DAVID CALLIES AND THE FUTURE OF LAND USE REGULATIONS

JAMES W. ELY JR.*

It is a privilege to acknowledge the enormous contribution of David L. Callies to our understanding of property rights and land use regulations. He has long wrestled with the relationship between the rights of individual owners and the concerns of the community, and has given thoughtful attention to current environmental issues such as hydraulic fracking.[1] Moreover, the range of his scholarship has been impressive and far-reaching. In addition to numerous legal articles, Callies has authored innovative books[2] and remained active in bar association and law reform affairs. As I was preparing for the first edition of *The Guardian of Every Other Right*,[3] I came across his 1988 article with the plaintive title "Property Rights: Are There Any Left?"[4] This piece has always resonated with me, perhaps because it captured my mood at the time. Despite the then-recent Supreme Court decisions in *Loretto*[5] and *Nollan*,[6] Callies was skeptical that the Court had meaningfully checked the erosion of private property rights. But he bravely concluded:

> Although we probably must regulate, it is worth taking care that in this period of critical examination of our constitutional values

---

* Milton R. Underwood Professor of Law, Emeritus, and Professor of History, Emeritus, Vanderbilt University. This article is an expanded version of remarks presented at the Fourteenth Annual Brigham-Kanner Property Rights Conference at the College of William & Mary on October 12, 2017. I am grateful to Jon W. Bruce for helpful comments on an earlier draft of this essay.

1. David L. Callies & Chynna Stone, *Regulation of Hydraulic Fracturing*, 1 J. INT'L & COMP. L. 1 (2014).

2. *E.g.,* FRED BOSSELMAN, DAVID CALLIES, & JOHN BANTA, COUNCIL ON ENVTL. QUALITY, THE TAKINGS ISSUE: AN ANALYSIS OF THE CONSTITUTIONAL LIMITS OF LAND USE CONTROLS (1973); DAVID L. CALLIES ET AL., THE ROLE OF CUSTOMARY LAW IN SUSTAINABLE DEVELOPMENT (2006); DAVID L. CALLIES, ROBERT H. FREILICH & SHELLEY SAXER, CASES AND MATERIALS ON LAND USE (7th ed. 2017); TAKING LAND: COMPULSORY PURCHASE AND LAND USE REGULATION IN ASIAN-PACIFIC COUNTRIES (Tsuyoshi Kotaka & David L. Callies, eds., 2002).

3. JAMES W. ELY JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (3d ed. 2008).

4. David L. Callies, *Property Rights: Are There Any Left?,* 20 URB. LAW. 597 (1988).

5. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (holding that any permanent physical occupation of property amounted to a compensable taking).

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

> and protections, we do not lose by degrees what our founding fathers sought to protect in a more simple time and more rural place. There are many values enshrined in that Constitution. Lest we forget, private property is one of them.[7]

My purpose, however, is not just to praise Callies for his fine scholarship but to build upon his work to assess future developments in the land use field. This, of course, is a hazardous assignment. I am skeptical that persons like myself, trained in history, possess any unique crystal ball to read the future. This challenge is compounded, moreover, by the fact that in 2014 Callies authored a comprehensive article in which he offered predictions for future developments in the field of land use law.[8] It is a daunting task to compete with that erudite piece.

Throwing caution to the winds, I will start by considering some of Callies's predictions in light of subsequent decisions. He maintained that the *Nollan-Dolan-Koontz* line of cases, limiting land-development conditions, such as exactions and impact fees, would prompt continued judicial scrutiny.[9] That would certainly seem to be the case. Litigation abounds on the constitutionality of imposed conditions. A few examples must suffice. At issue in *Horne v. Department of Agriculture* was a marketing order under a 1937 agricultural marketing act, which required the growers of raisins to deliver a portion of their crop to the government, free of charge.[10] The Ninth Circuit

---

7. Callies, *supra* note 4, at 645.

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

9. *Nollan*, 483 U.S. at 837 (1987) (determining that building permit conditions must have an "essential nexus" to the impact of the proposed project); Dolan v. City of Tigard, 512 U.S. 374, 391 (1994) (holding that there must be "rough proportionality" between exactions and proposed development); Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595 (2013) (ruling that *Nollan-Dolan* apply when a building permit is denied as well as when permit is granted with conditions, and that monetary exactions are subject to the same heightened scrutiny). This trilogy of cases establish the parameters governing exactions that may be constitutionally required of developers.

On remand in *Koontz*, the Florida District Court of Appeal found that conditioning the grant of a land use permit upon the landowner funding an offsite mitigation project constituted a taking of property. St. Johns River Water Mgmt. Dist., 183 So. 3d 396, 397 (Fla. Dist. Ct. App. 5th Dist. 2014), *rev. denied,* 2016 WL 688284 (Fla. 2016). For a helpful analysis of *Koontz*, see Ilya Somin, *Two Steps Forward for the 'Poor Relation' of Constitutional Law:* Koontz*,* Arkansas Game & Fish*, and the Future of the Takings Clause*, 2012–2013 CATO SUP. CT. REV. 215, 226–41.

10. Horne v. Dep't of Agric., 135 S. Ct. 2419 (2015).

Court of Appeals upheld the validity of this scheme against a takings challenge, determining that personal property received less protection than land under the Takings Clause, and analyzing the set-aside requirement as akin to a government-imposed condition on the grant of a land use permit.[11] Rejecting this analysis, the Supreme Court, in an opinion by Chief Justice Roberts, ruled that the government's action amounted to the physical appropriation of personal property and was therefore a per se taking of property.[12] The *Horne* decision not only confined the application of the land use–exaction cases to regulatory takings but rejected the bizarre contention that personal property was somehow afforded less protection than real property under the Fifth Amendment against physical dispossession.[13]

Rental practices provide another example. In 2014, a federal district court in California considered yet another in a long line of San Francisco ordinances purporting to deal with rental-housing shortages and high market values by placing financial burdens on landlords.[14] Before the court was an ordinance requiring landowners who wished to withdraw rent-controlled properties from the housing market—which was their right under state law—to pay hugely enhanced payments, potentially involving hundreds of thousands of dollars, to the displaced tenants. The district court held that the ordinance ran afoul of the *Nollan-Dolan* nexus and proportionality tests, and emphasized that under *Koontz* monetary exactions must also satisfy these tests. It found no nexus between the enhanced payments and the owner's proposed change in land use, concluding that the ordinance "seeks to force the property owner to pay for a broad public problem not of the owner's making."[15] The real-world impact of *Nollan-Dolan-Koontz* on exactions has been mixed, but in this instance they had some bite.

---

11. Horne v. Dep't of Agric., 750 F.3d 1128 (9th Cir. 2014).

12. *Horne*, 135 S. Ct. at 2428, 2430–31.

13. *Id.* at 2426–28. *See* 1 JOHN LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES 51 (3d ed. 1909) ("The Constitution protects personalty as fully as real estate.").

14. Levin v. City & County of San Francisco, 71 F. Supp. 3d 1072 (N.D. Cal. 2014), *appeal dismissed as moot*, 2017 WL 957211 (9th Cir. 2017), *and declining to vacate judgement*, 2017 WL 2335358 (N.D. Cal. 2017). While the appeal was pending, the city sufficiently amended the ordinance to present a different controversy from the one originally adjudicated. A California court ruled that the revised ordinance imposed a "prohibitive price" on the right of a landlord to exit the residential housing market by mandating relocation payments to displaced tenants, and was preempted by state law. Coyne v. City & County of San Francisco, 9 Cal. App. 5th 1215, 215 Cal. Rptr. 3d 589 (1st Dist. 2017) (review denied June 28, 2017).

15. *Levin*, 71 F. Supp. 3d at 1086.

An allied issue relates to the spread of inclusionary zoning. As land values and housing costs have increased markedly in many urban areas, a number of cities are facing a shortage of affordable housing. They have responded by adopting policies to create less expensive housing.[16] Inclusionary zoning requires developers to set aside a number of residential units for sale or rent at below-market prices or to contribute to a fund for the construction of such housing. A threshold question is whether such requirements are exactions subject to *Nollan-Dolan-Koontz* limitations.[17] One obvious problem is that the private developer is not responsible for the lack of affordable housing in the community, and so the "essential nexus" test may not be satisfied. Callies argues convincingly that inclusionary zoning should be viewed as a type of exaction, which would pass constitutional muster only if the municipality can demonstrate a clear nexus between the proposed development and the affordable housing shortage and the developer receives a meaningful incentive, such as a density bonus or tax abatement.[18] He cautions that unduly onerous requirements are likely to discourage development and thus render any inclusionary program meaningless. To date there has been relatively little litigation challenging inclusionary zoning, much of it from California. Still, inclusionary zoning is bound to trigger increasing judicial scrutiny. Given the uncertainty about the application of the nexus and proportionality tests, as well as the unsettled ramifications of *Koontz*, exactions will no doubt provide a fertile field for future litigation.

In this connection, Callies also considers whether the constitutional limitations on exactions should apply when imposed by general legislation on property as well as when imposed by administrative determinations on individual projects. The Supreme Court has never squarely addressed this question, and lower courts remain sharply divided on this point.[19]

---

16. *See, e.g.*, Scott Calvert & Laura Kusisto, *Newly Hot Locals Battle to Curb Cost of Housing*, WALL ST. J., Jan. 4, 2018.

17. Audrey G. McFarlane & Randall K. Johnson, *Cities, Inclusion and Exactions*, 102 IOWA L. REV. 2145, 2168–84 (2017) (considering whether inclusionary zoning should be treated as ordinary land use regulation or as exaction).

18. Callies, *supra* note 8, at 55–60; David L. Callies, *Mandatory Set-Asides as Land Development Conditions*, 42/43 URB. LAW. 307, 312–28 (2011).

19. Christina M. Martin, Nollan*,* Dolan *and* Koontz*—Oh My! The Exactions Trilogy Requires Developers to Cover the Full Social Costs of Their Projects, But No More*, 51

A number of courts have declined to apply *Nollan-Dolan-Koontz* to conditions imposed legislatively.[20] California courts, for instance, have confined the reach of the unconstitutional conditions doctrine to burdens imposed by ad hoc administrative decisions.[21] In 2016, a California appellate court upheld the validity of an in-lieu-fee exaction imposed on a developer under the state's Mitigation Fee Act. The purpose of the in-lieu fee was to help address the shortage of affordable housing in the community, not to defray the increased public costs arising from the specific development project.[22] Adhering to the prevailing rule in California, the court found that *Nollan-Dolan-Koontz* limitations were inapplicable because the fee was imposed legislatively.[23] The effect of this decision, of course, is to limit the protective shield against the imposition of unconstitutional conditions.

In contrast, other courts have applied the *Nollan-Dolan-Koontz* standard to conditions imposed legislatively.[24] The Supreme Court of Texas sharply challenged the distinction between legislative determinations and individualized decisions in the context of exactions. The court declared:

> While we recognize that an ad hoc decision is more likely to constitute a taking than general legislation, we think it entirely possible that the government could "gang up" on particular groups to force exactions that a majority of constituents would not only tolerate but applaud, so long as burdens they would otherwise bear were shifted to others.

WILLAMETTE L. REV. 39, 57–58 (2014) (noting disagreement as to whether *Nollan* and *Dolan* apply to legislatively mandated exactions).

20. *See, e.g.*, Parking Ass'n of Ga. v. City of Atlanta, 264 Ga. 764, 450 S.E.2d 200 (1994), *cert. denied*, 515 U.S. 1116 (1995) (three dissenting judges would have applied *Nollan-Dolan*).

21. For California's position on the standard for the review of prescribed conditions, see *California Building Industry Ass'n v. City of San Jose*, 61 Cal.4th 435, 459 n.11, 351 P.3d 974, 990 n.11 (2015), *cert. denied*, 136 S. Ct. 928 (2016).

22. This distinction highlights the concern that exactions may be wholly unrelated to the impact caused by developers' activities, and designed to impose the costs of other government projects on developers rather than taxpayers. Martin, *supra* note 19, at 43–44.

23. 616 Croft Ave., LLC v. City of West Hollywood, 3 Cal. App. 5th 621, 629, 207 Cal. Rptr. 3d 729, 736 (2nd Dist. 2016), *cert. denied*, 138 S. Ct. 377 (2017).

24. *See, e.g.*, N. Ill. Home Builders Ass'n v. Cty. of Du Page, 165 Ill. 2d 25, 649 N.E.2d 384 (1995); Home Builders Ass'n of Dayton & the Miami Valley v. City of Beavercreek, 89 Ohio St. 3d 121, 729 N.E.2d 349 (2000).

> Nor are we convinced that a workable distinction can always be drawn between actions denominated adjudicative and legislative.[25]

Applying *Nollan-Dolan* scrutiny, the court found that a road improvement project attached as a condition for plat approval amounted to a compensable taking of property. Such a severe split of authority surely warrants Supreme Court review.

It is noteworthy that Justices Thomas and O'Connor have expressed their view that *Nollan-Dolan* should apply to both administrative and legislative determinations. They declared:

> It is not clear why the existence of a taking should turn upon the type of governmental entity responsible for the taking. A city council can take property just as a planning commission can. . . . The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference.[26]

Along the same lines, Callies concluded, correctly to my mind, that courts should find the legislative/administrative distinction irrelevant.[27] The purpose of the Takings Clause is to prevent landowners from being singled out to bear a burden that should be appropriately placed on society as a whole.[28] Consistent with this principle, the judicial focus, I submit, should be upon the impact on the landowner, not on the vehicle by which the exaction was imposed. It makes no sense to allow localities to impose exactions legislatively that could not pass muster if done by an administrative body.

---

25. Town of Flower Mound v. Stafford Estates Ltd. P'ship, 135 S.W.3d 620, 641 (Tex. 2004).

26. Parking Ass'n of Ga. v. City of Atlanta, 515 U.S. 1116, 1117–18 (1995) (dissenting from denial of certiorari). Justice Thomas adhered to this view in *California Building Industry Ass'n v. City of San Jose*, 136 S. Ct. 928 (2016) (concurring in denial of certiorari).

27. Callies, *supra* note 8, at 44–45, 48–51.

28. Armstrong v. United States, 364 U.S. 40, 49 (1960) (Black, J.) ("The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."). *See also* Monongahela Navigation Co. v. United States, 148 U.S. 312, 325 (1893) (Brewer, J.) (explaining that the just compensation principle "prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him").

Callies's prediction that the Supreme Court "will soon re-examine" the controversial Supreme Court decision in *Kelo v. City of New London*[29] seems more questionable.[30] He is surely on sound ground in pointing out that "the Public Use Clause is virtually eliminated in federal courts" and that "government may once more acquire private property by eminent domain on the slightest of public purpose pretexts."[31] Much as I wish the Supreme Court would reconsider the constitutionality of allowing the exercise of eminent domain for economic development by private parties, I doubt that the Justices will revisit the meaning of "public use" in the near future. Three of the dissenters in *Kelo* have left the bench, and it is uncertain how their replacements would vote in a "public use" case.

To be sure, as Callies noted, there was a substantial public uproar over *Kelo*. Many states, by legislative enactment or constitutional amendment, purported to reign in the exercise of eminent domain for economic development purposes.[32] The efficacy of these measures varies widely but some appear to constitute meaningful reform.[33] Moreover, state constitutional law can provide additional safeguards against eminent domain abuse.[34] A number of state constitutions contain explicit restrictions on the exercise of eminent domain.[35] In

29. Kelo v. City of New London, 545 U.S. 469 (2005).

30. Callies, *supra* note 8, at 45.

31. *Id.* at 67.

32. ILYA SOMIN, THE GRASPING HAND: *KELO V. CITY OF NEW LONDON* AND THE LIMITS OF EMINENT DOMAIN 135–80 (2015); James W. Ely Jr., *Post*-Kelo *Reform: Is the Glass Half Full or Half Empty?*, 17 SUP. CT. ECON. REV. 127–50 (2009).

33. *See, e.g.*, City of Marietta v. Summerour, 807 S.E.2d 324 (Ga. 2017) (holding that the Landowner's Bill of Rights and Private Property Protection Act sets forth policies designed to increase due process protections for property owners, that such statutory procedures were binding on the city, and that the condemnation petition be dismissed for failure to comply with statute); St. Louis Cty. v. River Bend Estates Homeowners' Ass'n, 408 S.W.3d 116, 135–38 (Mo. 2013) (upholding the statute providing for additional compensation for taking homesteads or property held within the same family for fifty or more years, and stating that the statutes "promote the legislature's intended policy of providing additional benefits to certain property owners whose real property is taken for public use"); State of Missouri *ex rel.* Jackson v. Dolan, 398 S.W.3d 472, 478–82 (Mo. 2013) (construing Missouri statutes prohibiting the exercise of eminent domain "for solely economic development purposes," and finding that the proposed condemnation by the port authority violated statute).

34. Clint Bolick, *State Constitutions: Freedom's Frontier*, 2016–2017 CATO SUP. CT. REV. 15, 21–22 (2017).

35. For example, the Arizona Constitution, art. 2, § 12, provides: "Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question." There is similar language in

addition, state constitutional guarantees may be construed to afford more expansive protection for property owners than their federal counterparts.[36] Indeed, some state supreme courts, invoking state constitutional provisions, have invalidated the exercise of eminent domain for economic development purposes, and have even looked skeptically on so-called "blight" takings.[37] I submit, therefore, that the states are likely to emerge in the near future as the most fertile source of efforts to curtail the reach of eminent domain.

Likewise, Callies's optimistic insistence that the Supreme Court "needs to, and will, resolve the so-called 'relevant parcel' or denominator issue, both with respect to partial and total regulatory takings," seems to have been wide of the mark.[38] At issue in *Murr v. Wisconsin* was application of a Wisconsin law that treated two adjacent substandard lots with a common owner as a single lot, and barred the separate sale or improvement of one substandard lot.[39] The law, in effect, drastically reduced the economic value of one lot. Speaking for the Court, Justice Kennedy set forth a list of considerations to determine the relevant parcel for regulatory takings analysis. In so doing, he blurred the distinction between two discrete inquiries—what is the relevant parcel and whether the regulation constitutes

---

several other state constitutions. *See, e.g.*, MISS. CONST., art. 3, § 17; OKLA. CONST., art, 2, § 24; WASH. CONST., art. 1, § 16.

36. For a classic argument urging increased reliance on state constitutional law, see William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

37. *See, e.g.*, Gallenthin Realty Dev. v. Borough of Paulsboro, 191 N.J. 344, 924 A.2d 447 (2007) (invalidating a "blight" condemnation); City of Norwood v. Horney, 110 Ohio St. 3d 353, 853 N.E.2d 1115 (2006); Bd. of Cty. Comm'rs of Muskogee Cty. v. Lowery, 136 P.3d 639 (Okla. 2006); Benson v. State, 710 N.W.2d 131 (S.D. 2006); County of Wayne v. Hathcock, 471 Mich. 445, 684 N.W.2d 765 (2004). This is not to suggest that all state courts are prepared to restrict the reading of "public use" or to limit the condemnation of private property. The New York Court of Appeals, for instance, has endorsed a broad exercise of eminent domain. In *Goldstein v. New York State Urban Development Corp.*, 13 N.Y.3d 511, 921 N.E.2d 472 (2009), the court upheld the condemnation of the Atlantic Yards section in Brooklyn as a blighted area for the purpose of transfer to a private developer to construct a sports stadium. *See also* Violet Dock Port, LLC v. St. Bernard Port, Harbor & Terminal Dist., 239 S. 3d 243 (La. 2018) (upholding the exercise of eminent domain to acquire a privately-owned port facility for a one-to-one transfer to a state agency with plans to lease the acquired property to favored businesses outside of a comprehensive redevelopment plan).

38. Callies, *supra* note 8, at 45.

39. Murr v. Wisconsin, 137 S. Ct. 1933 (2017). For the background of this case, see Richard A. Epstein, *Disappointed Expectations: How the Supreme Court Failed to Clean Up Takings Law in* Murr v. Wisconsin, 11 N.Y.U. J.L. & LIB. 151, 154–61 (2017).

a taking of that parcel. Kennedy expressly rejected reliance on state property-law definitions to identify the property at issue for regulatory takings purposes.[40] Viewing the parcels as merged for takings purposes, Kennedy held that the owners were not deprived of all economically beneficial use and that no regulatory taking occurred. His malleable cluster of factors requires an ad hoc factual inquiry for each case, thus providing no guidance or certainty to buyers or landowners concerning regulatory risk. As Richard A. Epstein has convincingly observed: "[I]t is hard to see how massive levels of *ad hocery* advance any conception of fairness and justice."[41]

I argue that the murky multifactor test adopted in *Murr* falls well short of providing the clarification that Callies sought, and indeed compounds the confusion in identifying the relevant parcel for regulatory takings analysis. Surely reliance on parcel boundaries as defined by state law would better accord with the settled expectations of owners and would provide a readily ascertainable test for regulatory takings purposes. Instead, Kennedy offers an amorphous, multifactor balancing test that is virtually worthless and is likely to disadvantage individual owners. The impact of *Murr,* therefore, is to weaken the protective function of the Takings Clause.[42] As Nicole Stelle Garnett cogently pointed out, *Murr* "further undermined the already enfeebled constitutional rights enjoyed by property owners against regulatory excess."[43]

There is a partial silver lining to the *Murr* saga. In 2017, the Wisconsin legislature enacted a law which effectively overturned the Supreme Court decision with respect to that jurisdiction. The law provides that localities cannot enforce an ordinance prohibiting a property owner from conveying or developing a substandard parcel

---

40. *Murr*, 137 S. Ct. at 1945–47. In sharp contrast, Chief Justice Roberts, writing for three dissenters, insisted that "[s]tate law define[ ] the boundaries of distinct parcels of land, and those boundaries should determine the 'private property' at issue in regulatory takings cases". *Id.* at 1950.

41. Epstein, *supra* note 39, at 178.

42. *Murr*, 137 S. Ct. at 1954 (Roberts, C.J., dissenting) (complaining that the majority's definition of the parcel "undermines the effectiveness of the Takings Clause as a check on the government's power to shift the cost of public life onto private individuals").

43. Nicole Stelle Garnett, *From A Muddle to a Mudslide:* Murr v. Wisconsin, 2016–2017 CATO SUP. CT. REV. 131 (2017). *See also* Stewart E. Sterk, *Dueling Denominators and the Demise of* Lucas, 60 ARIZ. L. REV. 67, 90 (2018) ("But for that small group of landowners who claim that regulation has denied them all economically productive use of land, Murr makes their already steep uphill climb even steeper.").

that was of legal size when created, and bars localities from requiring the merger of lots for any purpose without the consent of the owners.[44] It gives no relief, of course, to the application of the unfortunate Kennedy opinion in *Murr* in other jurisdictions. Perhaps the lesson is that landowners should not overlook the possibility of a legislative remedy from onerous regulations.

Callies also takes aim at the ripeness doctrine, which often serves, as a practical matter, to prevent claimants from litigating regulatory takings claims on the merits in federal court. As Steven J. Eagle has cogently explained: "Over the years, the U.S. Supreme Court has established many doctrinal and procedural barriers that landowners must confront in ascertaining and protecting their rights. Some barriers are of Byzantine complexity."[45] A centerpiece in this obstacle-labyrinth is the Supreme Court decision in *Williamson County Regional Planning Commission v. Hamilton Bank*.[46] The Court ruled that a regulatory takings claim against a state or local government was not "ripe" for adjudication in federal court until the claimant was denied compensation in the state court. This requirement alone imposed a substantial hurdle for claimants, but the Court compounded the difficulty in *San Remo Hotel v. City & County of San Francisco*, holding that by virtue of the Full Faith and Credit Statute takings claimants were precluded from relitigating in federal court issues that were raised in state court actions.[47] Consequently, takings claimants are effectively denied any access to a federal forum. No other constitutional rights are treated in such a dismissive manner. This problematic outcome speaks volumes about the Supreme Court's disinterest in protecting the rights of property owners.[48]

Based on his review of the case law, however, Callies suggests that the Supreme Court is in the process of weakening the ripeness requirement, characterizing the doctrine as "prudential" rather than "jurisdictional."[49] A recent Supreme Court decision concerning the

---

44. 2017–2018 Wisc. Legis. Serv. Act 67 (2017 A.B. 479) (West).

45. Steven J. Eagle, *Advancing Judicial Review of Wetlands and Property Rights Determinations*: Army Corps v. Hawkes Co., 2015–2016 CATO SUP. CT. REV. 257 (2016).

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

47. San Remo Hotel v. City & County of San Francisco, 545 U.S. 323 (2005) (construing 28 U.S.C. § 1738 (West, Westlaw through Pub. L. No. 115-132)).

48. James W. Ely Jr., *'Poor Relation' Once More: The Supreme Court and the Vanishing Rights of Property Owners,* 2004–2005 CATO SUP. CT. REV. 39, 66–69 (2015) (criticizing San Remo Hotel, 545 U.S. 323 (2005)).

49. Callies, *supra* note 8, at 45, 92–103.

judicial review of a determination by the Army Corps of Engineers under the Clean Water Act provides some indirect support for Callies's assessment. Called upon to review an order that stated the subject property contained "waters of the United States," the Supreme Court reiterated its "pragmatic" approach to the issue of final agency action. It rejected the government's contention that the landowner either must run the risk of severe criminal and civil penalties for violating the order or must pursue an "arduous, expensive, and long" permitting process before having a right to judicial review.[50] This decision should make it easier for landowners to challenge wetlands designations and might prove a harbinger for a more general review of when takings claims can be heard in federal court.[51] Indeed, in March of 2018 the Supreme Court granted review of a case raising the question of the application of the ripeness doctrine as a bar to takings claims in federal court.[52]

These brief comments hardly do justice to the balance of the 2014 article by Callies. But I would now like to offer some additional comments about the future direction of property rights and land use law.

First, regulation of land use is not about to disappear. In fact, the developmental pressure on land will almost certainly increase, sparking calls for more controls. Indeed, I would maintain that landowners themselves, especially in our heavily zoned suburbs, are often the driving force for more regulations. I detect little interest in a free market in land. On the contrary, many residential owners seek to escape the vicissitudes of the real estate market, valuing stability and protection against change more highly than the right of individuals to use and develop their property as they see fit. As a rule, they are highly risk adverse. The popularity of planned communities, which commonly place intrusive restrictions on the use of land, attest to the widespread acceptance of this norm.

Second, even a supposedly conservative Supreme Court has done relatively little to safeguard property rights against regulation.[53]

---

50. U.S. Army Corps of Eng'rs v. Hawkes Co., 136 S. Ct. 1807, 1815–16 (2016).

51. Eagle, *supra* note 45, at 264–65 (noting the trend toward the removal of procedural barriers in environmental cases).

52. Knick v. Township of Scott, 862 F.3d 310 (3d Cir. 2017), *cert. granted*, 138 S. Ct. 1262 (2018).

53. STUART BANNER, AMERICAN PROPERTY: A HISTORY OF HOW, WHY, AND WHAT WE OWN 271 (2011) (observing that by the end of the twentieth century "property rights clearly received more protection from government regulation than they had a few decades before, but exactly how much more was a matter of debate").

Perhaps this should not be a surprise. In 1987 Justice Scalia bluntly observed: "I do not detect the sort of national commitment to most of the economic liberties generally discussed that would enable even an activist court to constitutionalize them."[54] He urged those interested in the rights of property owners to remind modern society of the importance of private property as a fountainhead of individual liberty. Yet to reclaim the property-centered constitutional vision of the framers will not be an easy task. Consequently, I predict that the Supreme Court will continue to move cautiously in this area, incrementally strengthening the rights of owners and invalidating egregious regulations but stopping short of an aggressive revival of property rights.

Third, in assessing the judicial reaction to land use controls, one must not overlook the role of state courts. They in fact do much of the heavy lifting. As discussed above, state courts are more likely than their federal counterparts to put some teeth into the "public use" limitation on the exercise of eminent domain. Now, I fully recognize that state court handling of property rights claims is a mixed bag.[55] They provide little solace if you live in California. Indeed, in 1999, Callies perceptively pointed out that a number of state courts narrowly construed the Supreme Court decisions in *Nollan*, *Dolan*, and *Lucas v. South Carolina Coastal Council*,[56] and rejected takings claims.[57] This melancholy trend has continued. A *Lucas* takings claim can be defeated by a finding that the subject property retains some economic value, however slight or speculative.[58] Indeed, a recent

54. Antonin Scalia, *Economic Affairs as Human Affairs*, *in* ECONOMIC LIBERTIES AND THE JUDICIARY 31, 37 (James A. Dorn & Henry G. Manne eds., 1987).

55. For problematic results, see *Violet Dock Port, Inc., LLC v. St. Bernard Port, Harbor & Terminal District*, 239 So. 3d 243 (La. 2018) (upholding the exercise of eminent domain to acquire a privately-owned port facility for a one-to-one transfer to a state agency with plans to lease the acquired property to favored private businesses outside of a comprehensive redevelopment plan), and *Bay Point Properties, Inc. v. Mississippi Transportation Commission*, 201 So. 3d 1046 (Miss. 2016), *cert. denied*, 137 S. Ct. 2002 (2017) (holding that the state agency effected a taking of property by exceeding the scope of an express easement for highway purposes to construct a public park, but denying just compensation for the unencumbered value of the land so taken based on a state statute governing termination of highway easements).

56. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992) (finding that regulation that deprived owners of "all economically beneficial or productive use of land" constituted a per se taking of property).

57. 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, 551–74 (1999) ("Clearly, state (and some lower federal) courts are not hearing (or not wanting to hear) the U.S. Supreme Court.").

58. *See* Leone v. County of Maui, 141 Haw. 68, 404 P.3d 1257 (Haw. 2017) (reaching the

study has pointed out that the *Lucas* test for a categorical regulatory taking has been successfully invoked in only a handful of cases.[59]

Yet there are heartening developments as well. The practice of state agencies, pursuant to state law, of mapping vacant lands for possible future projects and barring the owners from developing the designated land has long been controversial. Courts have looked skeptically upon such mapping laws, reasoning that they deprive the owner of the right to develop and use his or her land.[60] Following in this pattern, in 2016 the Supreme Court of North Carolina struck a blow for property rights when it invalidated the Transportation Corridor Official Map Act that restricted an owner's right to improve, develop, or subdivide property within a highway corridor map for an indefinite period. Not surprisingly, it was very difficult to sell land within a designated corridor. Designed to hold down the cost of acquiring land for future development by freezing the status quo, the Map Act clearly privileged the state's budgetary concerns over the severe economic loss inflicted on private owners. In an inverse condemnation action, the North Carolina court determined that the Map Act constituted a taking of property requiring the payment of compensation. It is striking that in reaching this conclusion, the court quoted William Blackstone, John Locke, and James Madison, and characterized property as a "fundamental right."[61]

---

dubious conclusion that although regulations prevented the owners from building a single-family residence on their land such controls did not deprive them of all economically viable use, and finding no regulatory taking).

59. Carol Necole Brown & Dwight H. Merriam, *On the Twenty-Fifth Anniversary of* Lucas: *Making or Breaking the Takings Claim*, 102 IOWA L. REV. 1847, 1862–63 (2017). *See also* Luke A. Wake, *The Enduring (Muted) Legacy of* Lucas v. South Carolina Coastal Council, 28 GEO. MASON U. C.R. L.J. 1, 40 (2017) ("At best, *Lucas* has proven to be only a modest gain for the property rights movement. Even as originally conceived, the *Lucas* rule would only apply in an extreme case. But, subsequent developments have significantly winnowed the field of viable *Lucas* claims in many jurisdictions—both in narrowly conceiving the test and in applying the background principles exception broadly.").

60. Forster v. Scott, 136 N.Y. 577, 584–85, 32 N.E. 976, 977–78 (1893) (declaring that as the landowner "was virtually deprived of the right to build upon his lot by the statute in question, and as this circumstance obviously impaired its value and interfered with his power of disposition, it was to that extent void as to him"). The New York Court of Appeals adhered to this position in *Jensen v. City of New York*, 42 N.Y.2d 1079, 369 N.E.2d 1179 (1977). *See also* LEWIS, *supra* note 13, at 431–32.

61. Kirby v. N.C. Dep't of Transp., 368 N.C. 847, 786 S.E.2d 919, 923–26 (2016). *See* Craig J. Richardson, *Is This North Carolina or Zimbabwe? How Property Rights in North Carolina Deteriorated to the Level of a Third-World Country*, 21 INDEPENDENT REV. 587 (2017). *See also* Joint Ventures, Inc. v. Dep't of Transp., 563 So. 622, 623–28 (Fla. 1990) (holding that the

One, of course, cannot assign undue significance to a single judicial opinion. Nonetheless, it is promising that at least some state courts recognize that property is a "fundamental right,"[62] a position surely in harmony with the views of the framers of the Constitution and Bill of Rights.[63] Whether such recognition will produce more stringent judicial protection over the rights of property owners remains to be seen. I submit that any broad revival of property rights in our constitutional system must begin by reclaiming the understanding that private property plays a vital role in safeguarding individual liberty. As David Callies has reminded us, "Property rights, and in particular rights in land, have always been fundamental to and part of the preservation of liberty and personal freedom in the United States."[64]

---

statute prohibiting the development of property subject to a map of reservation amounted to an unconstitutional taking of property).

62. *See also* City of Norwood v. Horney, 110 Ohio St. 3d 353, 363, 853 N.E.2d 1115, 1129 (2006) ("Ohio has always considered the right of property to be a fundamental right.").

63. Stuart Bruchey, *The Impact of Concern for the Security of Property Rights on the Legal System of the Early American Republic*, 4 WIS. L. REV. 1135, 1136 (1980) ("Perhaps the most important value of the Founding Fathers of the American constitutional period was their belief in the necessity of securing property rights.").

64. Callies, *supra* note 57, at 526. There is a large body of scholarly literature linking private property and individual liberty. *See, e.g.*, ELY JR., *supra* note 3; RICHARD PIPES, PROPERTY AND FREEDOM (2000); Walter Dellinger, *The Indivisibility of Economic Rights and Personal Liberty*, 2003–2004 CATO SUP. CT. REV. 9, 19 ("Economic rights, property rights, and personal rights have been joined, appropriately, since the time of the founding.").