

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

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INTRODUCTION

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

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

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

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

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

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

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

When seeking to push and shape the contours of the law, it behooves one to actually have a firm grasp on the field. I have repeatedly urged that “friends don’t let friends file takings claims.” I was not kidding. My concern is that too many lawyers tend to view a takings claim as simply some sort of catchall to add as a tag line at the end of a multicount complaint (which may or may not have a valid claim at its core *ab initio*). Bad idea. It leads to cases in which lawyers make all sorts of wild claims, irritating judges (who may, in any event, be hearing their first takings cases⁴) and making bad law by continuing to make judges think that takings law is not a legitimate subject. Claims like these: that a phone call made by a police officer during an arrest was a taking;⁵ that forcing “exotic” dancers to stay four feet away from customers was a taking of the bar owner’s interest in the four-foot circle of property surrounding each dancer;⁶ that precluding a murderer from collecting on a life insurance policy on his victim was

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

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

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

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

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

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

I. THE AIRPORT NOISE CASES—PHYSICAL TAKINGS

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

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

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

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

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

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

The airport cases had two post-war¹³ U.S. Supreme Court cases to provide a basis for analysis. In *United States v. Causby*,¹⁴ the Court held the federal government liable for the destruction of a chicken farm beneath the landing pattern at a federally owned airport.¹⁵ The Court had to deal only with the question of whether the government or the underlying landowner had to bear the burden of damage caused by multiple low flights. It was spared the need to go further, because the United States owned and operated both the airport and the military aircraft using it. The key holding, however, clearly placed responsibility on the government.

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

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

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

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

13. WWII, for our younger readers.

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

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

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

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

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

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

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

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

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

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

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

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

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

**L.A. AIRPORT FACES
SHUTDOWN IN 30 DAYS**

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

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

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

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

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

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

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

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

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

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

ordinance. We had gone to trial on the merits on the inverse claim and lost. The other claims had been dismissed as a matter of law. So, I briefed the heck out of each of them. My opening brief discussed 165 cases and 22 texts and law review articles (in addition to various constitutional provisions, statutes, and rules). To the greatest extent possible, it was a primer on both the substance of the underlying legal theories and their application to the facts in the airport v. neighbor context. I firmly believed that the courts needed such a primer on the inverse condemnation claims²⁵ and that they were not well educated on the law of nuisance either.²⁶

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

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

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

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

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

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

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

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

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

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

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

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

29. 49 U.S.C. § 1716(c)(3).

30. *City of Inglewood*, 451 F.2d at 956.

31. 12 Cal. 3d 447 (1974).

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

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

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

32. *Id.*

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

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

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

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

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

II. REGULATORY TAKINGS—THE MORE COMPLEX BRANCH

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

I was involved in many of the early (which is to say post-1978, when the Supreme Court got interested in takings cases after its fifty-year layoff³⁷) regulatory taking/ripeness cases as the law developed. In the takings course that I have taught for years, mostly at the University of Miami Law School, I have insisted that my students study the cases in chronological order—the way those of us in the field actually lived them—so they can see how the law developed and how the judicial lineups changed as we progressed from *Agins* in 1980 through *First English* in 1987. I continue to believe that you cannot truly understand how, and possibly why, the law developed as it did if you merely try to extrapolate black letter rules.³⁸ Suffice to say that, that period

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

My participation in the ripeness mess was largely as an amicus⁴⁷ and as a contributor to the scholarly journals.⁴⁸ I was one of the first to criticize *Williamson County*,⁴⁹ and I continued to do so from that day in 1985 to the present.⁵⁰ One of my critiques was as a co-author with my old law school mentor, Professor Daniel Mandelker of Washington University Law School. Although we respected each other, Dan and I disagreed on most aspects of regulatory taking law.⁵¹ Except in the area of ripeness. Finding that we both agreed that issues of federal constitutional law ought to be subject to litigation in federal courts, we joined forces to express that view.⁵² It was not that I failed

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

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

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

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

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

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

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

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

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

54. 16 U.S.C. § 1247(d).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

64. 42 U.S.C. § 1983 (2012).

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

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

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

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

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

CONCLUSION

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

