} \textit{Id.} at 1029.
  \item \textsuperscript{322} \textit{Lingle v. Chevron U.S.A. Inc.}, 544 U.S. 528, 537 (2005).
  \item \textsuperscript{323} See Michael Allan Wolf, \textit{Fruits of the “Impenetrable Jungle”: Navigating the Boundary Between Land-Use Planning and Environmental Law}, 50 Wash. U. J. Urb. & Contemp. L. 5, 11 (1996) (“If those suffering under confiscatory statutes, ordinances, or regulations can still salvage even a small amount of value, the \textit{Lucas} test will not apply.”).
  \item \textsuperscript{325} \textit{Berman v. Parker}, 348 U.S. 26 (1954).
\end{itemize}
use” as an independent constitutional requirement.  

327. To be sure, the Court stepped back in Kelo v. City of New London, but, even there, it broadly equated “public use” with “public purpose.” 328. Furthermore, as in Berman, courts routinely treat “blight” as a justification for condemnation, although the government does not take blighted property for its own use but rather for what should more accurately be described as abatement of common-law nuisances. 329

D. The Poor Fit Between the Takings Clause and Regulatory Takings

The Supreme Court first considered the concept of a taking by a regulatory ordinance in San Diego Gas & Electric Co. v. City of San Diego. 330. It explained that “[p]olice power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property.” 331

This observation suggests that the Supreme Court had the choice of either trying to fit overly burdensome regulations into the purview of the Takings Clause or to find some other constitutional basis for dealing with them. 332. It chose the former.

1. Practical Difficulties

Professor Joseph Singer, a leading proponent of progressive property, recently stated an apparent, universal truth: “Scholars have long derided the regulatory takings doctrine as incoherent and unpredictable.” 333 He concurred with my earlier assertion that the
Penn Central ad hoc, multifactor test “has become a compilation of moving parts that are neither individually coherent nor collectively compatible.” I suggest that the reason for those problems is that, as matters of constitutional law, logic, and history, the concept of regulatory takings and the Takings Clause have not been a good fit.

The Fifth Amendment Takings Clause suggests three direct questions: Did the claimant have a property interest? Did the government take that interest? And did the government provide the owner with just compensation? The focus throughout this inquiry is on property: Was it owned? Was it taken? And was property of equal value provided as compensation? To be sure, determining these questions often involves subtle inquiry. However, the essential analysis is straightforward, which reflects the crucial fact that property rights are in rem, and hence susceptible to being readily understood.

On the other hand, the issues as they have been adjudicated in regulatory takings cases do not focus on property. Rather, they focus on burdens placed on individuals who are owners of property. Armstrong v. United States primarily is known for its sweeping pronouncement, quoted in Penn Central, that the “Fifth Amendment’s guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”

It is instructive, however, to consider the issues and holding in Armstrong. Claimants, including Cecil Armstrong, furnished materials for the construction of boats that later were to be conveyed by a shipbuilder to the U.S. Navy. Under state law, the claimants possessed valid liens for materials supplied. When the shipbuilder defaulted, the Navy exercised its contract rights to terminate the agreement and demand transfer of boats that were completed or under construction. The government refused to satisfy the liens, and


334. Singer, supra note 333, at 603 n.1 (quoting Eagle, Four-Factor, supra note 21, at 602).

335. U.S. CONST. amend. V (“[N]or shall private property be taken for public use without just compensation.”). The Clause is applicable to the states through the Fourteenth Amendment and through Chicago, Burlington & Quincy R.R. v. City of Chicago, 166 U.S. 226 (1897).


petitioners brought a takings action. In his dissent, Justice Harlan stated that the government did not “take” the liens but that their value was destroyed as an incident of the government exercising its contract rights against the shipbuilder.338

Justice Black, writing for the Court, declared:

Neither the boats’ immunity, after being acquired by the Government, from enforcement of the liens nor the use of a contract to take title relieves the Government from its constitutional obligation to pay just compensation for the value of the liens the petitioners lost and of which loss the Government was the direct, positive beneficiary.

The Fifth Amendment’s guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. A fair interpretation of this constitutional protection entitles these lienholders to just compensation here.339

While the government did not take Armstrong’s lien, it was “the direct, positive beneficiary” of the materials that he furnished, that were incorporated into the boats, and that had given rise to his material supplier’s lien under state law. In short, the liens were a statutory substitute for materials furnished. This is confirmed by the fact that, under Maine law, the petitioners had the right to attach the uncompleted work. “[T]hey were entitled to resort to the specific property for the satisfaction of their claims.”340 The Court added that “such a right is compensable by virtue of the Fifth Amendment.”341

*Penn Central*, on the other hand, did not deal with arrogation of property, or even a property substitute such as a statutory lien. Rather, the Court focused, in a general sense, on the “economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations.”342

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339. *Id.* at 49 (emphasis added).
340. *Id.* at 44.
341. *Id.* (citing Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935)).
Justice Brennan quoted Armstrong’s “fairness and justice” pronouncement.343 He added that the Supreme Court “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.”344 “Economic injuries,” of course, is a much more varied and subjective category than property, or property substitutes. Had Armstrong attempted to reclaim materials delivered to the shipbuilder’s yard but not yet incorporated within boats, his ability to do so would not depend on the extent of his wealth, on the size and scope of his business, or on his personal expectations of his rights vis-à-vis his vendees. They would depend on the property he supplied and on his rights under state law.

The Penn Central line of cases thus changed Armstrong’s focus from protecting the substance of property rights to protecting individuals from unfair and unexpected economic harm.

When government exercises its power of eminent domain, and where the focus clearly is on the thing instead of its owner, the “proceedings are in rem, and compensation is made for the value of the rights which are taken.”345 Thus, once the amount of just compensation for a parcel is established, those with various ownership claims, such as freeholders and lessees, can litigate among themselves over entitlements to that sum.346 On the other hand, where there is a claim that an individual has been injured as a result of government regulations affecting his property, a court must focus on the extent of, and redress for, those injuries.

2. Constitutional Infirmities

The practical problems of applying the Takings Clause to regulatory takings, as discussed above, reflect constitutional issues pertaining
to that Clause. In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, the Court stated:

> The text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings. Its plain language requires the payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation. But the Constitution contains no comparable reference to regulations that prohibit a property owner from making certain uses of her private property.

However, the lack of a “comparable reference” in the Constitution does not mean that the Court should add one. Hesitancy on this point strongly is suggested in *Pumpelly v. Green Bay Co.*, where, in 1871, the Court carefully recognized that a physical appropriation of land would require just compensation even without an arrogation of title. The Court noted that its result would override state determinations that consequential injuries to owners resulting from internal improvement would not be the subject of redress. It explained that those state courts had taken the “comparable reference” principle to its “uttermost limit of sound judicial construction” and the Supreme Court would go no further.

Putting cautions expressed in cases like *Pumpelly* aside, Justice Stevens stated in *Tahoe-Sierra* that the “longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a ‘regulatory taking,’ and vice versa.” In essence, *Tahoe-Sierra* countenanced two separate bodies of takings law, just as Justice Kennedy

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347. Other provisions will be discussed subsequently. See infra Section II.E.
349. *Id.* at 321–22.
351. *Id.* at 180–81.
353. *Id.* at 324.
in *Murr* countenanced different meanings of “property” itself, dependent upon the purpose and occasion.\(^{354}\) Furthermore, that the distinction has been “longstanding” does not mean that it is valid. There is extensive scholarly literature on whether regulatory takings can find a home in the Takings Clause. A broad reading of the Clause suggests that it does.\(^{355}\) But others take a narrower view. Dean Treanor advanced a civic republican view of the values important during the founding era, one based on virtue instead of self-interest.\(^{356}\) He asserted that the property interest that was the subject of the Takings Clause was “physical control of material possessions.”\(^{357}\)

In his well-known book *Takings*,\(^{358}\) Professor Richard Epstein asserted that the framers, who had absorbed the intellectual framework of Blackstone and Locke, “meant to endorse” both the Takings Clause and broad government regulation of economic activities “without knowing the implicit tension between them.”\(^{359}\) Given this contradiction, Professor Epstein concludes that it is the value explicitly enumerated in the constitutional text that should be followed.\(^{360}\) Professor Michael Rappaport, after reviewing these sources, disagreed with Professor Epstein because he concluded that the founders did not have a uniform Lockean framework of property rights and because the actual practice during their era was not consistent with such a broad interpretation.\(^{361}\)

\(^{354}\) See supra notes 286–89 and accompanying text.

\(^{355}\) See, e.g., 1 WILLIAM BLACKSTONE, COMMENTARIES *138 (asserting that the individual’s right to property “consists in the free use, enjoyment, and disposal of all of his acquisitions, without any control or diminution, save only by the laws of the land.”).

\(^{356}\) See generally Treanor, supra note 229.


\(^{358}\) Epstein, supra note 8.

\(^{359}\) Epstein, supra note 8, at 29 (stating that the “founders shared Locke’s and Blackstone’s affection for private property”).

\(^{360}\) Epstein, supra note 8, at 28.

\(^{361}\) Michael B. Rappaport, Originalism and Regulatory Takings: Why the Fifth Amendment May Not Protect Against Regulatory Takings, but the Fourteenth Amendment May, 45 SAN DIEGO L. REV. 729, 737–740 (2008).
E. Alternatives to Present Takings Doctrine

1. Substantive Due Process

Leading conservative jurists often have looked askance at the idea that due process includes a substantive component. Justice Scalia wrote:

By its inescapable terms, [the Due Process Clause] guarantees only process. Property can be taken by the state; liberty can be taken; even life can be taken; but not without the process that our traditions require—notably, a validly enacted law and a fair trial. To say otherwise is to abandon textualism, and to render democratically adopted texts mere springboards for judicial lawmaking.³⁶²

The view of Judge Frank Easterbrook was just as biting.

Today the Court makes no pretense that its judgments have any basis other than the Justices’ view of desirable policy. This is fundamentally the method of substantive due process. Giving judges this power of revision may be wise or not. The Court may design its procedures well or poorly. But there is no sound argument that this is a legitimate power or function of the Court.³⁶³

The debate has been neatly framed by academics. Professors Nelson Lund and John McGinnis proclaimed:

Whatever the cause, due process has continued to provide a textual thunderbolt that Olympian judges can hurl at any law that offends them. Neither the Court nor any of its members has even once so much as attempted to explain how any of this can be derived from or even reconciled with the text of the Due Process Clauses.³⁶⁴

On the other hand, Professor Jamal Greene recently asserted: “Substantive due process is not a contradiction in terms. Indeed, it

is redundant. No inquiry into the propriety of some process—its ‘due’-ness—is or can be indifferent to the substance of the associated loss.  

Although *Murr* purported to redefine property only for regulatory takings purposes, the opinion reflects the Court’s elision of another inconvenient and troublesome distinction. If government takes private property for its own use, it must provide just compensation to the owners whose identity generally is incidental. As the Court noted long ago, “just compensation is for the property, and not to the owner.” On the other hand, if government singles out individuals for unfair burdens in connection with their ownership of property, the owners’ identities and personal circumstances are paramount. Acts of eminent domain are the subject matter of the Fifth Amendment Takings Clause whereas the applicability of that Clause to unfair burdens placed upon individuals is much more tenuous.

On the other hand, negative land use determinations predicated on the identity of the applicant can be violative of the Equal Protection Clause.

The question of substantive due process is especially important in takings law, given both that the concept of regulatory takings has its genesis there and also the difficulty courts have faced in fitting regulatory takings coherently into Takings Clause doctrines. Justice Stevens’s explanation in *Tahoe-Sierra* that the bifurcation of physical and regulatory takings jurisprudence is a “longstanding distinction” does not come to grips with the issue.

The Takings Clause provides that “nor shall private property be taken for public use without just compensation.” In *Dolan v. City of Tigard*, the Court declared that the Takings Clause is “made

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366. See supra notes 336–37 and accompanying text for explication.


368. See supra Section II.B.2 for discussion.

369. See Olech v. Vill. of Willowbrook, 528 U.S. 562 (2000) (explaining that the Clause can be invoked by a single applicant turned down by local officials for spite, regarding a previous lawsuit); Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston, 250 F. Supp. 2d 961 (N.D. Ill. 2003) (finding that an ordinance precluding religious organizations while permitting cultural and membership organizations is violative of equal protection).


371. U.S. CONST. amend. V.

applicable to the States through the Fourteenth Amendment,373 with a simple citation to *Chicago, Burlington & Quincy R.R. v. City of Chicago*.374 However, Justice Stevens’s dissent375 noted that *Chicago, Burlington & Quincy R.R.* “contains no mention of either the Takings Clause or the Fifth Amendment” but rather held that “the substance of ‘the due process of law enjoined by the Fourteenth Amendment requires compensation to be made or adequately secured to the owner of private property taken for public use under the authority of a State.’”376

In *Murr v. Wisconsin*, Justice Kennedy simply restated, also without discussion, that “[t]he Clause is made applicable to the States through the Fourteenth Amendment,” citing *Chicago, Burlington & Quincy R.R. Co. v. Chicago*.377 That the Court has elided the derivation of regulatory takings, and blithely treats *Chicago, Burlington & Quincy* as if it had invoked the Takings Clause, has fundamentally shaped regulatory takings jurisprudence, culminating in *Murr*.378

In *Pennsylvania Coal Co. v. Mahon*,379 Justice Holmes both famously, and cryptically, declared: “The 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.”380 With this plain recognition of takings by regulation, the problematic relationship between the Takings Clause and substantive due process ostensibly became clear.381

In subsequent opinions, the Court considered that Holmes’s use of “taking” might have been metaphorical,382 and that due process and takings analysis might have been “fused.”383 This interpretation

373. Id. at 383.
376. Id. at 405–06. See also Steven J. Eagle, Property Tests, Due Process Tests and Regulatory Takings Jurisprudence, 2007 BYU L. Rev. 899, 905 (2007) (asserting that the roots of regulatory takings are in substantive due process).
378. See supra Section II.B for discussion.
380. Id. at 415.
381. See supra Section II.E (discussing takings protections, the incorporation doctrine, and the Fourteenth Amendment Due Process Clause).
reached its apogee in *Agins v. City of Tiburon* when the Court declared that government regulation of private property “effects a taking if [such regulation] does not substantially advance legitimate state interests.” Only twenty-five years later in *Lingle v. Chevron U.S.A. Inc.* did the Court “conclude that [the Agins] formula prescribes an inquiry in the nature of a due process, not a takings, test, and that it has no proper place in our takings jurisprudence.”

As recently explained by Professor John Echeverria, “Understood in historical context, the transposition of due process analysis into takings doctrine was not as misguided or remarkable as it may appear 35 years later.” In his separate dissent in *Murr v. Wisconsin*, Justice Thomas suggested that the Court should take a “fresh look” at the grounding of regulatory takings jurisprudence.

Despite being an originalist, Justice Scalia executed what Professor Peter Byrne termed an “untroubled departure from original meaning” when it came to regulatory takings. In *Lucas v. South Carolina Coastal Council*, Scalia acknowledged that “Justice Blackmun is correct that early constitutional theorists did not believe the Takings Clause embraced regulations of property at all,” and that, prior to *Mahon*, “it was generally thought that the Takings Clause reached only a ‘direct appropriation’ of property, or the functional equivalent of a ‘practical ouster of [the owner’s] possession.’”

According to Professor Byrne,

> Scalia nonetheless justified applying the Clause to regulations of use, not on any revised claim about its original meaning, but on the need to adapt the clause to modern conditions of comprehensive regulation. . . . [H]e justified applying the Takings Clause to use regulations on the basis of his perception of social

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385. *Id.* at 260 (brackets in original).
387. *Id.* at 540.
392. *Id.* at 1028 n.15.
If government takes a home, it does not matter if the occupant owns five others. It also does not matter if the owner mistakenly believes that government does not have to compensate owners whose homes are taken to widen highways. Furthermore, if the governor takes land in order to convey it to a campaign contributor, that is an impermissible use of his powers and the misuse ought to be struck down as such. Correspondingly, if government takes private land in order to effectuate a compelling public need, it still must compensate the owner. That is what eminent domain is for.

2. Justice Kennedy and the Extension of Due Process Analysis

It is possible for the Supreme Court to extend the role of due process in takings law sub rosa. Justice Kennedy often has emphasized the role of due process. In Lawrence v. Texas, he recognized an individual’s “destiny” and that “the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance.” “Destiny” came up again in Murr, where he wrote

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395. Byrne, supra note 250, at 735–36.
396. Kelo v. City of New London, 545 U.S. 469, 477 (2005) (“[I]t has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation.”).
397. See Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 542 (“[A] regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause.”).
399. See E. Enter. v. Apfel, 524 U.S. 498, 539 (1998) (Kennedy, J., concurring in the judgment and dissenting in part) “The [Takings] Clause operates as a conditional limitation, permitting the government to do what it wants so long as it pays the charge. The Clause presupposes what the government intends to do is otherwise constitutional.” Id. at 545.
400. Lawrence v. Texas, 539 U.S. 558 (2003) (holding violative of the Due Process Clause a statute that criminalized a certain sexual conduct between persons of the same sex). Justice Kennedy declared that the Due Process Clause’s protection of liberty includes “the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.” Id. at 574.
401. Id. at 565 (citing Roe v. Wade, 410 U.S. 113 (1973)) (“Roe recognized the right of a woman to make certain fundamental decisions affecting her destiny and confirmed once more
that property ownership “empowers persons to shape and to plan their own destiny.”

Justice Kennedy’s proclivity to avoid the constraints of takings law and bright-line rules is illustrated by his swing opinion in *Eastern Enterprises v. Apfel*. There, a federal statute augmented the endangered health and retirement benefits of retired coal miners and their families by imposing severe retroactive burdens on companies that employed those miners many years earlier.

The plurality opinion, by Justice O’Connor, stated that the statute violated the Takings Clause principles of fairness. Writing for the four dissenters, Justice Breyer stated that the “Takings Clause does not apply” and that the issue of “retroactive liability finds a natural home in the Due Process Clause.”

Justice Kennedy, after reviewing the “perplexing” nature of regulatory takings law, observed: “Until today, however, one constant limitation has been that in all of the cases where the regulatory taking analysis has been employed, a specific property right or interest has been at stake.” He added that “[t]he difficulties in determining whether there is a taking or a regulation even where a property right or interest is identified ought to counsel against extending the regulatory takings doctrine to cases lacking this specificity.” He supplied the plurality its needed fifth vote, indicating the matter fell under the Due Process Clause.

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402. *Murr v. Wisconsin*, 137 S. Ct. 1933, 1943 (2017) (“Property rights are necessary to preserve freedom, for property ownership empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them.”).


404. *Id.* at 537 (Kennedy, J., concurring in the judgment and dissenting in part) (emphasis added).

405. *Id.* at 553 (Breyer, J., dissenting) (deeming the Coal Act of 1992 constitutional under the Due Process Clause).

406. *Id.* at 554–56 (Breyer, J., dissenting) (deeming the Act constitutional under the Due Process Clause).

407. *Id.* at 541 (Kennedy, J., concurring in the judgment and dissenting in part) (emphasis added).

408. *E. Enter.*, 524 U.S. at 542 (Kennedy, J., concurring in the judgment and dissenting in part) (emphasis added).

409. *Id.* at 547 (Kennedy, J., concurring in the judgment and dissenting in part) (“When the constitutionality of the Coal Act is tested under the Due Process Clause, it must be invalidated.”)
While the issues in *Eastern Enterprises* were different from those in *Murr*, it is interesting to observe that Justice Kennedy’s concerns in the former case stem from prudence and from the perceived difficulty in deriving an appropriate standard for review, not from a principled conclusion that takings doctrine would be inapplicable.

### 3. Privileges or Immunities

Justice Thomas has been fearless in raising issues regarding the constitutional limitations on property rights. In his dissent in *Kelo v. New London*, he “recognized that when the Supreme Court broadly interprets the public use restriction of the Fifth Amendment’s Takings Clause, and at the same time defers to political actors in this arena, it fundamentally abdicates its constitutional responsibility.” He similarly objected to exempting legislative decisions from the takings scrutiny accorded to administrative determinations, in *Parking Ass’n of Georgia, Inc. v. City of Atlanta*.

In his separate dissent in *Murr v. Wisconsin*, Justice Thomas declared: “In my view, it would be desirable for us to take a fresh look at our regulatory takings jurisprudence, to see whether it can be grounded in the original public meaning of the Takings Clause of the Fifth Amendment or the Privileges or Immunities Clause of the Fourteenth Amendment.” He cited the scholarly debate over those issues as summarized in an article on originalism and regulatory takings by Professor Michael Rappaport.

Professor Rappaport wrote that during the founding period there was “little evidence that nonphysical takings were covered by the Clause” but that concerns regarding takings “had grown tremendously” by the enactment of the Fourteenth Amendment. Thus,

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414. Id. at 1957.
415. Id. at 1957–58 (citing Rappaport, supra note 361).
416. Rappaport, supra note 361, at 753.
jurists had come to recognize just compensation as a “fundamental principle of justice.” 417 “Even more importantly,” Rappaport added, “state decisions had recognized that takings could occur not only from physical seizures, but from consequential and regulatory actions as well.” 418 The case law demonstrated that “many states did not understand takings to be solely physical takings,” and that takings jurisprudence “protect[ed] the right to use property, even if there was no physical interference.” 419

Professor Rappaport thus concluded that, although the original meaning of the Fifth Amendment does not cover regulatory takings, 420 there was a “very plausible case” that the Fourteenth Amendment Takings Clause “covers some regulatory takings.” 421 His argument was amplified more recently by John Greil under the rubric of “second-best originalism.” 422

It is not my intention here to comment on the viability of constitutional theories—such as Rappaport’s “incorporation plus” 423 approach—that would apply the regulatory takings doctrine to the states through the Fourteenth Amendment Due Process Clause. I do suggest, though, that Justice Thomas is correct that a “fresh look” at the Court’s regulatory takings jurisprudence is in order, given both the difficulty in fitting regulatory takings under traditional takings doctrine and also the great expansion of both legislative and administrative land use rules and exactions.

417. Id. at 754 (quoting AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 268–69).
418. Id. (citing cases and, inter alia, Eric R. Claeys, Takings, Regulations, and Natural Property Rights, 88 CORNELL L. REV. 1549, 1549 (2003)).
419. Id. at 755.
420. Id. at 731.
421. Id. at 732.
422. John Greil, Note, Second-Best Originalism and Regulatory Takings, 41 HARV. J.L. & PUB. POL’Y 373, 376 (2018) (asserting that, “[w]hen the meaning of the text is underdetermined, but a judge is still committed to enforcing the original meaning of the text, she needs to perform a ‘second-best’ form of originalism.”).
423. Under the currently prevailing view of “partial incorporation,” specified provisions of the first eight amendments are deemed applicable to the States through the Fourteenth Amendment Due Process Clause. See Palko v. Connecticut, 302 U.S. 319, 323–25 (1937). Under the “total incorporation” approach, all rights set forth in the first eight amendments are applicable to the States through the Fourteenth Amendment Due Process Clause. See Adamson v. California, 322 U.S. 46, 89 (1947) (Black, J., dissenting). The “incorporation plus” approach incorporates all of the rights included in “total incorporation” plus other rights as indicated by experience. Id. at 124 (Murphy, F., and Rutledge, JJ., dissenting).
CONCLUSION

While the Fifth Amendment Takings Clause traditionally had been applied to government physical appropriations of land only, the Supreme Court first recognized the concept of a regulatory taking in *Mahon*,424 and extended it in *Penn Central*425 and *Lucas*.426 The latter cases, however, were predicated upon the severity of burdens upon landowners. That, in turn, required a determination of the “relevant parcel” with respect to which the burden was to be measured. The relevant parcel test that would be most simple, and most respectful of the individual autonomy and productivity that the Takings Clause sought to advance, would be based on the deeded parcel. Only in the extraordinary instance where the landowner had sought to manipulate the integrity of the deeded-parcel system would another test be needed.

In *Murr v. Wisconsin*,427 the Court had an opportunity to reinforce the concept that *the* deeded parcel was almost always the relevant parcel. Instead, it melded ad hoc tests for determining the relevant parcel with *Penn Central*’s vague tests for determining when the “parcel as a whole” was taken. The result might not comport with Fifth Amendment takings law nor Fourteenth Amendment due process, but it does substantially advance a pattern of doleful indecision.

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