OPENING REMARKS: THE FEDERALISM DIMENSION OF CONSTITUTIONAL PROPERTY

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Thanks so much, Lynda, and I'm glad to be the excuse for such an esteemed gathering of property lawyers.

I think what we'll be talking about today, at least this morning, is the respective roles of state and federal law, especially in takings jurisprudence. The issue is of substantive importance in a variety of takings cases. If you think about *Murr v. Wisconsin*,[1] which the Supreme Court recently decided, it is an obvious example of where the Court rejected the notion that state law should furnish the denominator in takings cases. But I would argue that aside from the substantive issues, the relative importance of state and federal law also plays a role in issues like the wisdom of the *Williamson County* case.[2] To the extent that you think that state law plays a heavy role in takings law, *Williamson County* makes a lot more sense than if you think state law plays a relatively unimportant role in takings jurisprudence.

Now the existence of a federal role in takings jurisprudence, I think everyone can see, is beyond dispute. The Takings Clause has to have some federal content to the extent that it protects disruption of expectations. How much disruption we can tolerate is going to be a matter of federal law. Also, as Tom Merrill has established in his prior work, the categories protected by the Federal Constitution are also matters of federal law.[3]

The difficult question is, within those categories, what role should state law have? We can think about this in a variety of circumstances. For example, suppose a municipality were to enact an ordinance that limited the rights of a riparian owner to take water out of a stream. Should the takings claim arising out of that reduction in rights be

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1. *See* Murr v. Wisconsin, 137 S. Ct. 1933 (2017).

2. *See* Williamson Cty. Reg'l Planning Bd. v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985).

3. Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 952 (2000).

a matter of federal law? Or should it depend on whether, for instance, the jurisdiction might have a prior appropriation regime or, instead, a reasonable use regime? My contention has been that state law ought to play a significant role in that question and that we shouldn't view this as simply a matter of federal law. And certainly Justice Scalia's opinion in *Lucas*, which remanded for the determination of state nuisance law, suggests that there is a significant state law component to takings jurisprudence.[4] On the other hand, Justice Kennedy's opinion in *Murr* suggests that state law shouldn't be dispositive, and there is an important role beyond state law in figuring out what the baseline is for takings cases.[5]

So today's panelists are going to provide a variety of perspectives on the role of state law. I think Jim Krier, who is going to start, may talk a little bit about ideology and what role that might play in determining the relevant roles of state and federal law in particular cases. Tom Merrill is going to expand on his previously developed idea that looking at this as a dichotomy between state and federal law is a mistake and that instead we should recognize federal-patterning definitions, which actually leave a significant role for state law. Molly is going to talk about how state courts have frequently looked to the laws of other states in their takings cases. And I think ultimately, Michael Berger is going to argue that takings should be grounded almost exclusively in federal law, and to a large extent, in natural law.

With that, I will turn it over to the panel.

Thank you.

4. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1006–32 (1992).

5. *See Murr*, 137 S. Ct. at 1939–50.