MICHAEL M. BERGER—A CAREER DEVOTED TO PROPERTY RIGHTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. Berger, *supra* note 2.

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

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

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

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

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

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

11. 535 U.S. at 302.

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

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

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

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

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

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

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

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

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

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

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

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

16. *Koontz*, 133 S. Ct. at 2598–99.

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

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

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

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

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

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

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

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

20. Berger, *supra* note 2.

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

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

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

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

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

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

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