RUMINATIONS ON TAKINGS LAW IN HONOR OF DAVID CALLIES

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INTRODUCTION

Scholar? Lawyer? Teacher? Dave Callies has been—indeed, continues to be—all of these and more. With a career closing in on a half century, it is time the profession honored him for his contributions to property law—and particularly to land use and takings law. But what is there for one of us to say amidst this compendium of honorifics? He has educated us on so many aspects of these topics for so long that it is difficult to pin down a subject to write about that would do him justice. Just by way of illustration, consider that Callies was part of the team that produced two ground-breaking and highly influential books at the beginning of the modern takings era, under the auspices of the Council on Environmental Quality: *The Quiet Revolution in Land Use Control* in 1971[1] and *The Taking Issue* in 1973.[2] From those early days (seen as dark days by those of us who generally represent property owners) when his interests appeared to be pointing toward restricting the rights of property owners, David's scholarship has matured.[3]

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1. FRED BOSSELMAN & DAVID CALLIES, COUNCIL ON ENVTL. QUALITY, THE QUIET REVOLUTION IN LAND USE CONTROL (1971).

2. FRED BOSSELMAN, DAVID CALLIES & JOHN BANTA, COUNCIL ON ENVTL. QUALITY, THE TAKING ISSUE (1973) [hereinafter TAKING ISSUE].

3. And thankfully so. *The Taking Issue* itself was openly peddled as a screed to evade constitutional precepts that favored property owners: "If this book seems technical and detailed, it is because it is *designed to assist government officials and attorneys* who seek to fashion solutions to environmental problems." *Id.* at iii (emphasis added). The idea was "to cast doubt on the theory of regulatory taking in any form." (David L. Callies, *Fred Bosselman and the Taking Issue*, 30 TOURO L. REV. 255, 259 (2014)). For critical discussion of the whole idea of the government using its influence to seek "to screw its citizens out of their constitutional

A review of the vast array of Callies's works over the decades reveals a thread that connects the disparate, individual subjects that have animated each of his articles or books. David is a ruminator. And a damned fine one. In some of his earliest works, for example, he mused about how government should react to the cosmically Delphic statement in *Pennsylvania Coal Co. v. Mahon* that "if regulation goes too far[] it will be recognized as a taking."[4] David and his co-authors viewed rigorous enforcement of that concept to be the "weak link" in the government's ability to solve environmental problems through regulation,[5] and pondered ways to strengthen or avoid that link. Their possible solutions ranged from disregarding the use of regulations altogether[6] to seeking to convince the Supreme Court to overrule *Mahon* and thereby eliminate the "myth of the taking clause" as a strong protector of the rights of property owners.[7]

Subsequently, however, the Callies view of constitutionalism has acknowledged that, although the case law reported in his two early books gutted Fifth Amendment protections to such an extent as to render them "virtually moribund"[8] if not "nearly . . . meaningless,"[9] the U.S. Supreme Court's output since then has "added exponentially" to the protection afforded property owners.[10] Thus in David's

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rights," see Gideon Kanner, *Helping the Bear, Or "The Taking Issue" Was a Failed Propaganda Screed. So Why Is It Being Celebrated?,* GIDEON'S TRUMPET (Sept. 8, 2013), http://gideonstrumpet.info/2013/09/helping-the-bear-or-the-taking-issue-was-a-failed-propaganda-screed-so-why-is-it-being-celebrated/.

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

5. TAKING ISSUE, *supra* note 2, at iv.

6. *Id.* at 302.

7. *Id.* at 236.

8. David L. Callies, *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed From* Penn Central *to* Dolan, *and What State and Federal Courts are Doing About It*, 28 STETSON L. REV. 523, 524 (1999).

9. David L. Callies, *Through a Glass Clearly: Predicting the Future in Land Use Takings Law*, 54 WASHBURN L.J. 43 (2014).

10. *Id.* For a discussion of the eight U.S. Supreme Court decisions between 2010 and 2016 dealing with property rights (all of them favoring the property owners' positions), see Michael M. Berger, *Property, Democracy, & the Constitution*, 5 BRIGHAM-KANNER PROP. RTS. CONF. J. 45, 96–105 (2016) [hereinafter Berger, *Property*]. A footnote to this footnote should mention that, after this manuscript was written, the Supreme Court broke that string. *See* Murr v. Wisconsin, 137 S. Ct. 1933 (2017) (adding, in this observer's view, nothing but additional confusion to regulatory takings law by importing valuation issues into the definition of property

honor—and inspired by the example he set by tugging and pulling at various loose threads of the law to tease out hidden meanings and theories—the remainder of this Article will consist of a series of ruminations on various issues and developments in the law of takings. Some of these issues have been the subjects of recent, unsuccessful petitions for certiorari, showing their currency. Interest in them will continue until the issues are resolved. Some—if not all—of these deserve more extensive treatment than can be afforded here, hopefully leading to further exegesis.

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

An issue that keeps popping up like some crazed whack-a-mole is whether the government can simply redefine private property, so as to convert property interests that it would like to own into public property, with the wave of a Harry Potteresque wand and without having the good grace of paying for the transformation.[11] One wonders why government agents keep trying, because the Supreme Court has been quite clear that such definitional games cannot fit the constitutional matrix.[12]

The issue is worth examining at this time because the courts of both Mississippi and North Carolina have recently issued opinions seeming to approve the conversion of private into public property by the simple "definitional game" of saying so. Petitions for certiorari were filed to have both decisions reviewed.[13] Regardless of the outcome of

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as well as into the liability determination of whether a taking occurred at all). *See infra* text accompanying notes 50–55.

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

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

13. Bay Point Props. v. Miss. Transp. Comm'n, 201 So. 3d 1046 (Miss. 2016) (Sup. Ct. No. 16-1077); Nies v. Town of Emerald Isle, 780 S.E.2d 187 (N.C. App. 2015) (Sup. Ct. No. 16-1305).

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

It is possible that some agencies are seduced by the virtual and oft-repeated truism that property interests are created by state law.[14] The underlying concept is largely true. The Supreme Court has said that property rights "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law."[15] However, the Court has rejected the assertion that federal courts lack the power to determine whether a state action that "purports merely to clarify property rights has instead taken them."[16] Thus, states do not have the power to run roughshod over private property rights by exercising sleight of hand by redefining existing rights. The U.S. Constitution in general, and the Fifth and Fourteenth Amendments in particular, stand as a bulwark providing protection against confiscation.[17] In short, the ability to define—or even redefine—property rights does not mean that such wordplay may be done without compliance with the Fifth Amendment's just compensation guarantee.[18] The power to define is not the power to confiscate.[19]

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14. *See, e.g.*, Phillips v. Washington Legal Found., 524 U.S. 156, 164 (1998); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1001 (1984).

15. Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

16. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 560 U.S. 702, 728 (2010) (plurality opinion).

17. *E.g.*, Ark. Game & Fish Comm'n v. United States, 133 S. Ct. 511, 518 (2012) (finding that any sort of taking imparts on the government a "categorical duty" to compensate); *Phillips*, 524 U.S. at 167 ("[A] State may not sidestep the Takings Clause by disavowing traditional property interests long recognized under state law."); First English Evangelical Lutheran Church v. Cty. of Los Angeles, 482 U.S. 304, 315 (1987) ("[G]overnment action that works a taking of property rights *necessarily implicates* the 'constitutional obligation to pay just compensation.'" (emphasis added) (citations omitted)); Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (warning against "a shorter cut than the constitutional way of paying").

18. *E.g.*, Palazzolo v. Rhode Island, 533 U.S. 606, 626 (2001) (States do not have the unfettered authority to "shape and define property rights and reasonable investment-backed expectations," leaving landowners without recourse against unreasonable regulations.); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992) ("Any limitation so severe cannot be newly legislated or decreed (without compensation) . . . ."; Preseault v. ICC, 494 U.S. 1, 8 (1990).

19. Professor Tribe noted this truth in the early days of modern takings law. Analyzing Kaiser Aetna v. United States, 444 U.S. 164 (1979), he queried, "Did the government effect a taking by saying to the general public, 'Come on in, the water's fine'?" LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES 176 (1985). The Court had answered the question by voiding the government action. In Tribe's words, the owners possessed "investment-backed expectations

That this solid foundation of protection for the rights of private property owners might cause some difficulties for government agencies is something that the Court has acknowledged and accepted—even celebrated—as a necessary part of our constitutional system:

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

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

These concepts from 1987—a year in which the Court decided more takings cases than any other[25]—show the need for the Court's

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rising to the status of property rights for which the government must pay when it effectively nationalizes them." *Id.* at 176–77.

20. *First English*, 482 U.S. at 321 (emphasis added).

21. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 841 (1987).

22. *Id.* at 838.

23. *Id.* at 837.

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

25. In addition to *First English* and *Nollan*, the Court decided Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987); Hodel v. Irving, 481 U.S. 704 (1987); Fed. Commc'n Comm'n v. Florida Power Corp., 480 U.S. 245 (1987); and United States v. Cherokee Nation,

continuing intervention to protect the rights of property owners. Left to their own designs, government agencies continue to seek to acquire property at no cost.[26] The current cases from Mississippi and North Carolina illustrate rather bluntly how government agencies can abuse such power: simply redefining property so that what once was private becomes, ex post facto, public.

In *Bay Point Properties,* the Mississippi Supreme Court upheld a state statute whose effect was to convert private property underlying an easement into public property. This was allowed to stand, despite the fact that the easement encumbering the plaintiff's land had ended.[27] In a nutshell, the dispute arose after Hurricane Katrina destroyed a bridge. The bridge was rebuilt but at a slightly different location. An easement that had provided access to the former bridge was no longer needed for bridge access, so the easement's governmental owner converted it into a park—simply by saying so. Thereafter, when the agency sought to acquire the vestigial fee title, the trial court instructed a condemnation jury to provide virtually no compensation because the agency had not formally abandoned the easement even though it had ceased using it for its intended purpose.[28] This cannot satisfy the constitutional strictures laid down by the Supreme Court. The Supreme Court's jurisprudence has steadily enforced the protections established by the Fifth Amendment.[29] After all, the Bill of Rights was adopted to protect individuals

480 U.S. 700 (1987). The quotes above, coming at the end of a Term with such a heavy emphasis on takings law, clearly were written after the Court gave much thought and deliberation to this field. For a fuller discussion of the Supreme Court's 1987 decisions, see Michael M. Berger, *The Year of the Taking Issue*, 1 BYU J. PUB. L. 261 (1987).

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

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

28. Bay Point Props. v. Miss. Transp. Comm'n, 201 So. 3d 1046, 1054–55 (2016).

29. All clauses of the Fifth Amendment were designed to "limit the power of government." Tonja Jacobi, Sonia Mittal & Barry R. Weingast, *Creating a Self-Stabilizing Constitution: The Role of the Takings Clause*, 109 NW. U. L. REV. 601, 616 (2015).

against the government—the few against the many—not the other way around.[30]

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

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

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30. Stanley v. Illinois, 405 U.S. 645, 656 (1972); Boddie v. Connecticut, 401 U.S. 371, 375–76 (1971); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943). *See* JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT 4 (3d ed. 2008) (stating the Fifth Amendment is "designed to limit the scope of majority rule").

31. Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980).

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

33. *E.g.*, Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979); Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

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

35. Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 326 n.23 (2002). *See also Stop the Beach Renourishment*, 560 U.S. at 715 (2010) (plurality opinion) ("If a legislature or a court declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation.").

The Supreme Court dealt with a similar railroad-easement definitional problem in *Preseault*. That case involved an easement that had been acquired for railroad purposes and railroad purposes only. The railroad sought to abandon the easement and then sell the right of way to the State and trail groups for transformation into a recreational trail. A number of state courts had similar issues and uniformly held that factual abandonment of railroad use meant that the railroad company retained nothing that it could transfer to others.[36] So Congress intervened, enacting a statute that purported to redefine the concept of "railroad use" to mean that such uses have not been "abandoned"—even if the tracks and ties are torn up and sold for scrap, and the trains are gone—as long as the railroad retains an intent (however ephemeral or inchoate) to someday, maybe, perhaps, relay the tracks and reactivate the line. Honest.[37] In other words, by definitional sleight of hand, Congress sought to completely change the nature of railroad easements.[38] In *Preseault*, the Supreme Court refused to permit that change. At least, it refused to permit it without compensation.[39] The parties were told to repair to the Court of Federal

36. *E.g.*, Pollnow v. State, 276 N.W.2d 738 (Wis. 1979); Schnabel v. County of DuPage, 428 N.E.2d 671 (Ill. App. 1981). For a discussion of this historical development, see Michael M. Berger, *Rails-to-Trails Conversions: Has Congress Effected a Definitional Taking?*, *in* SOUTHWEST LEGAL FOUND., PROCEEDINGS OF THE INST. ON PLANNING, ZONING, AND EMINENT DOMAIN ch. 8 (1990).

37. The text of the statute plainly reads:

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

16 U.S.C. § 1247(d).

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

39. Geneva Rock Prods., Inc. v. United States, 107 Fed. Cl. 166, 172 (2012) (stating that there was "not enough to insulate the government from a takings claim").

Claims to determine the compensation that might be due. Compensation was eventually awarded.[40] If Congress could not get away with such definitional gamesmanship, Mississippi should not either.[41]

If anything, North Carolina has been even more high-handed than Mississippi. An example comes in the case *Nies v. Town of Emerald Isle*,[42] which involved beachfront property. In this case, there was no dispute over the ownership of the wet-sand areas; they had always been public. However, the dry sand—in North Carolina as in many other states—had historically been privately owned. That was the law until the legislature enacted a statute purporting to treat all dry-sand area as part of the state's "public trust" land that was subject to unlimited public use. North Carolina, in fact, did the California Coastal Commission's *Nollan* extortion one better. It simply declared, majestically, that all dry sand was ipso facto public, rather than seeking to accomplish its statewide goal one property at a time.

Guidance may be found in *Hughes v. Washington*,[43] particularly in the concurring opinion of Justice Stewart. The issue in that case was the boundary of property on the coast. The State sought a rule that would have made all accretions to the shore (i.e., to Stella Hughes's land) public land. Mrs. Hughes claimed any accretions belonged to her under settled state law. Justice Stewart examined the effect of a sudden change in law coming from the state court system. His conclusion was simple and straightforward: "to the extent that it constitutes a *sudden change* in state law, *unpredictable* in terms of the relevant precedents," the new state law would be entitled to no deference. "[A] State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of *asserting retroactively that the property it has taken never existed at all*."[44] In other words, a state cannot simply declare private property to be public and have that be the end of the matter. The Constitution remains a bar. As another recent opinion

40. Preseault v. United States, 100 F.3d 1525 (Fed. Cir. 1996).

41. Indeed, the Court of Federal Claims and the Court of Appeals for the Federal Circuit have consistently applied the *Preseault* rule and have required compensation in similar situations. *E.g.*, Howard v. United States, 106. Fed. Cl. 343 (2012); Ellamae Phillips Co. v. United States, 564 F.3d 1367, 1373 (Fed. Cir. 2009); Schmitt v. United States, No. IP 99-1852-Y/S, 2003 WL 21057368 (S.D. Ind. 2003).

42. Nies v. Town of Emerald Isle, 780 S.E.2d 187 (N.C. App. 2015).

43. Hughes v. Washington, 389 U.S. 290 (1967).

44. *Id.* at 296–97 (emphasis added).

put it, "[s]tates effect a taking if they recharacterize as public property what was previously private property."[45]

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

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

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

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

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45. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 560 U.S. 702, 713 (2010) (plurality opinion).

46. See Kaiser Aetna v. United States, 444 U.S. 164 (1979), in which the Court repeatedly noted that the property in litigation was private under state law (*id.* at 166, 167, 179) and thus protected from interference—even from federal law—by the Fifth Amendment (*id.* at 180). *See also* Hodel v. Irving, 481 U.S. 704 (1987) (finding that the statute purporting to eliminate Native American rights to devise and inherit property by intestacy was invalid because it was not accompanied by compensation).

47. Pa. Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).

48. Bay Point Props. v. Miss. Transp. Comm'n, 201 So. 3d 1046 (2016), *cert. denied*, 137 S. Ct. 2002 (2017).

49. Nies v. Town of Emerald Isle 138 S. Ct. 75 (Oct. 2, 2017) (No. 16-1305).

50. Nies v. Town of Emerald Isle, 780 S.E.2d 187 (N.C. App. 2015), *cert. denied*, 138 S. Ct. 75 (Oct. 2, 2017) (No. 16-1305).

51. Murr v. Wisconsin, 137 S. Ct. 1933 (2017).

as a single lot, through the magical planning tool known as "virtual joinder or merger." Had the two lots remained in separate ownership, they would have universally been recognized as separate lots available for separate development. However, as soon as title settled on the same people, the County's ordinance created a "virtual" merger of the two lots, and they "virtually" became a single lot for all intents and purposes, except, perhaps, for taxation.[52] When the Murrs sought to sell one of the lots, the County told them that the heretofore separate lot had ipso facto, *eo instante,* abracadabra, etc., become merely a part of the virtually conjoined lot. What had been two had become one, and the lots could not be rent asunder to facilitate development.

So, does *Murr* stand for the proposition that local government is free to redefine property interests at will, allowing rearrangement of land titles for the benefit of the government?

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

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52. In a somewhat cruel twist of fate, the same county that insisted that these two lots must be treated as a single entity had been sending separate property tax bills to the owners for years, taxing each individually at its highest and best use, without regard to the neighboring lot. But this is probably digressive.

53. *Murr*, 137 S. Ct. at 1944–45 (quoting Palazzolo v. Rhode Island, 533 U.S. 606, 626 (2001) (punctuation simplified)).

54. *Murr*, 137 S. Ct. at 1945.

55. There is one place where such separated joinder is allowed. In direct condemnation cases, where such separated properties share unities of title and use (and at least close

Although rendering a decision in favor of the State, the Court declined the State's suggestion to clothe it with absolute, definitional power over property, saying the State's approach was equivalent to framing the question this way: "May the State define the relevant parcel in a way that permits it to escape its responsibility to justify regulation in light of legitimate property expectations?"[56] In a word, no.

But wait; there is more. Four days after deciding *Murr*, the Supreme Court denied certiorari in *United States v. Lost Tree Village Corp.*[57] The reason this action may have meaning here (which some might dismiss as routine in light of the myriad petitions that receive the "denied" stamp every week) is that it was considered at the very time the Court was parsing the words of the *Murr* opinion and its two dissents, and it involves a related (perhaps similar) issue. One might even call *Lost Tree* the blood brother of *Murr*. Moreover, the *Lost Tree* petition had been pending since March 2016—fifteen months earlier—and the United States (the petitioner) had asked the Court to defer action pending the decision in *Murr* so that the decisions could be consistent.[58] Whether acting deliberately or not, holding *Lost Tree* is what the Court did. There are additional threads to harry here.

Lost Tree was another "parcel as a whole" case. It certainly received its share of judicial attention, having made two trips to the court of appeals. It was another case in which the U.S. Army Corps of Engineers denied a wetlands-fill permit. The property owner had developed homes on approximately 1,300 acres and then sought a permit to fill a 4.99-acre wetlands tract. The permit was denied. The trial court initially entered judgment on the takings claim in favor of the government. On appeal, that was reversed.[59] The next time around, the property owner won. The trial court held that the denial

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

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

57. Lost Tree Vill. Corp. v. United States, 787 F.3d 1111 (Fed. Cir. 2015), *cert. denied*, 137 S. Ct. 2325 (2017).

58. *See* Petition for a Writ of Certiorari at 29, United States v. Lost Tree Vill. Corp., 137 S. Ct. 2325 (2017) (No. 15-1192), 2016 WL 1166134, at *29.

59. Lost Tree Vill. Corp. v. United States, 707 F.3d 1286 (Fed. Cir. 2013).

of the permit deprived the owner of 99.4% of the property's value[60] rendering the government action a total and categorical taking.

Seeking certiorari, the government argued that the wetlands parcel could not be evaluated separately from what it called "the contiguous uplands under common ownership."[61] Right after *Murr*, however, where the Court held that such contiguity was an important factor, certiorari was denied without comment, or dissent. This provides more food for thought.

II. WHETHER GOVERNMENT ACTS LEGISLATIVELY OR ADMINISTRATIVELY, IT MUST COMPENSATE WHEN ITS ACTIONS ADVERSELY IMPACT PRIVATE PROPERTY

The Constitution is concerned with governmental action. Its Bill of Rights is designed specifically to protect individuals against government actions.[62] As Justice Stewart put it in a classic concurring opinion, "the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it *does*."[63]

The most serious place where this issue currently arises is in the field of exactions. Specifically, it arises in analyzing whether a taking occurs only when an exaction is imposed during an administrative process (i.e., on a case-by-case basis, depending on the individual facts) or whether a taking also occurs when an exaction is imposed legislatively (i.e., across the board, regardless of individual facts). The issue is of particular importance in California where municipalities are seeking to increase their stock of housing for low- and moderate-income residents.[64] The favored governmental method of ensuring

60. There have been disagreements about how much use or value can be eliminated before courts will acknowledge that a taking has occurred, but 99.4% should be "too far" in anyone's view. Compare this with Florida Rock Indus., Inc. v. United States, 45 Fed.Cl. 21 (1999) (determining that there was a 73.1% value loss; taking found).

61. Petition for Writ of Certiorari at i., United States v. Lost Tree Vill. Corp., 137 S. Ct. 2325 (2017) (No. 15-11192), 2016 WL 1166134.

62. Some examples include the protections around the government actions of quartering soldiers (U.S. CONST. amend. III), establishing religion (U.S. CONST. amend. I), interfering with the possession of property (U.S. CONST. amend. V), and deprivations of life or liberty (U.S. CONST. amend. V).

63. Hughes v. Washington, 389 U.S. 290, 298 (1967) (concurring opinion) (emphasis in the original).

64. More than four decades ago, the California legislature formally declared "a serious shortage" of housing for those of low and moderate means. CAL. HEALTH & SAFETY CODE

such housing construction is to compel the developers of market-rate housing to include a specified amount of "affordable" housing as part of their developments. In its most recent iteration, the California Supreme Court approved a requirement that obligated residential developers to sell at least fifteen percent of their units at a price that is "affordable" to low- or moderate-income occupants—and to keep those units affordable for forty-five years.[65] Developers who don't want the low-income units in their developments were given the option of either paying ransom[66] (in the form of fees "in lieu" of contributing those units to the local low-income housing stock) or building the units on a different site.[67]

Forgetting the lesson the U.S. Supreme Court tried to teach in *Nollan* about not evading the Fifth Amendment by a "clever" "play on words,"[68] the California Supreme Court concluded that it need pay no attention to *Nollan*, *Dolan*, or the most recent application in *Koontz*[69] through the simple, definitional expedient of saying that the affordable housing condition was not an "exaction" but merely

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

65. Cal. Bldg. Indus. Ass'n v. City of San Jose, 61 Cal. 4th 435, 441 (2015).

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

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

68. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 838, 841 (1987).

69. Koontz v. St. John's River Water Mgmt. Dist., 133 S. Ct. 2586 (2013).

a "regulation" of land use.[70] So saying, the California court found no need to analyze this legislatively imposed exaction by U.S. Supreme Court standards.[71] Although the California Supreme Court's opinion was a little blurred about the administrative/legislative distinction, a recent court of appeal decision applied that distinction clearly.[72]

That the California courts have approved such actions should not be surprising.[73] The U.S. Supreme Court has repeatedly had to explain to the California judiciary that the Constitution will not permit some of California's actions regarding private property.[74] The surprising thing is the state courts' analyses in these cases. In a nutshell, a central reason for the courts saying they approve of these government regulations is that the Constitution protects only against administrative actions not legislative ones. Is that—more importantly, can that be—true? We need to deconstruct the analyses and see if there is any there there.

Let's begin with a fundamental misconception: that the U.S. Supreme Court's exactions cases involved *administrative* impositions of conditions based on the *individual facts* of each case. Even Justice Thomas, who wants the Court to decide this issue, fell into this trap.[75] But that premise is wrong—demonstrably so. In fact, each of the

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70. Cal. Bldg. Indus. Ass'n v. City of San Jose, 61 Cal. 4th 435, 443–44 (2015) (stating that the regulations "do not impose exactions . . . but rather place a limit on the way a developer may use its property"). *See also id.* at 457–58 (finding the regulations "do[ ] not effect an exaction").

71. Candidly, I get a little dizzy when they do things like this. In *Nollan*, the U.S. Supreme Court had told the California Supreme Court not to play the "word game" of calling an exaction something more bland (in that case, a "dedication") in order to define its way out of a problem. Yet here is the same lower court playing the same game to evade the same constitutional guarantee, and then certiorari was denied. Cal. Bldg. Indus. Ass'n v. City of San Jose, 136 S. Ct. 928 (2016). Go figure. For further discussion of definitional word games, see generally Michael M. Berger, *To Regulate or Not to Regulate—Is That the Question? Reflections on the Supposed Dilemma Between Environmental Protection and Private Property Rights*, 8 LOY. L.A. L. REV. 253 (1975) [hereinafter Berger, *To Regulate or Not*].

72. 616 Croft Ave., L.L.C. v. City of West Hollywood, 3 Cal. App. 5th 621 (2016), *cert. denied*, 136 S. Ct. 377 (2017).

73. See Gideon Kanner, *Tennis Anyone? How California Judges Made Land Ransom and Art Censorship Legal*, 25 REAL ESTATE J. 214 (Winter 1997).

74. *E.g.*, First English Evangelical Lutheran Church v. Cty. of Los Angeles, 482 U.S. 304, 330 (1987) (noting that California cases were decided "inconsistently" with Fifth Amendment law); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987) (stating that "extortion" is not constitutionally permissible); City of Monterey v. Del Monte Dunes, 526 U.S. 687, 707 (finding the City's position is "contrary to settled regulatory takings principles").

75. Cal. Bldg. Indus. Ass'n v. City of San Jose, 136 S. Ct. 928 (2016) (Thomas, J., concurring in denial of certiorari) ("Our precedents in *Nollan* [and] *Dolan* . . . would have governed San Jose's actions had it imposed those conditions through administrative action.").

Supreme Court's exaction cases involved a hardline legislative decision that was applied by rote, albeit the decision was handed down in an administrative proceeding. In *Nollan*, the California Coastal Commission adopted "a comprehensive program to provide continuous public access" to the beach.[76] That program applied to all coastal property from Oregon to Mexico, and a condition of dedication was attached to all permits, regardless of individual circumstances. Although the condition was imposed in the context of an administrative proceeding where a permit was being sought, the fact is the decision to require the "dedication" in exchange for a permit was legislatively made as a common requirement along the entire coast.

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

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

76. *Nollan*, 483 U.S. at 841.

77. *See also* Town of Flower Mound v. Stafford Estates Ltd. P'ship, 135 S.W.3d 620, 641 (Tex. 2004); J. David Breemer, *What Property Rights: The California Coastal Commission's History of Abusing Land Rights and Some Thoughts on the Underlying Causes*, 22 U.C.L.A. J. ENVTL. L. & POL'Y 247, 265 (2004); Douglas W. Kmiec, *Inserting the Last Remaining Pieces into the Takings Puzzle*, 38 WM. & MARY L. REV. 995, 1040–41 (1997).

78. *E.g.*, Cal. Bldg. Indus. Ass'n, 61 Cal. 4th 457, 459 n.11 (reviewing the validity of "ad hoc administrative decisions").

79. *Id.* at 471 (quoting this distinction with approval).

shouldn't matter. As the U.S. Supreme Court has said, "[t]he Takings Clause . . . is concerned simply with the act."[80] And, here, the types of acts being examined are those that force the extraction of valuable property as quid pro quo for a development permit.

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

80. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 560 U.S. 702, 713–14 (2010) (plurality opinion).

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

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

83. *E.g.*, Molly Cohen et al., *Revolutionary or Routine?* Koontz v. St. Johns River Water Management District, 38 HARV. ENVTL. L. REV. 245, 257 (2014) (discussing impact fees and the possibility of *Koontz* "erasing the longstanding legislative/ad hoc distinction recognized in many states"); John D. Echeverria, Koontz*: The Very Worst Takings Decision Ever?* 22 N.Y.U. ENVTL. L.J. 1, 51 (2014) (stating that the decision suggests heightened scrutiny in the review of "legislative and executive branch action").

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

85. *See* Home Builders Ass'n of Dayton & Miami Valley v. City of Beavercreek, 729 N.E.2d 349, 355–56 (Ohio 2000); Town of Flower Mound v. Stafford Estates Ltd. P'ship, 135 S.W.3d 620, 641 (Tex. 2004).

being written, the Court denied certiorari in the *Croft* case from California, missing that opportunity to bring clarity to the field, but a new petition has been filed in the *Dabbs* case from Maryland, keeping the issue alive.[86] One of these days, certiorari will be granted. Unless anarchy is going to be allowed to continue to reign, it will have to be granted.

III. THE RIGHT TO EXCLUDE IS A FUNDAMENTAL RIGHT

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

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

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

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

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86. *Croft*, 3 Cal. App. 5th, *cert. denied*, 138 S. Ct. 377 (Oct. 30, 2017) (No. 16-1137). *See* Dabbs v. Anne Arundel Cty., No. 18-54 (seeking review of *Dabbs v. Anne Arundel County*, 182 A. 3d 798 (Md. 2018), in which Maryland's highest court held that impact fees imposed on broad basis by legislation are not subject to *Nollan* and *Dolan* scrutiny).

87. Indeed, it is hard to pick up a property decision by the Supreme Court and not find some reference to the bundle of sticks as an explanation for the holding. *E.g.*, Murr v. Wisconsin, 137 S. Ct. 1933, 1952 (2017) (Roberts, C.J., dissenting); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 831 (1987); Hodel v. Irving, 481 U.S. 704, 716 (1987); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1011 (1984); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433 (1982); United States v. Security Indus. Bank, 459 U.S. 70, 76 (1982); Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979).

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

89. *Loretto*, 458 U.S. at 435. Professor Callies calls the right to exclude "a fundamental part of the equally fundamental Constitutional Right to the enjoyment of private property." David Callies & J. David Breemer, *The Right to Exclude Others from Private Property: A Fundamental Constitutional Right*, 3 WASH. U. J.L. & POL'Y 39, 58 (2000).

> *devaluation* of petitioners' private property; rather, the imposition of the navigable servitude in this context will result in *an actual physical invasion* of the privately owned marina.[90]

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

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

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

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90. *Kaiser Aetna*, 444 U.S. at 180 (emphasis added).

91. Ralphs Grocery Co. v. United Food & Commercial Workers Union, 290 P.3d 1116 (Cal. 2012).

92. CAL. LAB. CODE § 1138.1; CAL. CODE CIV. PROC. § 527.3.

93. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 9-5, at 602 (2d ed. 1988).

94. *E.g.*, United States v. Causby, 328 U.S. 256, 261 (1946) (regarding military aircraft); Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166, 181 (1871) (regarding artillery shells).

95. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987).

96. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

97. Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979).

The point is simply this: neither by itself, nor through authorizing others, may a public agency hinder the right of private property owners to exclude third parties from their land—not without compensation.

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

> [T]he 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation.[98]

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

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

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98. *Id.* at 180.

99. First English Evangelical Lutheran Church v. Cty. of Los Angeles, 482 U.S. 304, 315 (1987) (emphasis added).

The question raised by government regulators in the labor/management context is whether the standard takings theory might have been displaced by the Court's holding in *PruneYard Shopping Center v. Robins*.[100] The California Supreme Court interpreted *PruneYard* as elevating the First Amendment rights of unions and employees over the Fifth Amendment rights of property owners and employers. I recognize that the *PruneYard* case involved students soliciting signatures to oppose an anti-Zionist measure in the United Nations, but the underlying constitutional precepts are the same and should have provided Ralphs's substantial protection. But California misreads the federal precedents.[101]

California began its analysis with an erroneous premise and followed that line to an erroneous conclusion. The focal point of the analysis was the U.S. Supreme Court's decision in *Lloyd*.[102] *Pruneyard*'s erroneous premise was that *Lloyd* was "primarily a First Amendment case."[103] But here is how the U.S. Supreme Court characterized the question it addressed in *Lloyd*:

> We granted certiorari to consider petitioner's contention that the decision below violates rights of private property protected by the Fifth and Fourteenth Amendments.[104]

Lloyd thus addressed—and answered—a Fifth Amendment question, deciding that the Fifth Amendment rights of the property owner, even in the context of a large (fifty-acre) shopping center, prevailed over the First Amendment rights of Vietnam War protesters to distribute handbills. Two points were paramount in that determination. *First*, the First Amendment guards against restrictions by the *government*, not private property owners.[105] *Second*, even

100. PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980).

101. California is not alone. New Jersey, for example, has held all private property subject to an inchoate servitude to free speech: "We do not interfere lightly with private property rights, but when they are exercised, as in this case, in a way that drastically curtails the right of freedom of speech in order to avoid a relatively minimal interference with private property, the latter must yield to the former." N.J. Coalition Against War v. J.M.B. Realty Corp., 650 A.2d 757, 780 (1994).

102. Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).

103. Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899, 904 (1979). Note that the two courts spell the shopping center's name differently. In other words, California makes it one word (Pruneyard) while the U.S. Supreme Court makes a mashup of two words (PruneYard). The latter seems to be the actual name of the center.

104. *Lloyd*, 407 U.S. at 552–53.

105. Even public property is not universally available for "free speech" activities, as the

the creation of a large shopping center, which the public is generally invited to use, does not automatically result in "dedication of private property to public use."[106] In a companion case, argued and decided on the same days as *Lloyd*, the Supreme Court elaborated:

> Before an owner of private property can be subjected to the commands of the First and Fourteenth Amendments the privately owned property must assume to some significant degree the functional attributes of public property devoted to public use. The First and Fourteenth Amendments are limitations on state action, not on action by the owner of private property used only for private purposes.[107]

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

California's failure to deal with the question of whether the First Amendment or the slightly expanded California equivalent is restricted to state action has been regularly criticized by both courts in sister jurisdictions and by legal commentators.[108] When the California Supreme Court addressed the question again in *Golden Gateway Center v. Golden Gateway Tenants Ass'n* (in the context of an apartment complex rather than a shopping center), only a plurality of the court concluded that state action—rather than private action—was a necessary element of the California Constitution, like its federal counterpart. The court determined the only exception to this was when private property had become "functionally equivalent to a traditional public forum."[109] The *Golden Gateway* plurality reached that conclusion in an effort to retain California's *Pruneyard* as

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Court noted in *Lloyd*, 407 U.S. at 568. More recently, that Court confirmed that different levels of speech restrictions may apply at different kinds of public facilities. Christian Legal Society Chapter of the Univ. of Calif. v. Martinez, 130 S. Ct. 2971, 2984 (2010).

106. *Lloyd*, 407 U.S. at 569.

107. Central Hardware Co. v. Nat'l Labor Review Bd., 407 U.S. 539, 547 (1972).

108. See comments collected by the plurality opinion in Golden Gateway Center v. Golden Gateway Tenants Ass'n , 26 Cal.4th 1013, 1020 n.4 (2001), and by the dissenting opinion in Fashion Valley Mall v. National. Labor Relations Bd., 42 Cal.4th 850, 874.

109. *Golden Gateway*, 26 Cal.4th at 1033 (2008).

precedent[110] but still keep it closely tied to the federal Constitution's restriction of free speech protections in public forums.

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

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

110. A member of that plurality later explained that retention was based "reluctantly" on stare decisis. *Fashion Valley*, 42 Cal.4th at 875 (dissenting opinion).

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

112. See discussion of the so-called "Arab Spring" in Berger, *Property, supra* note 10, at 61.

113. *See Dead Mall*, WIKIPEDIA, https://en.wikipedia.org/wiki/Dead_mall (last visited Mar. 15, 2018).

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

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

> We assume, of course, that the statute was passed upon the conviction that an exigency existed that would warrant it, and we assume that an exigency exists that would warrant the exercise of the power of eminent domain. But the question at bottom is upon whom the loss of the changes desired should fall.[114]

More recent authority echoes that conclusion: "[T]he Takings Clause *presupposes* that the government has acted pursuant to a valid public purpose."[115] Once it is determined that the government action

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114. Pa. Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).

115. Lingle v. Chevron USA, Inc., 544 U.S. 528, 543 (2005) (emphasis added). *See also* Fla. Rock Indus., Inc. v. United States, 18 F.3d 1560, 1571 (Fed. Cir. 1994) "It is necessary that the Government act in a good cause, but it is not sufficient. The takings clause already assumes the Government is acting in the public interest . . . ." *Id.* at 1571. More than that, the Takings Clause assumes that the government is acting pursuant to lawful authority. If not, the action is ultra vires and void. *Compare* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (finding an unlawful wartime seizure void), *with* United States v. Peewee Coal Co., 341 U.S. 114 (1951) (finding that compensation is mandatory after lawful wartime seizure.)

was done to achieve a legitimate goal, then the means chosen to achieve the goal must be examined against the constitutional matrix to ensure that private property rights have not been violated.

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

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

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

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

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116. *Mahon*, 260 U.S. at 417. Note that this was one of the few times that Justice Brandeis (the lone dissenter) disagreed with Justice Holmes.

117. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

118. *Id.* at 425 (Marshall, J.) (emphasis added).

119. Kaiser Aetna v. United States, 444 U.S. 164 (1979).

120. *Id.* at 174 (Rehnquist, J.) (emphasis added).

That is why the Court concluded in *First English* that the Fifth Amendment was designed "to secure *compensation* in the event of *otherwise proper interference* amounting to a taking."[121]

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

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

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121. First English Evangelical Lutheran Church v. Cty. of Los Angeles, 482 U.S. 304, 315 (1987) (Rehnquist, C.J.) (first emphasis, the Court's; second emphasis added).

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

123. Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) (Blackmun, J.).

124. Dames & Moore v. Regan, 453 U.S. 654 (1981) (Rehnquist, J.).

125. Reg'l Rail Reorganization Act Cases, 419 U.S. 102 (1974) (Brennan, J.).

126. To this end, the Fifth Amendment's just compensation guarantee has been held self-executing. The availability of compensation validates and constitutionalizes the otherwise wrongful government action. City of Monterey v. Del Monte Dunes, 526 U.S. 687, 714–15 (1999) (Kennedy, J.); United States v. Clarke, 445 U.S. 253, 257 (1980).

127. The only potentially contrary Supreme Court voice came somewhat earlier than this group of decisions in the relatively cosmic language of *Berman v. Parker*, 348 U.S. 26, 33 (1954), where the Court broadly pronounced: "Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine." To the extent that this was the law in 1954, it seems to have been seriously reined in since then.

Grocery. As a matter of federal constitutional policy, such a severe invasion of protected property rights cannot occur unless compensation is paid.

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

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

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

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

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

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

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128. Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899, 911 (1979) (dissenting opinion) (emphasis original) (citation omitted).

129. Lloyd Corp. v. Tanner, 407 U.S. 551, 569 (1972).

130. *Id.* at 570. *See also* Dolan v. City of Tigard, 512 U.S. 374, 392 (1994) (property rights are not "poor relation" to other constitutionally protected rights).

131. *Central Hardware Co.*, 407 U.S. at 547.

in recognizing the inherent constitutional problem of compelling store owners to provide space for union picketers:

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

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

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

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

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

132. Hudgens v. Nat'l Labor Relations Bd. 424 U.S. 507, 517 (1976).

133. Ralphs Grocery Co. v. United Food & Commercial Workers Union, 133 S. Ct. 2799 (2013) (No. 12-1162).

134. For an example, see the various opinions in Eastern Enterprises v. Apfel, 524 U.S. 498 (1998). The plurality struck down the statute as a taking. But that only provided the property owner with four votes. Justice Kennedy concurred in the judgment, concluding that the statute deprived the owner of property without due process. The same conclusion is reached but with different reasoning. The dissent also opted for a due process analysis, but did so because the lower standard of proof applicable to the government in due process cases would have allowed the government to prevail.

135. *See supra* notes 2–3.

complexity of the system."[136] The precise focus of this discussion is "finality," that is, what must a property owner do so that a case is sufficiently "final" for a court to litigate?[137]

For illustrative purposes, I am going to use two cases that I keep in a file marked "Great Cases I Have Lost" (and believe me, I have lost some wonderful cases). The cases are *Charles A. Pratt Construction Co. v. California Coastal Comm'n*[138] and *Galland v. City of Clovis*.[139] *Pratt* involved the potential development of the last portion of an undeveloped stretch of land in San Luis Obispo County, California.[140] The owner planned 149 homes for an 81-acre parcel, and the County approved the concept. After completion of a neighboring tract, the owner pared down its plan to forty-one homes and, at the same time, added forty-three more acres to the tract (to be left undeveloped). The owner spent nearly a decade in planning and studying, including examining ten alternative uses in its environmental impact report ("EIR"). Leaving eighty percent of the land undeveloped exceeded the County's official-plan requirement of sixty percent.[141]

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

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

136. AM. SOC'Y OF PLANNING OFFICIALS, WINDFALLS FOR WIPEOUTS: LAND VALUE RECAPTURE AND COMPENSATION 12 (Donald G. Hagman & Dean J. Misczynski eds., 1978).

137. *See* Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 186 (1985); Palazzolo v. Rhode Island, 533 U.S. 606, 618 (2001).

138. Charles A. Pratt Construction Co. v. Cal. Coastal Comm'n, 162 Cal. App. 4th 1068 (2008), *cert. denied*, 555 U.S. 1171 (2009).

139. Galland v. Clovis, 24 Cal. 4th 1003, 103 Cal. Rptr .2d 711, *cert. denied*, 534 U.S. 826 (2001).

140. Have you noticed how many takings cases involve the "last piece of undeveloped property" in the jurisdiction? *See, e.g.*, City of Monterey v. Del Monte Dunes, 526 U.S. 687 (1999).

141. Note the high-handedness of the county's plan, demanding that sixty percent of the land remain vacant as the price for developing the other forty percent. Interestingly, the property owner was willing to donate even more for the chance to make any semblance of realistic development.

would be allowed to make use of his or her land. Premature adjudication serves no one. However, some lower courts have used the Court's pragmatic desire for "finality" to launch a quest for some sort of Holy Grail, thus putting off "finality" indefinitely rather than viewing the facts—ad hoc—to determine whether enough process has been completed. Just as the Court disagreed with the contrary conclusions about finality made by the Rhode Island courts in *Palazzolo*,[142] some uniform treatment of this concern seems required.

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

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

When the County's permit issuance was appealed to the Coastal Commission, the commission had before it the entire record of the County's proceedings, including the EIR. The commission not only rejected the permit the County had approved, it rejected the other alternatives as well. It did this by concluding that there was "no way" it could suggest to modify the project (e.g., by using or slightly altering one of the alternatives) because the "revisions that would be necessary . . . are so extensive . . . denial . . . is the only appropriate course."[143]

Notwithstanding the Coastal Commission's suggestion that some alternative must be available that could be approved, the facts belie that suggestion. The reasons given by the commission for denial would not change. The water available on site would not increase.[144]

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

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

144. The water-service company for San Luis Obispo County had assured Pratt and the County that it could provide adequate water for the project. The Coastal Commission simply did not like the idea of bringing water from off-site (although the County had approved), and the courts gave short shrift to the water company's promise.

The extent of the environmentally sensitive habitat area would not decrease.[145] The utility of the property as a scenic background for the already developed part of the community would not change. As the Court held in *Palazzolo*, once it has been made clear that the reasons for denial will not change, there is no need to waste time making additional applications merely for the sake of making applications: "Ripeness doctrine does not require a landowner to submit applications for their own sake."[146]

In this context, rigid application of a multiple-application rule makes no more sense than it did in *Palazzolo*. The Coastal Commission's views on the private development of this property are clear. The rejection of all ten alternatives analyzed in the EIR removes any doubt. Under the ripeness framework of *Williamson County,* the idea is to allow sufficient consideration of alternatives to be able to conclude that adequate finality has been reached, which in turn would allow a court to conduct a Fifth Amendment analysis. It should make no difference whether the various alternatives were considered seriatim, as part of technically separate permit applications, or as part of one comprehensive analysis of the property as is the case here. The point should be to find the answer not to engage in process for its own sake.[147]

Second, the Coastal Commission has only administrative-appellate jurisdiction over this property, not plenary land use control. The latter power is held by San Luis Obispo County. The only time the Coastal Commission has even the possibility of reviewing the use of a property is if the County grants a development permit and a project opponent appeals, as happened in *Pratt*.[148] In no event does

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

146. *Palazzolo*, 533 U.S. at 622. The Court of Federal Claims has applied this rule for years against the federal government. *E.g.*, Formanek v. United States, 18 Cl. Ct. 785, 792 (1989); Beure-Co. v. United States, 16 Cl. Ct. 42, 49 (1988); Loveladies Harbor, Inc. v. United States, 15 Cl. Ct. 381, 386 (1988).

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

148. CAL. PUB. RES. CODE § 30603(a).

Pratt have the ability to present an application directly to the Coastal Commission.[149]

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

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

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

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

149. *Id.* § 30603.

150. City of Monterey v. Del Monte Dunes, 526 U.S. 687 (1999).

151. The Coastal Commission's most famous case, of course, was *Nollan*, 483 U.S. 825 (1987). It lost on Fifth Amendment grounds but no compensation was sought in that case.

152. Justice Brennan described a famous incident in which a prominent government lawyer waxed exuberantly over the "gaming" aspects of the ripeness system and over the ability to keep property owners running like hamsters on a wheel. San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 655 n.22 (1981) (dissenting opinion). Since Justice Brennan brought the "games" to light, government lawyers' public acknowledgment of their gamesmanship has gone to ground. But the "games" remain afoot.

153. Palazzolo v. Rhode Island, 533 U.S. 606, 620 (2001).

enjoy as "an open space backdrop" for their own homes. It also sought to "preserve" habitat for species never seen on the property.[154]

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

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

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

> [F]laws in Clovis's rent adjustment mechanism are the very basis of the due process claim. In this circumstance, it defies logic to impose the remedy of further rent adjustment proceedings. *Further*

154. *See City of Monterey*, 526 U.S. at 695 (noting that the City sought to create a habitat for a butterfly not found on the property).

155. Galland v. City of Clovis, 24 Cal. 4th 1003 (2001).

156. *Id.* at 1037.

157. *Id.* at 1036.

> *administrative proceedings cannot possibly compensate for an injury caused by excessive administrative proceedings.*[158]

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

V. WHAT'S UP WITH RIPENESS?

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

158. *Id.* at 1048 (dissenting opinion) (emphasis added).

159. Please recall that, even at that time, it had been settled that "[i]t is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." Monroe v. Pape, 365 U.S. 167, 183 (1961). *See also* Felder v. Casey, 487 U.S. 131, 148 (Civil Rights Act remedies "are judicially enforceable in the first instance.").

160. If the city council remands to the rent-control commission, it would revert the process back to step one, to begin again and adding more administrative steps.

161. This could, of course, lead to two additional litigation steps, in the court of appeal and the state supreme court—a process that could consume years.

162. In *Kavanau v. Santa Monica Rent Control Board*, 16 Cal. 4th 761 (1997), the California Supreme Court created a process for a landlord to seek an upward rent adjustment if the impact of the regulation was too great.

163. *See supra* note 160.

164. *See supra* note 161.

165. This, of course, would provide proof for Bosselman's theory about the Byzantine process being the antithesis of due process. *See supra* note 136 and accompanying text.

one. Actually, I don't think I am constitutionally capable of not doing so.[166] The core ripeness issue is one that has caused confusion and injustice since the Supreme Court's decision in *Williamson County Regional Planning Commission v. Hamilton Bank*.[167] The issue is whether property owners who claimed that government action took their property without just compensation in violation of the Fifth Amendment have the right—like other constitutional claimants—to have their cases decided on the merits in federal courts.[168] The decisions by lower state and federal courts have been confusing and unjust. The only consistency about them is that they have deprived property owners of access to the federal courts, while saying that they are applying a rule that will "ripen" the cases for federal court litigation.

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

166. For more detailed discussion, see my earlier ripeness writings: MICHAEL M. BERGER, WASH. LEGAL FOUND., REGULATORY TAKINGS UNDER THE FIFTH AMENDMENT: A CONSTITUTIONAL PRIMER, 13–19 (1994); Michael M. Berger, *Anarchy Reigns Supreme*, 29 WASH. U. J. URB. & CONTEMP. L. 39 (1985); 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, *Happy Birthday, Constitution: The Supreme Court Establishes New Ground Rules for Land-Use Planning*, 20 URB. LAW. 735, 786–95 (1988); 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 & 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, *Property Rights and Takings Law: Y2K and Beyond*, 2002 INST. ON PLAN., ZONING, & EMINENT DOMAIN 4–1; Michael M. Berger, *The Ripeness Game: Why Are We Still Forced to Play?* 30 TOURO L. REV. 297 (2014); 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 7–1; 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 & 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) [hereinafter Berger & Kanner, *Shell Game!*]; Michael M. Berger, *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*, 3 WASH. U. J.L. & POL'Y 99 (2000); Michael M. Berger, *What Has* San Remo *Done to the Ripeness Doctrine?*, 2006 INST. ON PLAN., ZONING, & EMINENT DOMAIN 4–1.

167. Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985).

168. *See, e.g.*, Bell v. Hood, 327 U.S. 678, 681 (1946) (stating that the complaint, which seeks compensation for violations of Fourth and Fifth Amendment rights, belongs in the federal court if the plaintiff so chooses).

courts have expressed frustration at their inability to adjudicate federal takings claims, with descriptions running the gamut from "odd" and "unfortunate,"[169] to "draconian,"[170] to one concluding that the situation presents "a Catch-22 for takings plaintiffs,"[171] to another describing the plaintiff as having "already passed through procedural purgatory and wended [his or her] way to procedural hell."[172] Why will the Supreme Court not end this national agony? Why, indeed.

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

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

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

169. Fields v. Sarasota-Manatee Airport Auth., 953 F.2d 1299, 1306, 1307 (11th Cir. 1992).

170. Dodd v. Hood River County, 59 F.3d 852, 861 (9th Cir. 1995).

171. Santini v. Conn. Hazardous Waste Mgmt. Serv., 342 F.3d 118, 130 (2d Cir. 2003).

172. Front Royal & Warren Cty. Indus. Park Corp. v. Town of Front Royal, 135 F.3d 275, 283–84 (4th Cir. 1998). A collection of the harshly critical analyses directed at *Williamson County*, 472 U.S., by commentators from all parts of the jurisprudential spectrum—even those who agree that the litigation belongs in state court—appears in Berger & Kanner, *Shell Game!*, *supra* note 166, at 702–03.

173. Kottschade v. City of Rochester, 319 F.3d 1038, 1041 (8th Cir. 2002).

174. *See* First English Evangelical Lutheran Church v. Cty. of Los Angeles, 482 U.S. 304, 320 n.10 (1987) (stating "an illegitimate taking might not occur until the government refuses to pay").

175. City of Chicago v. Int'l Coll. of Surgeons, 522 U.S. 156 (1997).

authorized a municipal defendant who was sued for a taking in state court to remove the case to federal court, even though removal would be proper only if the plaintiff could have brought suit in federal court in the first place[176]—something *Williamson County* forbids. Second, in *San Remo Hotel v. City & County of San Francisco*,[177] the Court held that, once a case is brought and tried in state court—as commanded by *Williamson County*—issue preclusion would prevent prosecuting such a case in federal court. Four concurring Justices urged reconsideration of *Williamson County*.[178] Third, in *Horne v. United States Department of Agriculture*,[179] the Court concluded that, once there has been a taking without payment, a proper constitutional claim has been presented, without the need for further "ripening." In these three post–*Williamson County* opinions, the Court has eliminated any jurisprudential basis for continuing to hew to that plainly outmoded precedent.

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

176. 28 U.S.C. § 1441(a).

177. San Remo Hotel v. City & Cty. of S.F., 545 U.S. 323 (2005).

178. *Id.* at 348 (Rehnquist, C.J., concurring and joined by three others).

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

180. Dolan v. City of Tigard, 512 U.S. 374, 392 (1994).

181. Felder v. Casey, 487 U.S. 131, 144 (1988) (quoting Wilson v. Garcia, 471 U.S. 261, 269 (1985)).

discernible from the Constitution."[182] The Just Compensation Clause is self-executing.[183]

There is an additional reason not to require state court litigation to ripen the federal-constitutional issue. *Williamson County* was brought under the Federal Civil Rights Act,[184] as many regulatory takings cases are. Such cases are probably the worst scenarios in which to inject a state court–litigation requirement. As the Court has held, the point of the civil rights legislation was to "interpose the federal courts between the States and the people, as guardians of the people's federal rights."[185] It was not intended to work the other way round—by interposing state courts between the federal courts and the people in order to restrict the people's federal rights. *Williamson County*'s state court–litigation mandate inverted this basic building block of 42 U.S.C. § 1983: it interposed state courts to shield municipalities from federal accountability. It is time for the Court to end this practice.

That property owners have been singled out is clear.[186] As one commentator concluded, "[t]he state compensation portion of [*Williamson County*] finds no parallel in the ripeness cases from other areas of the law"[187]—no parallel, indeed. The settled rule in other areas of substantive litigation under section 1983 is that the federal

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182. STEVEN J. EAGLE, REGULATORY TAKINGS 1070 (2d ed. 2001). For a graphic illustration of the Fifth Amendment/First Amendment differentiation, see *National Advertising v. City of Raleigh*, 947 F.2d 1158 (4th Cir. 1991). This case challenged an amortization ordinance aimed at ridding the city of billboards over a five-year period. The complaint charged violations of both the Fifth and First Amendments. The property owner lost on all counts, but the important thing for this discussion is that it took the court many pages of tortured analysis before it concluded that the Fifth Amendment claim was barred by the statute of limitations while the court wasted almost no time concluding that the First Amendment claim could not be so barred.

183. First English Evangelical Lutheran Church v. Cty. of Los Angeles, 482 U.S. 304, 315 (1987).

184. 42 U.S.C. § 1983.

185. Mitchum v. Foster, 407 U.S. 225, 243 (1972).

186. *See, e.g.*, DANIEL R. MANDELKER, LAND USE LAW § 2.24, at 2–32 (5th ed. 2003) ("The Supreme Court has adopted a special set of ripeness rules to determine whether federal courts can hear land use cases."); John Delaney & Duane Desiderio, *Who Will Clean Up The "Ripeness Mess"? A Call For Reform so Takings Plaintiffs Can Enter the Federal Courthouse*, 31 URB. LAW. 195, 196 (1999) ("[T]he ripeness and abstention doctrines have uniquely denied property owners, unlike the bearers of other constitutional rights, access to the federal courts on their federal claims.").

187. Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 VAND. L. REV. 1, 23 (1995).

forum is available at the plaintiff's demand, regardless of alternative remedies under state law:

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

Precedents are not cast away lightly. The Court, however, has done so when scholars have been sharply critical of decisions,[189] when the application of a precedent has produced a rule that "stands only as a trap for the unwary,"[190] when necessary to clarify the implications of earlier decisions,[191] when decisions of the Court are "if not directly . . . [conflicting,] are so in principle,"[192] or when "the answer suggested by [the Court's] prior opinions is not free of ambiguity."[193] It is time for *Williamson County* to go. It may be that the Supreme Court agrees. As this Article goes to press, the Court has granted certiorari in *Knick v. Township of Scott*[194] for the sole (stated) reason of reconsidering this aspect of *Williamson County*.

VI. DOES "PROGRESSIVE" PROPERTY THEORY COMPORT WITH THE CONSTITUTION?

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

188. Monroe v. Pape, 365 U.S. 167, 183 (1961).

189. Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 48 (1977).

190. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977).

191. Sec. & Exch. Comm'n v. United Benefit Life Ins. Co., 387 U.S. 202, 207 (1967).

192. Funk v. United States, 290 U.S. 371, 374 (1933).

193. McDaniel v. Sanchez, 452 U.S. 130, 136 (1981).

194. Knick v. Township of Scott, 862 F.3d 310 (3d Cir. 2017), *cert. granted*, 138 S. Ct. 1262 (2018) (No.17-647).

195. In the context of property law, anything within the last half century qualifies as "recently."

196. For an earlier and more expansively critical discussion of this kind of analysis by definitional ipse dixit, see Berger, *To Regulate or Not*, *supra* note 71.

judicial explications of the meaning and content of "property," and to substitute something wholly different in its stead, then I have gone a long way toward remaking our system of property rights and perforce their protection. The idea that the affixing of labels is critical to governance is of ancient lineage:

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

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

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

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197. Gideon Kanner, *Confucius Say . . .*, GIDEON'S TRUMPET (June 20, 2016), http://gideonstrumpet.info/2016/06/confucius-say (citing CONFUCIUS, ANALECTS, bk. XIII, ch. 4:4–7).

198. Gregory S. Alexander, Eduardo M. Peñalver, Joseph William Singer & Laura S. Underkuffler, *A Statement of Progressive Property*, 94 CORNELL L. REV. 743 (2009).

199. *Incommensurable*, MERRIAM WEBSTER, https://www.merriam-webster.com/dictionary/incommensurable (last visited Mar. 15, 2018). *Argle-bargle*, ENGLISH OXFORD LIVING DICTIONARIES, https://en.oxforddictionaries.com/definition/argle-bargle (last visited July 24, 2018) (meaning copious but meaningless talk or writing; nonsense). For legal usage, see *United States v. Windsor*, 570 U.S. 744, 799 (2013) (Scalia, J., dissenting).

200. For a recent illustration of the stark differences, compare, for example, Joseph William Singer, *Justifying Regulatory Takings*, 41 OHIO N.U. L. REV. 601 (2015), with Berger, *Property, supra* note 10.

Rights was adopted to protect individuals against the government, the few against the many, individuals against the collective—not the other way round.[201] As Justice Douglas put it, "[t]he Constitution and the Bill of Rights were designed to get Government off the backs of the people."[202] This is neither a liberal nor a conservative proposition, and it applies as much to protecting criminal defendants as to protecting law-abiding property owners and others.[203]

It is not that progressives do not understand the concept of property ownership. They understand quite well. They just don't like it and want to change it because the traditional definition places the benefits of property ownership with the property owner.[204] In place of that, they would change the slope of the playing field in order to emphasize values like human dignity, social obligations, democratic governance, community relationships, and biodiversity.[205] All of this would be crammed into the concept of property ownership. Why? Because "lawmakers can define ownership in many ways, and fashioning rules or standards on the meaning of ownership therefore inevitably requires lawmakers to make value choices."[206] Here is how they justify making quick, definitional changes to this fundamental concept of our constitutional system: it is just a question of values, and we are always free to adopt new values. This is how they put it:

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201. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943). *See* JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT 4 (3d ed. 2008) (The Fifth Amendment is "designed to limit the scope of majority rule . . . .").

202. Letter from Justice Douglas to the Young Lawyers Section of the Washington State Bar Association (1976), *quoted in* NAT HENTOFF, LIVING THE BILL OF RIGHTS 2 (Harper Collins 1998).

203. *See, e.g.*, Florida v. Jardines, 133 S. Ct. 1409 (2013); United States v. James Daniel Good Real Prop., 510 U.S. 43 (1993).

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

205. *See* Eric T. Freyfogle, *Private Ownership and Human Flourishing: An Exploratory Overview*, 24 STELLENBOSCH L. REV. 430, 435–40 (2013).

206. Timothy M. Mulvaney, *Legislative Exactions and Progressive Property*, 40 HARV. ENVTL. L. REV. 137, 162 (2016).

> The current set of property rules resulted from value choices; therefore, continuing open conversations about the reasons for preferring one set of rules or standards over the alternatives are paramount.[207]

The problem with treating the entirety of "property" as some sort of fluid concept that can be altered at will is that time tends to vest rights, and those that have been recognized and protected for many years are not so easily uprooted as one might think. As Justice Cardozo remarked: "Deep into the soil go the roots of the words in which the rights of the owners of the soil find expression in the law. We do not readily uproot the growths of centuries."[208]

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

> By constitutional I do not mean to refer only to constitutional law, but to the fact that property institutions are fundamental to social life, moral norms, political power, and the rule of law.[209]

Those things may all be relevant subjects for a social or political science seminar, but it transforms (indeed, adulterates) the concept of a "constitutional" right. It blends the concept with social, moral, and political issues that inherently vary from time to time and from person to person, rather than allowing the concept to remain rooted in our founding document. While each definition of "property" has an important role in American society, the individual notions of creative professors should not be used to describe other people's "property."

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207. *Id.* at 162*; see* Eric T. Freyfogle, *The Owning and Takings of Sensitive Lands*, 43 U.C.L.A. L. REV. 77, 120 (1995) (Courts "must at all times keep one eye on the community and its evolving norms and expectations.").

208. Techt v. Hughes, 128 N.E. 185, 191 (N.Y. 1920); *see also* Reconstruction Fin. Corp. v. Beaver County, 328 U.S. 204, 210 (1920) (Black, J.) ("Concepts of real property are deeply rooted in state traditions, customs, habits, and laws."); City of Knoxville v. Knoxville Water Co., 212 U.S. 1, 18 (1909) ("[O]ur social system rests largely upon the sanctity of private property, and the State or community which seeks to invade it will soon discover the error in the disaster which follows."); Davis v. Mills, 194 U.S. 451, 457 (1904) (Holmes, J.) ("[P]roperty is protected because such protection answers a demand of human nature, and therefore takes the place of a fight.").

209. Joseph William Singer, *Property as the Law of Democracy*, 63 DUKE L.J. 1287, 1299 (2014).

Nor are such definitions part of legal "constitutional" analysis because the terms can become so malleable that they can mean virtually anything the speaker wants them to. When Keats wrote "beauty is truth, truth beauty,"[210] it was a lyrical use of language, but not very explanatory, as each term is too pliant to pin down.

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

> "When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."
>
> "The question is," said Alice, "whether you can make words mean so many different things."
>
> "The question is," said Humpty Dumpty, "which is to be master—that's all."[211]

How is continuously looking for ways to change the rules a "progressive" or even a proper or worthwhile thing to do? Particularly when rule changes are sought in ways that cause harm to those whose rights were stable under the old rules, one would think that theorists who profess to be concerned about "individuals" and "democratic" precepts would be wary.[212] A prime rule of American civilization is that we don't change the rules while the game is in progress.[213] There are good reasons for that, but they have their origins in the idea that people should be able to rest secure that what is theirs when they go to sleep will still be theirs when they wake up. As Professor Callies put

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210. John Keats, *Ode on a Grecian Urn*, 15 ANNALS OF FINE ARTS, Jan. 1820, *reprinted online under* John Keats, *Ode on a Grecian Urn,* POETRY FOUNDATION, https://www.poetryfoundation.org/poems/44477/ode-on-a-grecian-urn (last visited June 6, 2018).

211. LEWIS CARROLL, THROUGH THE LOOKING GLASS (Macmillan 1872).

212. *E.g.*, Gregory S. Alexander et al., *supra* note 198 at 743–44; Rashmi Dyal-Chand, *Pragmatism and Postcolonialism: Protecting Non-Owners in Property Law*, 63 AM. U. L. REV. 1683, 1742–45 (2014); Timothy M. Mulvaney, *Progressive Property Moving Forward*, 5 CALIF. L. REV. CIR. 349, 354 (2014); Joseph William Singer, *Property as the Law of Democracy*, 63 DUKE L.J. 1287, 1299 (2014); Joseph William Singer, *Subprime: Why a Free and Democratic Society Needs Law*, 47 HARV. C.R.-C.L. L. REV. 141, 142 (2012); Andre van der Walt, *The Modest Systemic Status of Property Rights*, 1 J.L. PROP. & SOC'Y 15, 92 (2014).

213. Do you really need a citation of authority for this?

it, "The point is simple: the Constitution, not ever-evolving policy considerations, should inform the Court's opinions."[214]

We are talking about rules that are so basic that most children are able to understand them. Distinguishing between the concepts "mine" and "not mine" is something that is supposed to occur in the preschool years. Sometimes some of us forget those early playground lessons. The concept is easy: if it is "mine," I get to play with it and you don't, unless I approve. Professor Kochan has compared the traditional definitions of rights and duties, devised by Professor Hohfeld, with the basic precepts of child psychology and has found much commonality:

> Sharing starts to seem more acceptable to a child when a child understands their reciprocal claims and obligations regarding owned things. In other words, we are more willing to share once we know three things: (1) we can get our things back; (2) we can set the terms and conditions of sharing; and (3) the sharee must accept the bitter with the sweet in sharing and abide by the owner's terms if the sharee wishes to have the benefit of using, possessing, or accessing the property of another. *We are more willing to share when there are strong property norms, backed by the confidence generated by strong property rights enforcement mechanisms*.[215]

If you insist on taking it from me, then you need to pay me.[216] When that concept gets tangled up with emotional issues like endangered species, climate change, or equal access to facilities, however, some people's vision tends to glaze over. They wrap themselves in global homilies and talk as though what is "mine" is actually not.[217] But that is a revolutionary thought.

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

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214. David Callies & Calvert G. Chipchase, *Moratoria and Musings on Regulatory Takings*, 25 U. HAW. L. REV. 279, 282 (2003).

215. Donald J. Kochan, *I Share, Therefore It's Mine*, 51 U. RICH. L. REV. 909, 924 (2017) (emphasis added) (footnote omitted).

216. Kaiser Aetna v. United States, 444 U.S. 164, 180 (1979).

217. Ironically, people who do so are often wealthy and tend to scream bloody murder were someone to interfere with their ample assets. *See* BERNARD FRIEDEN, THE ENVIRONMENTAL PROTECTION HUSTLE (1979); William Tucker, *Environmentalism and the Leisure Class*, HARPER'S MAGAZINE, Dec. 1977, at 49.

content with it, at least as long as the property in question belongs to somebody else.

CONCLUSION

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

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

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

218. David Callies, *Environmental Lawyers Off Target with Criticism of Callies*, HONOLULU CIVIL BEAT, Mar. 6, 2013, http://www.civilbeat.org/2013/03/18533-environmental-lawyers-off-target-with-criticism-of-callies/.