

MICHAEL M. BERGER—A PATH TO FAIRNESS

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

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

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1. 8 LOY. L.A. L. REV. 253 (1975) [hereinafter *1975 Reflections*].
2. *Id.* at 300 (citing Ostrow, *Levi Calls Broad Distrust of Law System a Problem*, L.A. TIMES, Feb. 4, 1975, pt 1, at 4, col. 1 (quoting Attorney General Edward H. Levi)).
3. *Id.* (citing Thompson, *Appellate Court Reform—The Near Term*, 6 BEVERLY HILLS B.J., Sept., 1972, at 9, 13, 18; Tobriner, *Can Young Lawyers Reform Society Through the Courts?*, 47 CAL. ST. B.J. 294 *passim* (1972); Wright, *The Role of the Judiciary: From Marbury to Anderson*, 60 CALIF. L. REV. 1262, 1268 (1972)).

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

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

[i]n the old days we had such abundant land and the land was so rich that waste didn't seem to matter. But millions of acres of our prime agricultural land has fallen to the tract builders and much more is doomed. Litter, endless billboards, honkytonk commercialism, and banal slurb construction line the highways. Poisons and sewage pollute our bays, lakes and rivers. Smog chokes Los Angeles, but what the San Francisco Bay Area and the Central Valley can anticipate will make Los Angeles seem desirable. And this is but part of the story.

Despite the awesome political power of those who make money in the process of polluting and destroying the resources of California, we have it within our power to halt the spread of blight and to return this bright land to the splendor it once was. Right now, today, we have the constitutional right, the technology and the money. The problem is how to muster them.⁵

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

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

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

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

5. *Id.* at 253.

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

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

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

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

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

Thus, we find the Tenth Commandment: “Thou shalt not covet thy neighbor’s house, thou shalt not covet thy neighbor’s wife, nor his manservant, nor his maidservant, nor his ox, nor his ass, nor anything that is thy neighbor’s.”⁹ As Justice Holmes expressed it, “Property is protected because such protection answers a demand of human nature, and therefore takes the place of a fight.”¹⁰

Thus, we have developed systems of title recording and title insurance (not to mention statutes of limitation) in order to provide security of land ownership to allay these otherwise deep-seated universal anxieties and, intertwined with personal ownership, satisfy the need for social stability. The United States Supreme Court has repeatedly so recognized: No class of laws is more

7. *Id.* at 257.

8. *Id.* at 266.

9. *Id.* at 267 (citing *Deuteronomy* 5:12–17).

10. *Id.* (citing *Davis v. Mills*, 194 U.S. 451, 457 (1904)).

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

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

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

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

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

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

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

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

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

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

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

JUSTICE. A major bridge or a freeway construction or something could deprive a property owner of access for a good while.

MR. BERGER. Yes, they can. And under—

JUSTICE. And in your view that would require compensation.

MR. BERGER. —Under settled law, Your Honor, if access is totally deprived to property, that is the taking of the property interest and requires compensation.

UNKNOWN SPEAKER. Even though it is admittedly for a temporary duration?

MR. BERGER. Yes, ma'am. The highway people routinely condemn temporary easements so that they can perform just that kind of construction without having to litigate with people over inverse compensation cases.

They acknowledge that they are taking their access and interfering with their use, and they directly go ahead and buy that interest.¹⁷

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

