RECENT DEVELOPMENTS IN EMINENT DOMAIN AND CONDEMNATION LAW

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RECENT DEVELOPMENTS IN EMINENT DOMAIN AND CONDEMNATION LAW

I. Eminent Domain

A. Power to Take, Public Use and Purpose

1. Colorado: Attempted Taking For Public Road Not A Public Purpose, Not Necessary: Alter Ego Developer, Not The Public, Is Beneficiary Of The Taking

A very interesting public use opinion from the Colorado Court of Appeals. In *Carousel Farms Metropolitan District v. Woodcrest Homes, Inc.*, No. 2017COA149 (Nov. 30, 2017), the court invalidated an attempted taking of Woodcrest's property, concluding that the condemnation was neither for a public purpose, nor necessary for that purpose.

The facts of the case are straightforward, and rather than paraphrase, we'll just quote the opinion:

> ¶ 1 Appellant, Woodcrest Homes, Inc., owned a .65-acre parcel of land (referred to as Parcel C) outside the Town of Parker. Century Communities, Inc., and its subsidiaries (collectively, the Developer) acquired the parcels to the north and south of Parcel C, with a plan to create a development — Carousel Farms — comprising all three parcels. Under its agreement with the Town, the Developer could not move forward with its development plan until it acquired Woodcrest's land.
>
> ¶ 2 Woodcrest, though, declined to sell Parcel C for the price offered. So the Developer threatened to condemn the property. When Woodcrest did not acquiesce, the Developer created the Carousel Farms Metropolitan District (District), the appellee, which promptly initiated condemnation proceedings and took possession of Parcel C.

Slip op. at 1.

In short, the developer's subdivision plans could be thwarted if the owner of Parcel C refused to sell. Which it did. So the developer created a government entity with the power of eminent domain, staffed it with its own employees, and condemned Parcel C.

In response to the objection of the owner of Parcel C that the taking was neither a public use or purpose and was not necessary, the district claimed that "the property would, upon the Town's approval of the subdivision, be used for public

improvements such as roads and sewers." Slip op. at 16. Thus, the taking was supported by a public purpose. The court rejected the argument:

> We do not doubt that the planned improvements would benefit the public or, more accurately, the future residents of the proposed subdivision. The question, though, is not whether the condemned property will eventually be devoted to a public use, but whether the taking itself was for a public purpose.

Slip op. at 16 (emphasis original).

In other words, public use, standing alone, was not sufficient, and the condemnor needed to show a public purpose.

The court had other reasons for rejecting the claim that the taking was for a public purpose and was necessary: how could the taking be "necessary to the public health, safety, and welfare of the property owners and residents of the District for the District to construct the Public Improvements," when, "[a]t the time of the resolution, the District had no residents, the only two property owners having sold their property to the Developer"? Slip op. at 9.

Plus, the District was essentially bootstrapping its reasons. At the time of the taking of Parcel C, there was no subdivision. Indeed, the subdivision approval was conditioned on the successful taking. "Thus," the court held, "without Parcel C, there was no likelihood of a subdivision and no necessity for the public improvements that purportedly justified the condemnation in the first place. In other words, the taking of Parcel C was a step removed from any public purpose." Slip op. at 17. The taking justified itself.

The court concluded "the essential purpose of the taking itself was to ensure that the terms and conditions of the Agreement were satisfied so that the Developer could seek final approval of its final plat in the first place." Slip op. at 18. And here's the money quote:

> When the primary purpose of a condemnation is to advance private interests, even if there will be an eventual public benefit, the condemnation is not for a public purpose

Slip op. at 18.

Lacking a public purpose, the taking obviously wasn't necessary to further a public purpose, and "the evidence of bad faith is substantial," because the directors of the District were all employees of the developer, and thus concededly adopted the

taking and necessity resolutions while operating under a conflict of interest. Slip op. at 19-20.

> This evidence establishes that, when the Developer could not obtain Parcel C at the desired price, the District stepped in to assist the Developer and ensure that the development process could proceed. The fact that the Developer threatened to condemn Parcel C when it had no authority to do so, and then created the District (which promptly initiated condemnation proceedings), suggests a kind of alter ego relationship between the District and the Developer, as does the fact that the Developer signed the amendments to the Agreement, but the District did not. In other words, the Developer spoke for the District and the District acted for the Developer.

Slip op. at 21-22.

In sum, "[t]he immediate purpose of the taking was to ensure the Developer's compliance with the contract, slip op. at 23, and "[w]e conclude that the District failed to demonstrate that its condemnation of Parcel C was for a public purpose and necessary for such a purpose. And, by taking Parcel C, effectively on behalf of the Developer, the District also ran afoul of section 38-1-101(1)(b)(I) — the statue prohibiting a taking for transfer to a private entity for the purpose of economic development." Slip op. at 15-16.

Finally, the court concluded the transfer violated Colorado's "anti-*Kelo*" statute by transferring private property from one private owner to another.

This case resonates with us, because we represented the property owner in a very similar case, and that similarly ended up making good law, even if the eventual result wasn't righteous. In that case, a private developer and the County entered into a development agreement which committed the developer to acquire private property for what would eventually road dedicated to the public by the developer. If the developer could not acquire these properties on the market, the development agreement committed the County to exercising its power of eminent domain to take the properties by force.

As in the Colorado case, a property owner did not voluntarily sell, and the County eventually condemned the property (twice, simultaneously!). The County claimed that the fact that the property being taken would likely end up as a publicly-owned road and that the resolution of taking was silent on the private benefit and motivation, meant that the taking was essentially immune from judicial scrutiny. The Hawaii Supreme Court concluded that courts have an obligation to allow a property owner to prove that the stated reasons supporting a taking are

pretextual, and cannot simply rely on the government's proffered reasons, even where the use may eventually be public.

Thus, we think the Colorado court's opinion is a welcome addition to ours and others which conclude that the condemnor's actual purpose matters, and not merely its proffered purpose, or even eventual use, and that courts should take seriously their role in evaluating exercises in eminent domain for actual public use and purpose.

Last update: the government has petitioned the Colorado Supreme Court for discretionary review, so stay tuned.

2. Taking Of Power Line Easement Is For Public Use Because Public Has Right To Use The Electricity

The South Dakota Supreme Court's opinion in *Montana-Dakota Utilities Co. v. Parkshill Farms, LLC*, No. 28174 (Dec. 13, 2017), resolved both a public use question, and one of compensation. In other words, something for every takings maven, no matter your interest. Read on!

This was a taking of permanent easements by publicly-regulated but privately-owned utilities. The owner asserted that just compensation and damages was $840,000. The condemnors valued the take at "only $73,097." Slip op. at 3. The jury awarded $95,046.

The power-to-take question was whether the condemnation of private property by the power companies was "for public use" because the land taken was not going to be open to the public, nor were the transmission lines. Under South Dakota law, a taking is for public use when the property itself is going to be used by the public. But this was not as simple as the property owners made it out to be, according to the court, which concluded that "[i]n essence, the [owners] argue that in order to satisfy the public-use clause, the general public must be entitled to use the condemned property in the same manner as the condemning authority." Slip op. at 5.

The court rejected the argument as "untenable," holding instead that it was enough that the public had the right to make use of the service which the utilities would provide. The court compared the utility companies to railroads, and held that it was sufficient under existing South Dakota law that trains be open to the public, and not the land on which the tracks are located. Thus, because the public has the

right to the services which the utilities would provide, the taking was for a public use:

> In this case, the nature of the proposed use of the easements is public. The circuit court found that the Utilities are public utilities. As such, they are required by law to "furnish adequate, efficient, and reasonable service." SDCL 49-34A-2. The Utilities may not, "except in cases of emergency, fail to provide, discontinue, reduce or impair service to a community, or a part of a community, except for nonpayment of account or violation of rules and regulations, unless permission has been first obtained from the Public Utilities Commission to do so." SDCL 49-34A-2.1. And as noted above, federal regulations require the Utilities to provide open access to their transmission lines under nondiscriminatory rates to others in the market. Because the Utilities are required to provide nondiscriminatory, government-regulated service to the general public, the easements at issue were taken for public use.

Slip op. at 7-8.

The court also rejected the owners' necessity challenge, concluding that whether taking these easements in perpetuity (rather than for a 99 year term, as in neighboring North Dakota) is "a legislative question, [and] it will continue to be a legislative question 99 years from now." Slip op. at 9. No surprise there.

But the owners did get some love from the court, in the just compensation portion of the opinion, which begins on page 12. The owners asserted the trial court wrongly refused to give this jury instruction:

> The Landowners' damages in this case include damages for all rights taken under the easement, not just those arising from the project proposed by the Plaintiffs. In considering damages for the rights taken under the easement, you must consider all damages, present and prospective, that will accrue reasonably from the taking of the easement, and in doing so must consider the most injurious use of the property reasonably possible under the easement.

Slip op. at 13. The court agreed, rejecting the utilities' argument that the instructions which the jury received were adequate. Although they were accurate statements of the law "the jury instructions were inadequate as a whole." Slip op. at

14. Before-and-after, check. Value of the property taken, plus damage to the remainder, check. But these formulations didn't account for another element of damage: the potential, but presently un-exercised rights which the easements granted to the utilities. This included the right to install guy wires on certain portions of the easement, a right which the jury instructions did not account for.

The court didn't quite buy the owners' jury instruction 100%, concluding that it was a bit too broad, since future damages must be "reasonable," and the instruction quoted above could be read to charge the jury with awarding money for future damage, even if not foreseeable. Slip op. at 15. Thus, the court sent the case back down to the trial court for another trial on compensation:

> The circuit court is not required to adopt the specific language in the Parkses' requested instruction. The Utilities may propose their own version for consideration. But whatever instruction is given must be consistent with our holding in JB Enterprises that a property owner is entitled to compensation for any right explicitly taken by a condemning authority, regardless of whether the condemning authority ever uses such right.

Slip op. at 16.

It may not have been a total win for the property owners, but we bet they are probably okay with living to fight another day and getting another crack at the jury.

3. Cert Petition: Is Land Only Partly Owned By A Tribe Immune From Eminent Domain?

Here's the cert petition in a case we've been following out of the Tenth Circuit involving an attempt by a private utility company to take property which is now partly tribal land.

In *Public Service Co. of New Mexico v. Barboan*, 857 F.3d 1101 (10th Cir. 2017), there wasn't a question that a federal statute prohibited a utility company from taking "tribal land." The big issue was what land fell within that definition.

The Navajo Nation owns undivided fractional interests in two parcels which a utility claimed it needed for a electric transmission line. The land earlier had been "allotted" to individual owners, who are treated like fee owners except for certain restrictions on alienation. This land is no long tribal land or part of any reservation, and under a federal statute, allotted land is subject to an exercise of eminent domain:

> Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.

25 U.S.C. § 357.

Tribal and reservation land, by contrast, cannot be taken.

Eventually, the Navajo Nation obtained fractional interests in the two allotted parcels via a "buy back" consolidation program (14% for one parcel, a mere .14% for the other). After the utility sought to condemn for the transmission line, the Navajos objected, asserting that its small interests took the land outside of the statutory text. The U.S. District Court agreed, concluding that if the Navajo Nation owned any interest in the condemned parcels, it could not be taken. Moreover, the court held that the Nation was a party whose presence was needed but who could not be joined ("indispensable party" for all you old-timers). The court allowed the utility to take an interlocutory appeal.

The Tenth Circuit affirmed, but only on the first issue, rejecting the utility's "once an allotment, always an allotment" theory (as the court labeled) it, and concluding that "[n]o court has held that § 357 allows condemnation of tribal land, whether the tribal interest is fractional, future, or whole." After the Tenth Circuit denied en banc review, the cert petition followed.

Here are the Questions Presented:

> A common feature in the Eighth, Ninth and Tenth Circuits is "allotment land." This land was once part of an Indian reservation but was carved out and "allotted" to individual members of the tribe as their own property, held in trust by the United States. In 1901, Congress enacted 25 U.S.C. § 357, which allows States and state-authorized public utilities to condemn rights-of-way across allotment land for any public purpose, while paying fair market value to the allotment holders. The Tenth Circuit held that, when an Indian tribe acquires any interest in a parcel of allotment land – no matter how small that interest – the statute no longer applies and no part of the parcel may be condemned for any public purpose. The Questions Presented by the Tenth Circuit's decision are:

1. Does 25 U.S.C. § 357 authorize a condemnation action against a parcel of allotted land in which an Indian tribe has a fractional beneficial interest, especially where (a) the the tribe holds less than a majority interest, (b) the purpose of condemnation is to maintain a long-standing right-of-way for a public utility, and (c) the statute was not "passed for the benefit of dependent Indian tribes." Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89 (1918)?

2. If 25 U.S.C. § 357 authorizes such a condemnation action, may the action move forward if the Indian tribe invokes sovereign immunity and cannot be joined as a party to the action?

The petition raises questions of Indian law, national energy policy, whether eminent domain is an in rem proceeding (as frequently noted, but most often not true in the modern era). The petition points out that there isn't a traditional circuit split, because (among other reasons), "[a]llotment lands lie almost entirely in the western States encompassed by the Eighth, Ninth and Tenth Circuits. Two of those circuits - the Eighth and Tenth - have now prohibited use of § 357 where an Indian tribe has acquired an interest in the allotment land." Pet. at 21.

For us eminent domain lawyers, the most interesting part of the petition begins on page 22 ("'Condemnability' Is an Attribute of the Land."), which argues that what is important is the land, and not who owns it.

The petition also raises the indispensable party issue as its second question presented, even though the Tenth Circuit declined to consider it. Just condemn the land without the Nation.

Update: the Court denied review. But this issue is coming back, for sure.

4. Georgia's Eminent Domain Requirements Are Not The Pirate's Code: "Before" Means "Before," And Bad Faith Need Not Be Shown When Condemnor Didn't Strictly Comply With The Statute

Here's a decision which we've been waiting for in a case we've been following since it was decided in the intermediate appellate court, involving Georgia's "landowner bill of rights."

In *City of Marietta v. Summerour*, No. S17G0057 (Oct. 30, 2017), the Georgia Supreme Court concluded that when a statute says "before the initiation of negotiations" with a property owner, the condemnor must "establish and amount it

believes to be just compensation," and "shall make a prompt offer" of that amount to the owner, and that the agency "shall provide" the owner a written statement of how it determined that amount—that it means just that. "Shall" means must, and "before" means before. So the failure of the agency to provide those things at the right time—even though it did so later, and there was no showing of ill will or bad faith—meant that the taking was invalid.

The facts are pretty straightforward. The city condemned a grocery store for a recreation center. After multiple attempts to contact the property owner and multiple offers of compensation, the city and the owner finally began the negotiation process, during which Summerour asked the city to produce a summary of its appraiser's report as required by the Georgia statute. The city eventually provided the summary, and its full report. The parties still could not agree, and the city instituted condemnation. But although the city eventually provided the summary, it did not do so initially.

The court of appeals agreed with the owner that the city was required to have complied with the statute's requirement that the condemnor provide a summary of the basis for its calculation of just compensation before starting the negotiation process, and remanded the case to the trial court for a determination whether the city had acted in bad faith. The Georgia Supreme Court agreed on the result, but tweaked it a bit, concluding that bad faith, *vel non*, wasn't an element, and it didn't matter what the city's intent was. The point of the statute was to protect property owners, and procedural and timing requirements like these are there for a purpose.

The court, correctly in our view, read the statutory requirement strictly, and held that the statute mandates a condemnor provide the summary "before the initiation of negotiations." Here, the city only provided the summary years after initially contacting Summerour about the acquisition of his property, and after Summerour had asked the city for it. Not good enough.

Anyone who has followed our writings for any length of time knows that we appreciate the scene from one of the *Pirates of the Caribbean* films where Geoffrey Rush's character notes that in his view, the "Pirate's Code" isn't so much a set of requirements, but "more like what you'd call guidelines than actual rules." Too often, we have experienced condemning agencies treating the requirements of the applicable eminent domain statutes more like guidelines, than actual rules that cabin their authority. Their approach seems to be "we're going to get the property anyway, so what's the difference whether we strictly stick to the rules?" We think, as the Georgia court concluded, that eminent domain statutes are strictly construed

for a reason: with great power comes great responsibility, and when exercising a power to deprive an owner of their property, the agency has a supreme obligation to follow the rules "just so." It's a point that we often make with courts, but that we note is honored more regularly in the breach than in the actual observance.

But as the Georgia court rightly noted, the requirements of the statute aren't there simply to make humbug for agencies, but "to protect property owners from abuse of the power of eminent domain at all stages of the condemnation process." Slip op. at 13. The only real difference the Supreme Court had with the court of appeals' approach is that it asked too much: "And dismissing the condemnation petition is an appropriate remedy where a condemning authority has acted outside its authority by violating the law, irrespective of bad faith." Slip op. at 27. Having failed to adhere to the statue, the city's condemnation was ultra vires.

Those of us outside of Georgia where this opinion is not binding precedent should still take a close read of the case. We think other courts will be positively influenced by the court's approach and its analysis, even if your eminent domain code doesn't have exactly the same language.

5. DOT Can't Condemn Land It Has Already Deemed To Be Taking In Inverse Case

Here's the latest "Map Act" case from North Carolina, one that touches a bit on the metaphysical side because it gets into the question of whether an ongoing inverse condemnation case in which the N.C. Supreme Court has already ruled that property was taken (although it did not determine the interest taken), prevents the government from instituting a direct condemnation lawsuit to short-circuit the case.

In *Dep't of Transportation v. Stimpson*, No. COA17-596 (Mar. 20, 2018), the N.C. Court of Appeals held that the DOT could not institute an eminent domain action to take land that it had already been deemed to have taken -- or be taking -- in an inverse condemnation action.

The facts of the case are pretty straightforward. North Carolina's Map Act (as we detailed here) allows the DOT to designate land for future highway acquisition and prohibits development in the interim. The N.C. Supreme Court held the restrictions constitute a taking of the owners' property, and that the taking in these cases occurred when the DOT recorded the corridor maps which restricted the owners' use of their land. Land banking doesn't cut it.

On remand, the trial court ordered the DOT to "comply with the requirements of Article 9, Chapter 136, 'Condemnation,' for all the plaintiffs,

including filing plats, obtaining appraisals, and depositing good faith estimates of the value of the properties involved." Slip op. at 3. Although the relief the owners seek in the inverse case is compensation for the taking of their fee simple interests, the trial court reserved ruling on what property interests had been taken and the amount of compensation.

In response, the DOT appealed (and lost), and then filed a direct condemnation action to take the fee simple interest in the properties. It made a deposit, which normally would have vested title in the DOT under N.C.'s quick take procedure. You told us to take the property, so we did.

The court dismissed the condemnation, agreeing with the owners that the property had already been taken (or maybe more accurately, the Supreme Court had already held that property had been taken, and the trial court was in the process of determining exactly what property), and that you cannot have two ongoing cases in which the same property is being condemned. ("Abatement" for all you common law types.)

> In his motion to dismiss, Defendant argued that, because he filed an action for inverse condemnation pursuant to N.C.G.S. § 136-111 on 9 May 2016, and because Defendant's inverse condemnation action concerns substantially the same parties and subject matter as DOT's 13 December 2016 direct condemnation action, DOT's action must be abated.

Slip op. at 11.

The Court of Appeals affirmed, rejecting the DOT's argument that the property, issues, and relief are different in the two cases:

> DOT fails to convey to this Court any utility in initiating a condemnation action concerning a property already subject to a condemnation action, nor how DOT's action could result in anything other than confusion and delay – as is currently the situation for the Property, as well as the properties involved in the companion appeals. We hold that the prior pending action doctrine applies in this case, and on these facts Defendant's Action served to prevent DOT from proceeding with a direct condemnation action pursuant to N.C.G.S. § 136-103.

Slip op. at 16.

The court held that the DOT can't use an eminent domain action to "derail" an ongoing inverse case (which was initiated precisely because the DOT did not condemn on its own). Responding to the DOT's argument that it is condemning fee simple title, but the trial court has not yet determined which property interests were inversely condemned, the court noted that the DOT could have brought a counterclaim in the inverse case to take whatever interests were not taken by the application of the Map Act:

> However, DOT instead continues to seek to proceed by its own direct condemnation actions – actions it only decided to file after years of litigation involving hundreds of plaintiffs who have been seeking the same resolution through inverse condemnation actions, some of which were filed over seven years ago. We do not believe the General Assembly contemplated Article 9 to permit direct condemnation actions and inverse condemnation actions concerning the same property to be litigated simultaneously, and we find nothing in Article 9 or elsewhere granting DOT that right. We therefore affirm the 23 February 2017 order dismissing DOT's 13 December 2016 action.

Slip op. at 19. You say "taking," I say "taken." Either way, court says you can't have two.

Will there be more? Who knows, but these Map Act cases just keep on giving, so we would not be surprised.

6. When Is A Taking For Private Benefit Compensable? When It's A Statutory Inverse Condemnation In North Carolina

If the headline of this post throws you off a bit, not to worry: it was designed to. Because the situation in the North Carolina Supreme Court's recent opinion in *Wilkie v. City of Boiling Spring Lakes*, No. 44PA17 (Mar. 2, 2018), turned the usual arguments on their heads.

In condemnation cases, if the owner objects on the grounds that is being accomplished for a private -- and not public -- use or benefit, the remedy they seek is to stop the taking or unwind it. We can't recall a case in which an owner sought compensation for what was claimed to be private taking. The question in the Wilkie case was whether that same approach applies in inverse condemnation cases --

those in which the owner alleges that some government act other than an affirmative exercise of the eminent domain power has taken private property.

In that case, the owners' land was partially flooded by the city when it (at the behest and for the benefit, in part, of the owners themselves) raised two pipes which drained a city-owned lake. Raising the drain pipes caused the lake's water level to rise, something the owners anticipated would be a good thing. But apparently not so; they had a change of heart and later asked the city to restore the pipes' original height. Eventually, the city did so, and the drain pipe modifications were removed. But this didn't restore the lake's water to its pre-modification level. The owners sued for compensation for the flooding, alleging that as a consequence of the pipe modification, they lost 15%-18% of their lakeside land, which was now lake-bottom land.

They sued under a North Carolina statute (N.C.G.S. § 40A-51) which recognizes inverse condemnation:

> If property has been taken by an act or omission of a condemnor listed in G.S. 40A-3(b) or (c) and no complaint containing a declaration of taking has been filed the owner of the property, may initiate an action to seek compensation for the taking.

That section also sets out the procedure in these actions.

Here's the key trial court finding: it concluded that the taking by the city was for private benefit (in part, the plaintiffs themselves):

> After conducting a hearing pursuant to N.C.G.S. § 40A-47 for the purpose of resolving all disputed issues between the parties other than the amount of damages, if any, to which plaintiffs were entitled, the trial court entered an order on 5 November 2015 determining that the installation of the elbows "for the benefit of, and at the sole request of, residents around the lake" elevated the lake level and "encroached upon and submerged" plaintiffs' property and resulted in a "taking of [plaintiffs'] property without just compensation being paid."

Slip op. at 4. The court concluded the owners were entitled to compensation under the statute.

But wait, the city argued, this is a private taking ... we don't owe compensation for a taking that is not for public use or benefit. Slip op. at 45 ("In seeking relief from the trial court's order before the Court of Appeals, defendant

argued that plaintiffs' claims should be dismissed because a claim for inverse condemnation does not lie unless plaintiffs' property is taken for a public use or public purpose."). The public use requirement is baked into the statute, the city claimed, so even if the statute doesn't require that an inverse taking be accomplished for public benefit, that's an inherent precursor to liability.

The trial court disagreed, but the N.C. Court of Appeals reversed, concluding that public use is a necessary prerequisite to a "taking," and "there can be no inverse condemnation when property is not taken for public use." The court analogized inverse condemnation to actions in eminent domain, and correctly noted that eminent domain can only be exercised for actions that result in the public use of private property. Slip op. at 6-7.

The N.C. Supreme Court granted discretionary review and reversed, relying on the fact that the statute never mentions public use or purpose as an element of an inverse taking claim. Notably, the opinion frames the issue purely in terms of the statute. See slip op. at 11 ("The essential issue before us in this case4 is whether a property owner seeking to assert a statutory inverse condemnation claim pursuant to N.C.G.S. § 40A-51 must show that the condemnor acted to further a public purpose."). The opinion stuck to the statute's plain text and the legislature's intent, focusing on the city's claim that liability is limited in the statute to entities which posses the power of eminent domain. In the city's view, if only entities with that power can be liable under the statute, and those entities can only exercise the power to take for a public use, then it follows that public use is an element of an inverse condemnation claim, QED.

Not so, held the court, the statute is only meant to identify which entities can be liable, "and nothing more." Slip op. at 15. The legislature's intent was to provide compensation when property had been taken, and "it seems to us that a decision to provide a claimant whose property has been taken for a public purpose with a statutory inverse condemnation remedy while depriving a claimant who has suffered the same injury for a non-public purpose of the right to utilize that statutory remedy," was not logical. Slip op. at 16. seems inconsistent with the likely legislative intent.

Finally, the court rejected the city's argument that the term "taken" was used in the statute as a term of art, meaning a taking for public use or purpose:

> Although this Court's decisions sometimes utilize "taking" and "taken" in ways that are at variance from their ordinary meaning, this Court has never gone so far as to hold that "taken" invariably means "taken by the power of

> eminent domain" or that "taking" means nothing more or less than a "taking for the public use."

Slip op. at 18 (citations and footnote omitted).

One caution. The court's analysis was solely under the North Carolina statute, and did not analyze directly whether an inverse claim under either the U.S. or N.C. constitutions would similarly not require public use as an essential element of a property owner's complaint. Other jurisdictions require it when constitutional claims are raised.

But even if you are in a jurisdiction without a similar statute, we recommend reading the entire opinion, as it is well worth your effort.

7. Louisiana Supreme Court: Port Can Take Docking Facility To Run It Itself, But Fell Short Of Fully And Fairly Compensating Owner

Here's an important case we've been following out of Louisiana. The case is an appeal to the Louisiana Supreme Court in an expropriation case from a quick-take of a Mississippi River docking facility downriver from New Orleans. The Port took the entire VDP facility, made no change in how the property was used, and eventually turned over operation of the facility to a "hand-picked" private operator.

In *St. Bernard Port, Harbor & Terminal District v. Violet Dock Port, Inc*., No. 2017-C-0434 (Jan. 30, 2017), the Louisiana Supreme Court upheld the taking of VDP's property by the Port so that the Port could run it itself. The owner challenged the power to take, as well as the compensation awarded. The Supreme Court held that the Port has the power to take the docking facility so that the Port could operate the facility:

> Consistent with the authority given to public ports to expropriate property, the trial court made a factual determination that the Port's purpose for expropriation was to "build and operate a terminal to accommodate transport of liquid and solid bulk commodities into national and international commerce to and from St. Bernard." This purpose falls squarely within the constitutional definition of "public purpose" for public ports.

Slip op. at 10. The court interpreted the "business enterprise clause" of the Louisiana Constitution, concluding that the Port's expropriation was not for the purpose of operating VDP's facilities or "halting competition with a government enterprise." Id. Or at least the trial court was not "manifestly erroneous" when it concluded the clause didn't apply as a factual matter. The court also rejected the

owner's argument that the real purpose was to take over VDP's valuable Navy contracts and to halt competition. Not so, held the court, the record suggested the real reason for the taking was because the Port was at capacity and "sought to expand its cargo operations."

As the Church Lady would say, "how convenient!"

But on the issue of just compensation, the court agreed with the owner that it was undercompensated. The owner argued that because its property is unique, the lower courts' sole reliance on fair market value as the only applicable valuation standard was wrong, and that evidence of replacement cost should have been admitted. (We helped write the Owners' Counsel amicus brief which focused on the just compensation issues, arguing that replacement cost, not fair market value, was the correct measure of compensation.)

The Louisiana Constitution provides not only for just compensation, but also require the owner be compensated for "the full extent of loss." The court focused on the trial court's decision to accept the Port's expert's testimony:

> Here, we find the trial court used the incorrect standard for evaluating experts' valuation testimony. Explaining why it accepted the Port's expert testimony rather than Violet's, the court stated: "It is the opinion of this Court that it does not have the discretion to 'split the baby' and arrive at a valuation somewhere in between" the two expert opinions. This is erroneous. A trier of fact is not required to make a binary choice and accept one side's testimony in its entirety, but is instead empowered to weigh strengths and weaknesses of expert testimony. To the extent the trial court held otherwise, this is legal error. ... Further this error was prejudicial to Violet insofar as the trial court set just compensation in the exact amount put forward by the Port's experts.

Slip op. at 15.

8. Anti-Eminent Domain Protester Persecuted Because Of His Political Opinions

Mr. Song's tale is harrowing: His property targeted for redevelopment. Offered compensation, but he believed that local regulations required payment of at least 45% more. When he attempted to negotiate, local officials said no deal. So he organized a protest at which he and his neighbors held signs that said things like "opposed to forced demolition." They also "chanted slogans like 'give me my fair compensation,' 'please do what is just,' and 'return to me what is mine.'"

For his troubles, he eventually was arrested, charged with "interfering with official duties." (This tale, as you may have already deduced, takes place in the People's Republic of China.)

During the three days Song was jailed, police tortured and beat him, and encouraged his cell mates to do the same. Song was forced to spend an entire night in a squatting position. The police also interrogated him about his alleged crime. When asked why he had gathered the crowd of protestors, Song maintained that the compensation the government had offered was not fair and was inconsistent with government regulation.

When Mr. Song did not knuckle under, "police beat him with a baton and electric baton until he passed out. Song suffered multiple injuries from the beatings, to the point that he was unable to walk." His family eventually bailed him out. He came to the United States on a visitor visa and sought asylum.

The Ninth Circuit's opinion in *Song v. Sessions*, No. 14-71113 (Feb. 15, 2018) dealt with whether Mr. Song's actions fleeing his homeland were because he was being persecuted for his political views, or whether they were "motivated by a desire for increased compensation for his property," as the Board of Immigration Appeals concluded. The court noted that everyone agreed Mr. Song had been persecuted. But under federal law, a claim for asylum must be based on a person's actual or imputed political opinions.

The court first concluded that it didn't matter what Mr. Song's actual motivations here were, because it was enough that the local officials who persecuted him attributed a political opinion to him:

> From the government's perspective, Song was the leader of a large group of local residents protesting the government's eminent domain policy. Song organized over one hundred people to block the entrance of a government building. He identified himself as a leader of the protest and told a government employee that the protestors were there specifically because they were subject to the government's eminent domain policy. He refused to disperse the crowd until the residents' concerns about the forced demolition of their building were heard. The Chinese government was familiar with such protests; the 2010 Human Rights Report confirms that forced relocation protests were "common" and that there was "widespread" animosity toward

> forced demolitions. It was in this context that government officials approached Song.

Slip op. at 10. The officials had acknowledged this when they accused Mr. Song "of holding anti-government views in response to Song's assertion that the compensation he was offered was not consistent with government regulation." Slip op. at 11.

The court concluded that this was an actual or imputed political opinion: "[a]ccordingly, we find that the record compels the conclusion that the government imputed an anti-eminent domain opinion to Song, and persecuted him for that opinion.being 'anti-government.'" Slip op. at 12. Political opinions are not just beliefs about electoral politics or formal ideology or action, but includes claims for more compensation when property is being expropriated, and the natural actions which flow from that:

> The record makes clear that Song not only sought additional compensation for himself, but also staged a public protest of more than one hundred neighbors and a sit-in refusal to vacate his building, accompanied by a statement that he would die for the cause, in opposition to the demolition. The IJ and BIA narrowly focused on Song's "desire for increased compensation for his property" without taking into account the full spectrum of Song's actions.

Slip op. at 12.

Denial of asylum vacated, case sent back for consideration of whether Mr. Song met the other elements of the claim.

This case highlights two points. First, property rights are civil rights, and standing up for your property rights is a political stance. Think about that any time you hear people criticizing those who object to the taking of their property by accusing them of merely trying to leverage more compensation. There is often a lot more going on in these cases than just merely money. This apparently wasn't Mr. Song's home, it was a "building in which Song had owned a commercial unit since 1997." Slip op. at 4. But the climate in which he operated was charged:

> Forced demolition was the leading cause of social unrest and public discontent in China in 2010. Affected residents often were not paid market value for their property, and sometimes received even less compensation than the government initially promised. Nearly 70% of respondents in one study reported that they had encountered problems with demolition and relocation,

> either relating to compensation or forced eviction. Government officials frequently colluded with property developers to pay those subjected to forced eviction as little as possible. Yet few legal remedies were available to displaced residents, local officials sometimes retaliated against those who tried to protest.

Slip op. at 4-5 (footnote omitted). We suspect that the deprivation of his dignity, and not money, was his biggest beef.

Second, even though the PRC has made some gains in the property rights arena, the idea of "property rights" in a officially socialist country remains anathema. It may claim to support property rights and private ownership, but the reality seems far different. As the above quote from the opinion notes, this stuff is the source of hundreds if not thousands of similar protests each year, most of which go unreported and never make even the back pages of western media. But if the plot line of "*Wolf Warrior 2*," China's biggest moneymaking movie of all time -- in which the Rambo-ish main character is drummed out of the People's Liberation Army because he supported a village objecting to eminent domain -- can be driven by this issue, you know this is a much bigger thing than we realize.

B. Just Compensation and Damages

1. Florida: Highest And Best Use Doesn't Require Owner Have More Than "Conceptual Plans"

In *City of Sunny Isles Beach v. Cavalry Corp.*, No. 3D15-1420 (Jan. 25, 2017), the Florida District Court of Appeal affirmed an eminent domain judgment and an award of just compensation, concluding that the trial court was within its discretion when it allowed the landowner to present evidence of "conceptual" site plans to establish the property's highest and best use.

The city took property for a bridge, and "[f]or all the years since the current owner acquired title to the property and before, there has been no effort by an owner to develop the canal property." Slip op. at 3. But at trial, the owner "contended at trial, based upon conceptual site plans prepared by one of its testifying experts, that the highest and best use for valuation of the injury to the property caused by the taking is that of a private docking facility for adjoining condominiums or homes." *Id.*

The city, however, argued this highest and best use was created for trial, and because the owner didn't take any affirmative steps to actually develop the

property, the jury shouldn't have been allowed to hear of the owner's conceptual plans. The trial court disagreed, and the jury awarded the owner the precise amount sought.

The court of appeal affirmed. It noted that the appraisers tried to use the comparable sales approach to valuation, but could not find comparable properties. Thus, the owner's appraiser used the discounted cash flow/development approach. The court concluded that conceptual plans are "plainly" admissible to support the appraiser's testimony.

The court rejected the city's argument that this was too speculative, concluding the owner "did not seek compensation based upon what could or might be done to make the land more valuable and then solicit evidence on what it might be worth," which would have been speculation. "Rather," the court held, "the testimony [] adduced [in the case before us] was based upon the actual value of the property at the time of the taking if sold for development [as a private docking facility], its highest and best use." Slip op. at 8.

> "We note in passing that the valuation methodology used by the Owner in this case, relying on a highest and best prospective use, even though the Owner has no plans to sell the property or use it for that use, is precisely the same strategy long employed by county appraisers in appraising property for tax assessment purposes." Slip op. at 9-10.

2. North Carolina: Evidence Of Rental Income From A Billboard Is Admissible In Just Comp Trial

As the title of *Dep't of Transportation v. Adams Outdoor Advertising of Charlotte LP*, No. 206PA16 (Sep. 29, 2017) might indicate, this is a condemnation case involving billboard valuation in North Carolina. But the issues in the case go much deeper, we think.

On the surface, the North Carolina Supreme Court resolved a question of which state statute applies when the DOT acquires land on which an income-generating billboard is located: a statute which requires DOT to pay "fair market value of the property at the time of the taking" when it takes property for highway purposes (Article 9), or a statute which requires inclusion of the "value of the outdoor advertising" in compensation when certain prohibited billboards on leased land are condemned (Article 11) in order to remove them. The billboard was one of those now-prohibited billboards (it was a nonconforming use, since it was ok when first installed), and DOT took the land for a highway-widening project.

The DOT, naturally, took the position that Article 9 governed, and a billboard is personal (moveable) property, it was taking the land on which the billboard sat for highway improvement purposes and not to remove an nonconfirming billboard. It therefore instructed its appraiser not to account for the substantial income which the billboard would have generated. The owner argued that the specific statute controlled over the more general. But the court agreed with DOT, concluding:

> DOT therefore was not exercising its authority under Article 11 to acquire prohibited outdoor advertising and all related property rights by condemnation; it was exercising its authority under N.C.G.S. § 136-18(2)(e) to condemn property in order to widen a highway. After all, even if the billboard had been conforming, DOT still would have condemned the leasehold interest because it needed the property for its highway-widening project. So the fair market valuation provision specific to Article 11 does not govern this condemnation proceeding; the general fair market valuation provision in Article 9 does instead.

Slip op. at 10 (footnote omitted). Things were not looking too good for the property owner's claim for lost income from the billboard.

But don't give up just yet. Read on. The court held that under the "fair market value" standard of Article 9, the owner was entitled to just compensation for the rental income from the billboard. Now the court didn't phrase it that way, and instead held that it was only valuing the land and not the billboard. But the value of the land was tied up with the billboard, so we end up in pretty much the same place.

> So the question here is whether a billboard owned by Adams Outdoor, and situated on the site of Adams Outdoor's leasehold interest, would be a factor that a willing buyer and a willing seller would consider when agreeing on the price of that leasehold interest. We are not considering the fair market value of the physical billboard structure as compensable property; we are considering only whether any value that the presence of the billboard adds to the value of Adams Outdoor's leasehold interest should be a factor in determining the fair market value of that interest.

Slip op. at 11. Okay, got it. Same difference, as they say, right? The court made a fine distinction. It court agreed with the court of appeals' conclusion (like Texas, for example), that billboards are moveable property, a trade fixture, and thus noncompensable. The Supreme Court did agree it qualified as a "trade fixture," and that the billboard itself was not compensable in condemnation. Slip op. at 13 ("So we are not saying that the trier of fact should add the fair market value of the physical billboard structure to the amount that it determines to be the fair market

value of the leasehold interest."). But what should be considered in a just compensation trial is the value which the billboard added to the land.

Again, a subtle distinction, and not one we are sure makes a whole lot of sense. But the law is made up of fine distinctions that lead to differing results, and we must say that the result the court reached certainly seems like a just one.

Here's the money quote. Kind of long but worth reading, since it gets the sense of these things right, in our opinion:

> The value that the billboard added to the leasehold would not just come from rental income, which we discuss separately below. It would also come from the inherent value of the billboard's presence on the property: that is, from the potential to rent it out to advertisers even if it is not currently being used in that way, and from the ability to use the billboard to communicate messages to an audience of approximately 85,000 vehicles per day. Certainly a willing buyer who is purchasing a leasehold that can be used only for outdoor advertising purposes would consider whether the property actually had a billboard on it in determining the price that he or she was willing to pay for the leasehold interest. And certainly a seller who owns a grandfathered-in nonconforming billboard on a leasehold that can be used only for outdoor advertising purposes would consider the presence of that billboard on it in determining the price for which he or she was willing to sell the leasehold interest. We therefore hold that evidence concerning the value that the billboard added to the leasehold interest is admissible to help the trier of fact determine the fair market value of that interest.

Slip op. at 12.

The court also addressed some other nuances in "business losses," concluding:

> We conclude that (1) the fair market value provision of Article 9, not Article 11, governs this condemnation proceeding; (2) the value added by Adams Outdoor's billboard may be considered in determining the fair market value of Adams Outdoor's leasehold interest; (3) evidence of rental income derived from leasing advertising space on the billboard may be considered in determining the fair market value of the leasehold interest; (4) the value added to the leasehold interest by the permits issued to Adams Outdoor may be considered in determining the fair market value of the leasehold interest; (5) the automatic ten-year extension of the lease may be considered in determining the fair market value of the leasehold interest, but the options to renew the lease after the automatic ten-year extension may not be; and (6) the bonus value method evidence offered by DOT may not be considered in determining the fair market value of the leasehold interest.

Slip op. at 24.

Three Justices dissented, arguing that the lost income from the billboard cannot be considered part of compensation for the taking. They would have held that the billboard could have been removed and was thus personal property, and should not have been considered by the majority as part of the value of the land on which it sat.

3. Hawaii Supreme Court On Larger Parcel, Deposit

The Hawaii Supreme Court issued a unanimous opinion that is worth reading because it clarifies three issues in eminent domain cases. The case involves three parcels on Kauai—one of which is owned by a fellow who has been a thorn in the County's side—which were condemned by the County for the expansion of a public beach park. The County was taking Parcels 49, 33, and 34. Sheehan owned 49; HRH, an entity incorporated in the Cook Islands, owned 33 and 34. Sheehan asserted his use of Parcel 49 stretched across 33, 34, and Area 51—a portion of another Parcel but not a separate record lot. He claimed to use Area 51 pursuant to an easement.

The owner sought damage for the severance of Parcel 49 from Area 51. He also challenged the "blight of summons" damages (also known inaccurately as "interest") on the final just compensation award. There was also a dispute after the County revised its appraisal downward, and then withdrew a portion of the deposit which it had made to secure immediate possession.

The Intermediate Court of Appeals held that Hawaii law requires that two parcels physically abut before a jury can consider them part of a larger parcel. The property owned by the condemnee was separated from the other parcel he claimed to use, and not physically connected. The condemnee claimed he used the two parcels together as a boat yard, and therefore the taking of his property damaged his use of the other.

Applying the "three unities" test, the ICA held that the owner "cannot satisfy the physical unity requirement" because the two parcels Petitioners claim to use together are separated by two others. *County of Kauai v. Hanalei River Holdings, Ltd.*, No. CAAP-14-0000828, slip op. at 31; 2016 Haw. App. LEXIS 224, at *10 (2016). The ICA asserted the "must touch" test was established by the Hawaii Supreme Court in *City and County of Honolulu v. Bonded Investment Co., Ltd.*, 54 Haw. 523, 511 P.2d 163 (1973), which, in the ICA's view, required "that all of the pertinent lots abut one another." Slip op. at 20.

The property owner applied for cert (we don't call them "petitions" in Hawaii, but rather "applications for certiorari"), and asked three Questions Presented:

First, "[m]ust two parcels physically abut in order for the jury to consider whether they are part of a larger parcel?" The second question challenged how the courts below calculated blight of summons damages, and whether the County had conditioned its okay of the owner's withdrawal of the deposit which the County had made to secure immediate possession. The final question was whether the County could reduce the deposit after it updated its appraisal of the property, and it lowered its valuation.

The County opposed the application.

The Supreme Court issued a very readable 50-page opinion. The short story is that it corrected the Court of Appeals' larger parcel analysis, holding that parcels didn't need to physically abut in order to be part of the severance damage claim. This was the argument we advanced in our amicus brief, so we're glad the Supreme Court agreed. But the court didn't disturb the judgment, and held that even under the correct analysis, the owner didn't prove any of the three unities.

To us, this is the most interesting part of the opinion (pages 19-28), and there's a good run down of the three unities test and larger parcel analysis in severance damage claims. The court correctly focused on unified use as being "the most important factor to this analysis," and held that three unity analysis isn't an "elements" test where all three are required, but are "factors" —

> Accordingly, we hold that when determining whether a claimant is entitled to severance damages under the three unities test as articulated in *Bonded Inv. II*, the three unities should be evaluated and weighed against one another as factors, and should not be viewed as essential elements. The unity of use should be accorded more weight compared to the unity of title and physical unity. Consequently, a lack of physical unity will not be dispositive of a condemnee's claim for severance damages. Therefore, the ICA gravely erred to the extent that it applied the three unities as elements and barred Sheehan from claiming severance damages as a matter of law because Parcels 49 and Area 51 are not physically contiguous.

Slip op. at 26. Check it out, the court has a good summary of the law nationwide in this part of the opinion.

As to the second and third issues, the court affirmed the court of appeals' rulings on conditional deposit, and the condemnor's ability to withdraw a portion of the deposit to reflect its lowered appraisal. The Supreme Court concluded that the

condemnor was not placing a condition on the owner's withdrawal of the deposit when it required the owner show it was entitled to compensation. This seems like a reasonable demand, and one which comes from the language of the statute: the withdrawing party has to show that it is an owner "entitled to compensation" before it can withdraw.

However, the court held that the deposit became conditional (and blight of summons damages began again) when the condemnor demanded that the owner indemnify it because it was a Cook Island corporation. The County said that an offshore owner meant that if the eventual jury verdict exceeded the deposit, the County wanted assurances that it would get the difference between the verdict and the deposit returned. The court held that making such demands as a condition made the deposit conditional. You can't do that, and the statute doesn't discriminate based on where the residence of the owner. Lacking an unconditional deposit, the owner was entitled to blight of summons:

> We therefore hold that a deposit made unconditionally at the outset may later become conditional if, after the initial unconditional deposit, the condemning authority opposes the withdrawal of the deposit to an entitled condemnee by imposing a subsequent condition upon the withdrawal of the funds.

Slip op. at 39.

Finally, the court concluded the County could withdraw a portion of the deposit to reflect its lowered valuation, because the condemnee would not be harmed by the withdrawal. If the property owner would be harmed, however—if, for example, the owner had already withdrawn the deposit or compensation had already been paid—or if the condemnor was acting in bad faith, that would be a different story:

> Accordingly, we agree with the ICA and hold that the court in an eminent domain proceeding has the discretion to permit a governmental entity to withdraw a portion of a deposit of estimated just compensation when the deposit has not be disbursed to the landowner, the government acted in good faith in seeking to adjust the estimate to accurately reflect the value of the property on the date of summons, and the adjustment will not impair the substantial rights of any party in interest.

Slip op. at 46-47.

All in all, an interesting end to an interesting case.

4. Wisconsin: "Special Benefits" In Eminent Domain Means "Uncommon Advantage," But Only Regarding Market Value

When the city condemned a portion of CED's property back in 2012 for a highway project (replacing an intersection with a roundabout), the city's appraiser testified that the taking did not confer any "special benefits" to CED's remainder parcel. Eventually, CED and the city settled the case and the city paid agreed-upon compensation and severance damages.

Flash forward a few years, and to help fund the roundabout project, the city adopted a special assessment and tagged CED and other nearby landowners. Based on its street frontage, the city charged CED a total of $40k, asserting that CED's parcel had specially benefited from the improvement project by, among other things, "a substantial increase in accessibility, which includes safer, lower cost, and short travel time for customer, deliveries and employees. These special benefits are different in kind that those enjoyed by the public for through traffic." The city acknowledged there were also community ("general") benefits brought about by the project, but argued that the presence of specific benefits to CED's parcel allowed it to make the assessment.

CED appealed, asserting the project conferred only community benefits, pointing out that hey, during the condemnation, the city asserted the project did not confer any special benefits to CED's parcel, and arguing that the term "special benefits" has the same meaning in both Wisconsin's eminent domain code and special assessment statute:

> because the City conceded "special benefits" did not accrue to CED's property during the Wis. Stat. ch. 32 eminent domain action, the City forfeited the opportunity to assert "special benefits" during the later special assessment appeal.

CED also submitted evidence in the form of an appraiser who testified that the project did not confer any benefits, special or general, to CED's parcel. The city, by contrast, asserted the term "special benefit" has one meaning for purposes of eminent domain, and a different meaning when used in the special assessment statute. The trial court granted the city summary judgment because CED could not overcome the presumption of validity for assessments. The court of appeals agreed that the special assessment was reasonable as a matter of law.

In *CED Properties, LLC v. City of Oshkosh*, No. 2016AP 474 (Apr. 3, 2018), the Wisconsin Supreme Court held that the term "special benefit" means the same thing in the eminent domain code as it does in the special assessment statute. But (and this is a finer point), this doesn't mean the term is used the same in both statutes:

> CED and the City disagree on whether the term "special benefits" has the same meaning in both Wis. Stat. ch. 32 and ch. 66. CED argues that if it has the same meaning, then the City cannot take the position that no special benefits exist in a ch. 32 action but later assert special benefits exist in a ch. 66 action. We hold the term "special benefits" has the same meaning in both statutes, but that it is used differently in each context. Accordingly, the City is not barred from imposing a special assessment on CED's property to pay for improvements, provided the City establishes the improvements were local, conferred special benefits on CED's property, and were fair, equitable, and in proportion to the benefits accruing to the property. These issues involve questions of fact for the trier of fact to resolve.

Slip op. at 12.

Generally, "'[s]pecial benefits' means "an uncommon advantage."' Slip op. at 14. But in eminent domain, this advantage is linked to the market value of the property; in the special assessment statute, it is not linked. Thus, the court concluded:

> We conclude that "special benefits" has the same meaning in each statute, but the failure to raise the issue of special benefits in an eminent domain action does not necessarily preclude a municipality from levying and collecting "special benefits" via a subsequent special assessment. Notably, in an eminent domain action, only special benefits accruing to the property that affect its market value because of the planned improvement are required to be considered and used to offset the value of the property taken. Wis. Stat. § 32.09(3). In contrast, special assessments upon property may be levied and collected for special benefits conferred on the property by the improvement, regardless of the impact on the property's market value; Wis. Stat. § 66.0703 is silent on the subject.

Slip op. at 19.

So the city was not automatically precluded from claiming that a parcel is specially benefited by a project just because the city had claimed that it had not been benefited in an earlier condemnation.

But it did not mean the city's assessment here met all the requirements of imposing an assessment in the statute. The court held the city's earlier assertion that CED's parcel was not specially benefited should not have been ignored, and remanded the case to consider that fact, and others.

In other words, the city's earlier position, and CED's appraiser's affidavit contradicted the city's proffered evidence on special benefits, and revealed a dispute about a genuine issue of material fact, thus making summary judgment inappropriate. Slip op. at 31.

5. NC: Real Estate Broker Is Qualified To Testify About Fair Market Value

In *North Carolina Dep't of Transportation v. Mission Battleground Park*, No. 361PA16 (Mar. 2, 2018), the North Carolina Supreme Court confirmed that real estate brokers -- and not only appraisers -- can testify about the fair market value of condemned property.

The background is fairly routine -- the DOT condemned a portion of a tract of land for a highway project, made a $276,000 deposit which the landowner considered insufficient, and they went to trial. The owners asked a licensed real estate broker to testify about fair market value. He prepared a report which relied on the before-and-after method, and concluded that just compensation was $3.734 million.

The DOT sought to preclude him from testifying, arguing that brokers are limited by statute to preparing a report on probable selling price, and therefore could not testify as an expert regarding fair market value. The trial court agreed. The owners offered a different expert, who testified that compensation was $3.1 million. The jury returned a verdict for $350,000.

The owner's main contention on appeal was that the jury was entitled to consider the real estate broker's opinion of just compensation, but the Court of Appeals affirmed.

On discretionary review, the Supreme Court first rejected the DOT's argument that in order to testify, an expert must first prepare a report, and because real estate brokers are limited by statute to preparing reports on sales price, they

cannot testify about fair market value. The statute prohibits brokers from "prepar[ing] a broker price opinion or comparative market analysis for any purpose in lieu of an appraisal when an appraisal is required by federal or State law." Sounds like not good news for the owners.

But the court concluded that even if producing a written report were a prerequisite to offering an opinion (something the court assumed without expressly deciding), the statute quoted above doesn't govern brokers' conduct when testifying in court. That is governed solely by the rules of evidence and the qualifications of experts. If a witness qualifies under Daubert (and North Carolina's standard for expert testimony) "that standard is both necessary and sufficient." Slip op. at 7.

Because the broker-witness did not prepare his report under the authority of the statute, but in order to testify, the statutory limitation did not apply. The court noted that "under DOT's reading of the statute, subsection 93A-83(f) would bar a licensed broker from testifying about fair market value simply because he holds a broker's license—even when an intelligent layperson, without any license, could potentially testify about fair market value." Slip op. at 10.

The next question the court answered was whether exclusion of the broker's testimony was prejudicial. Of course it was, because even though his testimony "may not have resulted in defendants' receiving all of the compensation that they wanted, it almost certainly would have changed the jury's analysis, and therefore would have changed the final dollar figure announced in the verdict." The standard for what counts as prejudice when evidence is kept from the jury is pretty low, and the court concluded it was "improbable" for the jury to not have been influenced by his testimony. Slip op. at 12.

Finally, the court rejected the DOT's argument that because North Carolina's statute on how to calculate compensation and damages in partial takings requires a comparison of the before-and-after fair market value, the broker could only testify about price. The court concluded that maybe the DOT should have let the broker testify and then attacked his conclusion (which in the DOT's view could only be about price) because there's a difference between FMV and probable selling price:

> Fair market value, after all, is defined as "the price to which a willing buyer and a willing seller would agree. An analysis of probable selling price could take into account things that would not factor into an analysis of fair market value, though, such as individual motivations or hardships that might force either a buyer or a seller to accept a worse deal than he or she would if approaching the transaction willingly. In other words, fair market value and

> probable selling price are conceptually distinct, and an estimate of one cannot appropriately substitute for an estimate of the other. Indeed, DOT's main argument for excluding Mr. Collins' testimony is based entirely on the fact that subsection 93A-83(f) allows licensed brokers to estimate one but not the other in their BPOs and their CMAs.

Slip op. at 13 (citation omitted) (emphasis original).

Vacated and remanded. The jury is entitled to consider the broker's testimony, and he can testify about fair market value of the property.

6. "Buyback" Statute Requires Owner Pay Premium After Condemnor Devalues Property

Okay, we get it: the text of a statute is the text, and it says what it says. And Virginia's "buyback" statute—which says that if a condemning agency hasn't started the project for which property was condemned within 20 years, the agency must reconvey it to the owner upon demand—dictates that the owner must buy it back at the "original purchase price."

And the Virginia Supreme Court in *Kalergis v. Commissioner of Highways*, No. 161347 (Oct. 26, 2017) concluded that "original purchase price" means exactly tha0—the price for the property which the condemning agency paid back in the day, regardless of whether or how the agency altered the property in the intervening 20 years. And there's something about that conclusion that doesn't quite sit right.

There, VDOT acquired the property from Mr. and Mrs. Kalergis in 1994, taking about 1/2 of their 26-acre improved property for future use as a highway. The land was improved with a house, guest house, swimming pool, stables, fencing, and terraces. The appraisal valued the land at $286,110, and the improvements at $863,890, for a total purchase price of $1,150,000. VDOT tore out the house, guest house, swimming pool, stables, fencing, and terraces. But after 20 years, it had not used the land for the project, and the Kalergis eventually exercised their statutory right to demand VDOT reconvey the property to them at the "original purchase price."

In the Kalergis' view, that meant the price of the land. Because, after all, VDOT had removed all of the improvements. So they demanded that VDOT sell back to them at the original purchase price for the land, $286,110. Not so fast, argued VDOT, the "original purchase price" of the property back in 1994 was way

more, $1,150,000, and that's what you have to pay us in order to get the property back. That makes no sense, argued the Kalergis, that price was for the land plus the improvements, all of which you've destroyed?

The Virginia Supreme Court sided with VDOT, concluding that "original purchase price" means the amount the Kalergis paid, not the component parts of the appraised value. Whether that made sense or not didn't trouble the court, because the court is stuck with the text of the statute which says "original purchase price." That the court implicitly concluded the legislature meant to say something ridiculous was of no moment: "If the General Assembly had intended for courts to use the 'appraised value' instead of the 'original purchase price,' the legislature would have used that language in [the statute]." Slip op. at 5. The fact that the parts were appraised separately didn't matter, what mattered was the total price, regardless of how the agency had altered the property in the interim.

So the former owners have to buy back the raw land at about 300% more than VDOT originally purchased it for, all because the agency tore out the improvements.

Thus, the lesson from this case is for condemning agencies which don't want to be bothered by the statutory buyback provision to alter the land so that it wouldn't be worth it for the former owner to buy it back if the agency doesn't eventually use it. The lesson for property owners and their lawyers is to try and structure the original purchase price to not simply recognize appraised values, but perhaps force the agency to purchase each component separately, if that is possible.

Finally, we ask: is the result in this case really what the Virginia legislature intended when it adopted the buyback requirement? To us, this case illustrates the way that a statute which is well-intended cannot account for the myriad situations that could arise. Will the Virginia legislature revisit the statute in light of this case and tweak it? We'll see.

C. Attorneys' Fees and Costs

1. Oregon: Legislature Didn't Preclude Condemnee From Recovering "Fees On Fees"

Here's one about one of our favorite (sub)topics: attorneys' fees in eminent domain. Indeed, it is about what we consider a very interesting subtopic of the subtopic, the question of whether an owner can recover attorneys' fees for the efforts expended in recovering attorneys' fees, the aptly-named "fees on fees" question. We

did a case like this a few years ago in the Hawaii Supreme Court, and have been hooked ever since.

The opinion, *Tri-County Metro. Trans. Dist. of Oregon v. Aizawa*, No. S064112 (Oct. 5, 2017), is from the Oregon Supreme Court, and overall, may not be that relevant to your specific jurisdiction because it focuses on the court's interpretation of the Oregon fee-shifting statute and a rule of civil procedure. Thus, your mileage may vary back home. But we encourage you to review it anyway (even in a jurisdiction like ours where fee-shifting in eminent domain cases is only available when a condemnation fails or is dismissed by the condemning agency), because it is, we think, a good exemplar of how courts should approach a situation where a statute can be reasonably read more than one way, and the court is forced to rely on sources other than the text in order to confirm how the text should be read.

The short story is that in Oregon, "fees on fees" is generally an accepted thing, and a party can recover attorneys' fees expended in the effort to recover attorneys' fees. (Which seems right to us, if the goal of fee-shifting statutes is to make the party whole.) The question here was whether the Oregon legislature had deviated from the usual rule in condemnation cases that are settled by compromise, and not litigated. One way of reading the statute applicable to those circumstances was that the condemnor is only liable for pre-offer fees, because the statute only mentions pre-offer fees, and is otherwise silent regarding whether a condemnee can recover fees for efforts she undertakes after the offer of compromise by the condemnor. Here, the owner incurred post-offer attorneys' fees to recover attorney's fees. Got it?

"Ah ha!" argued the District, the statute expressly contemplates pre-offer fees, which means that all other fees are precluded. The owner didn't see it the same way, and argued that simply because the legislature recognized pre-offer fees, didn't mean it prohibited post-offer fees. The trial court, court of appeals, and ultimately the Oregon Supreme Court agreed, even while noting "[t]he text permits either interpretation." The court framed the issue this way:

> Does ORS 35.300(2) reflect a legislative intent to preclude a property owner who is entitled to pre-offer fees incurred in defending a condemnation action from recovering post-offer fees incurred in determining the amount of the resulting fee award?

Slip op. at 8. The court held it didn't:

> At this stage of the inquiry, our answer to that question is "no." As explained above, the text of ORS 35.300(2) identifies one type of fees that shall be included in a judgment (pre-offer fees incurred in litigating the merits of a condemnation action). It does not provide that only those fees may be included in the judgment, nor does it preclude a property owner from seeking other, related fees that derive from another source, such as ORCP 68. Authorizing an award of pre-offer fees incurred in litigating the merits of a claim does not preclude an award of a different type of post-offer fees that derive from some other source. Viewing the text of ORS 35.300(2) in the context of the attorney-fee cases that preceded it, we think that Noble has the better of the argument.

Id.

2. West Virginia: Relocation Act Attorneys' Fees Required Where Owner Sues To Compel Condemnation

West Virginia Dep't of Transportation v. Newton, No. 16-0325 (Mar. 7, 2017) was the second time that case had come before the West Virginia Supreme Court. The first time, the court held that the Department of Highways should have instituted eminent domain proceedings before it started removing Ms. Newton's limestone from her land. After she prevailed in her mandamus action, WVDOH did so.

As a result of the condemnation action, Newton was awarded nearly $1 million in compensation, and $250,000 in attorneys' fees for the mandamus and condemnation actions under the Uniform Relocation Act, which is incorporated into West Virginia law. The URA provides for fee shifting when an owner is forced to initiate a claim for compensation.

WVDOH appealed, arguing that hey, we condemned Newton's property (after she won her mandamus action), so she can't get fees. Slip op. at 8 ("Maintaining that the condemnation action was filed in a timely manner, the DOH asserts that 'the inquiry into whether Ms. Newton is entitled to associate litigation costs should end with a simple review of the caption of this case,' which reads West Virginia Department of Highways v. Newton.' In other words, the DOH contends that because it ultimately filed the eminent domain proceeding, there was not inverse condemnation."). Paging Mr. Rosten! The court rejected the argument, holding that DOH didn't really intend to institute condemnation proceedings, but was forced to by her mandamus action.

It didn't matter that Newton's mandamus action (which sought to compel WVDOH to institute condemnation proceedings) and not a formal inverse

condemnation case. Under West Virginia law, "that is the only mechanism available to an aggrieved property owner in this state who believes his or her property has been damaged or taken without compensation." Slip op. at 11. "Thus," the court concluded, "the mandamus and eminent domain proceedings constituted an inverse condemnation action[.]" Slip op. at 12. Besides, WVDOH acted in bad faith. Fees awarded.

But (and there's almost always a "but" isn't there?), the court sent the case back to the trial court for a recalculation of the amount of fees to be awarded. Newton retained her lawyer on a contingency fee, and the court concluded that the URA requires a "reasonable" fee, and thus the contingency arrangement "cannot be the sole basis for determining" the amount of the fee award. Slip op. at 18. Since the trial court had not undertaken the fact-driven analysis (twelve factors!) which West Virginia case law requires to determine a reasonable fee, the Supreme Court sent the case back for that determination.

II. Regulatory Takings and Inverse Condemnation

A. Inverse Condemnation or Tort?

1. Idaho: You Aren't Special, Just Because You Had Your Property Taken

In *Ada County Highway District v. Brooke View*, No. 43452 (May 23, 2017), the Idaho Supreme Court held that construction damage caused by the Highway District to property adjacent to -- but not part of -- a road project for which it took property, was not covered in the condemnation case as damage caused "by reason of ... the construction of the improvement." During construction of the highway widening project, the county damaged a wall belonging to the condemnee.

The court held that this type of damage was not part of the valuation case in eminent domain, but was covered by tort law. Thus, the property owner could not claim that the cost to repair the damage was part of just compensation and damage, but had to sue the county in a negligence action. The Idaho statute on which the property owner relied would seem to include construction damages as part of just compensation:

> If the property sought to be condemned constitutes only a part of a larger parcel: (a) the damages which will accrue to the portion not sought to be condemned, by reason of its severance from the portion sought to be condemned, and the construction of the improvement in the manner proposed by the plaintiff...

Idaho Code § 7-711 (emphasis added).

The court concluded that the italicized text above didn't mean that a condemnor would be liable for the damages caused by the "method" of construction, but only in the "kind of improvement" to be built. Slip op. at 8. That's a pretty fine distinction, and one we're not really sure how to unwrap.

Ultimately, however, what seemed to convince the court was the nature of eminent domain actions as compared to tort claims for negligence. The point of eminent domain, according to the court, is valuation of the property on the date of the taking (in Idaho, the date of summons). Which means that injury to property incurred after the date of summons isn't included. "There are many occurrences during a construction project that could possibly injure the remaining property, depending upon the nature of the remaining property and other factors. When the summons was issued, one would not know whether the remaining property would be injured by something that may later occur during the construction process or the extent of such possible injury." Slip op. at 9.

The court held that if it were to allow the condemnee to recover post-summons damages to its property caused by the project, that would give property owners in eminent domain an unfair advantage over owners whose property was damaged by a project, but whose property wasn't subject to eminent domain. That a tort claim may be fruitless didn't much concern the court:

> Brooke View next asserts that if just compensation does not include the damage to the Wall, it would be inequitably left without legal recourse because it would be unable to prevail under a tort theory. This Court takes no position as to whether Brooke View might be able to recover in a tort action. To make such a determination would be improper, especially considering that the district court specifically forbade the parties from presenting evidence that would be relevant in a negligence case. However, whether Brooke View could prevail under a tort theory does not dictate whether limiting Brooke View to tort theories is equitable or inequitable. To the contrary, our interpretation of Idaho Code section 7-711 leaves Brooke View in exactly the same position as any other party whose property is damaged during a road improvement project.

Slip op. at 14.

Yes, but it sounded better in the original French: "*Ils y doivent travailler devant la majestueuse égalité des lois, qui interdit au riche comme au pauvre de coucher sous les ponts, de mendier dans les rues et de voler du pain*" (the law, in its

imperial majesty, prohibits the rich and the poor equally from sleeping under bridges, begging in the streets, and stealing bread).

Property owners who had their land seized and damaged should be in no better position that the other poor saps whose property was merely damaged: "The fact that neighbor A had a small part of property taken should not separate her from neighbor B when it comes to bringing claims for the same damage caused the same way." *Id.*

2. MR-GO, Katrina Flooding: Inverse Condemnation And *Schlimmbesserung* At The Federal Circuit

When you a federal takings plaintiff in the Federal Circuit and you pull Judge Timothy Dyk on your panel, your heart sinks. More so when he aggressively questions you in oral argument. And when you see he has written the opinion, you know it's game over at this level.

Because we can't remember a single case in which he's ever held for a property owner in a regulatory takings or inverse case. He just doesn't like property owners and their takings claims, apparently. His last big decision on flood takings, Arkansas Game and Fish, adopted a per se rule that any flooding which the owner could not prove was "permanent" is categorically immune from takings liability. His opinion for the Federal Circuit was reversed unanimously by the Supreme Court, in an opinion by Justice Ginsburg, which alone should tell you something.

Well, Judge Dyk is at it again with a flooding case, a fascinating case we've been following, the just compensation claim by victims of the disastrous Katrina flooding against the federal government.

In February, a three-judge panel of the Federal Circuit held oral arguments considering the feds' appeal from the judgment of the Court of Federal Claims holding the U.S. liable for a taking, and determining compensation. After listening to the arguments, we had little doubt that if Judge Dyk was the one assigned the majority opinion, it would not be a decision favorable to the property owners.

The Judge Dyk-authored opinion, issued by the court late in April 2018, bears out our prediction: property owners lose. No taking, because the Katrina flooding caused mostly by the federal government's construction and maintenance of a navigation project, the Mississippi River Gulf-Outlet canal (known as MR-GO), could only result in tort liability for which the federal government has already been

determined to be immune. MR-GO was an attempt to improve navigation, and it obviously wasn't the sole cause of the flooding, but by all accounts it simply ended up worsening dramatically and magnifying the effect of Katrina.

Schlimmbesserung: to worsen by improvement.

But to the Federal Circuit, this was at most a case of negligence, not takings.

This despite very comprehensive rulings by the Court of Federal Claims on both takings liability, and just compensation. We won't go over the CFC's reasoning here (please read the posts on the decisions for more), and we are on the run today, so don't have time to go into the details of the Federal Circuit's opinion reversing in favor of the government, but for now leave you to read the court's relatively short opinion, which starts this way:

> We conclude that the government cannot be liable on a takings theory for inaction and that the government action in constructing and operating MRGO was not shown to have been the cause of the flooding. This is so because both the plaintiffs and the Claims Court failed to apply the correct legal standard, which required that the causation analysis account for government flood control projects that reduced the risk of flooding. There was accordingly a failure of proof on a key legal issue. We reverse.

That's a bit disingenuous, because the remainder of the opinion doesn't so much focus on a lack of evidence, but in reality adopts a categorical rule that "inaction" in maintaining MRGO results in a blanket exception to takings liability. This diverges from at least four other lower courts (the Court of Appeal of Maryland, that state's highest court, and the Supreme Courts of California, Florida, and Minnestota), which conclude that government inaction in the face of a duty to act supports an inverse condemnation claim. And remember in Arkansas Game and Fish where the Supreme Court cautioned against per se rules in flood takings cases?

Because government-induced flooding can constitute a taking of property, and because a taking need not be permanent to be compensable, our precedent indicates that government-induced flooding of limited duration maybe compensable. No decision of this Court authorizes a blanket temporary-flooding exception to our Takings Clause jurisprudence, and we decline to create such an exception in this case.

Something tells us we haven't seen the last of this case.

B. Ripeness

1. New Cert Grant: Overrule Williamson County's Exhaustion Of State Procedures Requirement?

The last time the U.S. Supreme Court faced Williamson County in a merits case, the property owners made the mistake of not challenging that case's "state procedures" requirement directly. An exchange with Justice O'Connor went like this; from the transcript:

> Justice O'Connor: And you haven't asked us to revisit that *Williamson County* case, have you?
>
> Mr. Utrecht: We have not asked that this Court reconsider the decision in *Williamson County*.
>
> Justice O'Connor: Maybe you should have.

Ouch.

But fool me once, shame on you; fool me twice...we won't get fooled again!

This time, therefore, no mistake: the owners raised a challenge to Williamson County squarely, and as a result, there may now be a light at the end of the very bizarre ripeness tunnel that has mostly kept federal courts from reviewing claims that the U.S. Constitution has been violated.

Last month, the Court agreed to hear a case we've been following out of the Third Circuit, one which we dubbed "*The Night of Living Zombie Zoning Inspectors*." If that title doesn't grab you, how about this, the first Question Presented from the cert petition which the Court agreed to consider:

> Whether the Court should reconsider the portion of Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172, 194-96 (1985), requiring property owners to exhaust state court remedies to ripen federal takings claims, as suggested by Justices of this Court? See Arrigoni Enterprises, LLC v. Town of Durham, 136 S. Ct. 1409 (2016) (Thomas, J., joined by Kennedy, J., dissenting from denial of certiorari); San Remo Hotel, L.P. v. City and County of San Francisco, 545 U.S. 323, 348 (2005) (Rehnquist, C.J., joined by O'Connor, Kennedy, and Thomas, JJ., concurring in judgment).

The case also raises (although not directly) a question that has long plagued property owners: to what extent can local officials physically invade property in order to "have a look around" for things like valuations, zoning inspections, conformity with rent control, and other regulations?

By way of background, the Township of Scott, Pennsylvania, apparently has a problem of unregulated cemeteries. We had no idea. So it did what local government do when they think they have a problem, it passed a law. That law, Ordinance 12-12-20-001, required owners of all cemeteries, public or private, to maintain them.

The ordinance also contained two troublesome provisions. First, it requires the owners of the cemeteries to keep them open to the public during the day. Second, it allows the Township's code inspectors to enter "any property" to inspect and see if it is in compliance with the ordinance. Under the authority of the ordinance, a code inspector came on Knick's property without a warrant, and told her "guess what, these stones are actually grave markers, and you better clean up this cemetery." Knick's response was "what cemetery? My land doesn't have a cemetery on it." Not buying it, the inspector wrote her up for violating the ordinance.

Knick sued in state court, seeking to enjoin the enforcement action. The Township withdrew the notice of violation and the parties agreed to stay enforcement actions. But Knick didn't file an inverse condemnation action, or include a claim for compensation in her state court challenge.

After the Township issued a second notice of violation of the ordinance, and the state court denied Knick's request for a contempt order, she sued in federal court, asserting a violation of her Fourth Amendment rights against warrantless searches, and her Fifth and Fourteenth Amendment rights to due process and just compensation. After some back and forth on the contents of the pleadings, the District Court dismissed the action because Knick had not exhausted her state law remedies.

In *Knick v. Township of Scott*, No. 16-3587 (July 6, 2017), the U.S. Court of Appeals for the Third Circuit affirmed. The court concluded that Knick lacked Article III standing to assert a facial Fourth Amendment search-and-seizure claim because she did not appeal the District Court's ruling that the ordinance, as applied to her, was lawful because the search was of an open field, and thus not protected.

She thus “accepted the District Court’s conclusion that her Fourth Amendment rights were not violated.” Slip op. at 11. Thus, even if she was injured by the inspector’s actions, her rights were not violated, because even if a court were to enjoin the Township from enforcing the ordinance in an unconstitutional manner, it could still search an open field. In short, the Township could search an open field even without the ordinance.

Although the opinion “recognize[d] that the Ordinance’s inspection provision ‘is constitutionally suspect and we encourage the [Township] to abandon it (or, at least, to modify it substantially),” the court held that it needed a plaintiff with standing in order to consider the argument.

Knick fared no better with her claim for just compensation, because of the “state procedures” requirement of *Williamson County*. As noted earlier, she had not sought compensation via available Pennsylvania law avenues. The court rejected each of her three arguments that she didn’t need to pursue just comp in Pennsylvania courts.

First, it concluded that a facial takings claim isn’t exempt from the available state procedures prong of *Williamson County*. The Third Circuit has already held otherwise, in *County Concrete Corp. v. Town of Roxbury*, 442 F.3d 159 (3d Cir. 2006), and “[w]e cannot overrule our own precedent.” Slip op. at 23. If you want to try and understand the difference between a “facial” challenge, an “as-applied” challenge, and a “facial taking,” at least in the Third Circuit’s view, take a read of pages 24-27. We don’t think the court’s reasoning is entirely convincing.

Second, the court rejected Knick’s argument that her earlier state court lawsuit was enough. This wasn’t a claim for just compensation, only for injunctive relief, so she has not been denied compensation by the state, yet.

Finally, the court declined to exercise its prudential discretion and not apply *Williamson County*. Yes, it is an optional doctrine, but the facts here do not suggest that it would be unfair to require her to go back to state court and try and get compensated. The court distinguished decisions from other circuits which declined to apply *Williamson County*, concluding that “there is ‘value in forcing a second trip’ to state court here.” Slip op. at 35.

Any regular reader of our work knows about the *Williamson County*/*San Remo Hotel* “ripeness” Catch-22: try vindicating a property owner’s federal

constitutional right in federal court in the first instance, and the federal court will tell you that you are too early -- a regulatory taking is of no constitutional moment until the state regulators have made a final decision, and the state courts have denied compensation (even if this means the state hasn't offered compensation and in state court denies it owes any). But bring a federal action after a state court inverse condemnation case, and the federal court will tell you that you are too late -- you already litigated your federal claim, even if you expressly didn't.

The Catch-22 nature of this prompted four Justices to note in *San Remo Hotel* (the case in which Justice O'Connor delivered her now classic rejoinder above) that the *Williamson County* experiment may have run its course and is due for another look. Chief Justice Rehnquist wrote:

> Finally, *Williamson County*'s state-litigation rule has created some real anomalies, justifying our revisiting the issue... I joined the opinion of the Court in *Williamson County*. But further reflection and experience lead me to think that the justifications for its state-litigation requirement are suspect, while its impact on takings plaintiffs is dramatic... In an appropriate case, I believe the Court should reconsider whether plaintiffs asserting a Fifth Amendment takings claim based on the final decision of a state or local government entity must first seek compensation in state courts.

We shall see, of course. The Court could very well leave things the way they are. Or it could throw out the requirement entirely. Or keep the rule in place but narrow it down. Who can say?

You know what our answer is. Legal scholars and practitioners have extensively criticized *Williamson County*'s analysis (see here and here for examples, or see 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 The Urban Lawyer 671 (2004) for an extensive reference guide).

Stay tuned.

C. Property

1. Minnesota's Unclaimed Property Act Is A Taking If State Holds Interest-Bearing Account, But Doesn't Pay Interest

A very interesting (pun intended) read today from the Minnesota Supreme Court.

In *Hall v. Minnesota*, No. A16-0874 (Mar. 7, 2018), the court held that Minnesota's Unclaimed Property Act, under which unclaimed property is presumed abandoned and then held by the State, works a taking when the State takes possession of an interest-bearing bank account, but does not pay interest to the owner when the property is eventually reclaimed.

That conclusion should not be all that surprising, and what makes the opinion well worth your time to read is the contrast between abandoned accounts which were interest-bearing, and those which were not. The State took possession of money and accounts of several of the plaintiffs, ranging from an unclaimed final paycheck under $100, to an interest-bearing bank account of more than $100,000.

The Act sets out the process for reclaiming abandoned property, and the plaintiffs did so. But when the State turned back over their money, it did not include the time value of that money, also known as interest. So they filed a class action lawsuit, asserting a takings claim for the failure to pay interest, and a due process claim based on the lack of sufficient notice of the remittance of their property to the State.

> Appellants allege, individually and on behalf of a class of all owners of property that has been remitted to the State under the Act, that they did not receive sufficient notice—either from the original holder of their property or from the State—that their property had been remitted to the State. The complaint further alleges that the notice deficiency violates appellants' and the class members' procedural due process rights. Finally, the complaint asserts that the Act effects an unconstitutional taking because claimants do not receive earnings or constructive interest on the unclaimed property after it is delivered to the State.

Slip op. at 5. The trial court rejected the State's motion to dismiss, but certified the legal questions to the Court of Appeals, which concluded that the Act was neither a taking or a due process violation. Up they went.

After walking through the procedures under the Act, the Supreme Court noted that the State does not take ownership of unclaimed property and merely holds it, and that all of the unclaimed property either had been returned to the plaintiffs or was in the process of being returned. The main takings issue was whether the time value of money is property. Slip op. at 10 ("The specific question we must answer is whether the appellants have a protected property right in the

interest earned on the unclaimed property during the time period when the State holds the unclaimed property.").

The court concluded that it wasn't a taking for the the property and money which the State held which were not already receiving interest to be returned without interest. Yes, the money is the property of the plaintiffs and always was so: the State merely had custody of it, not ownership. But there's no property right to the time value of money where it was the owners' failure to perform their duties to keep up under the rationale of *Texaco, Inc. v. Short*, 454 U.S. 516 (1982):

> Because it was not interest bearing before the State came into custody of it, these appellants had no property right to receive the payment of interest. And because no statute authorizes the payment of interest—indeed, the Act specifically states that no interest need be paid—Hall, Undlin, and Herron must search elsewhere for a right to interest on their property. As other states have recognized in somewhat similar circumstances, to require that the State pay interest to these owners of unclaimed property would reward their inattention and provide an inappropriate windfall.

Slip op. at 12. In other words, these plaintiffs were in no worse position because of the Act than they would have been without it. Slip op. at 13-14 ("In this case, by contrast, the property at issue for Hall, Undlin, and Herron was not earning interest before it was transferred to the State, and the complaint is devoid of any allegations that the property earned interest after it was transferred to the State."). Yes, interest follows principal, but here, no interest. No harm, no foul.

But not so with the $100,000 account which was an interest-bearing account. In that case, the same principle (again, pun intended) applies: since this money was already earning interest, the State was obligated to keep on paying when it came into custody of the account. Thus, "the right to earn interest was part of Wingfield's unclaimed property, and she therefore has the right to receive that interest from the State if she is to be made whole." Slip op. at 16. She, unlike the other plaintiffs, had suffered an actual loss.

Finally, the court rejected the due process challenges of most of the plaintiffs because the Act didn't vest title to their money or accounts in the State, but merely gave it custody. No deprivation of property, no due process violation. But what about the $100,000 account owner, who, as noted above, did have "property?" She was entitled to due process, but the court concluded the Act's publication notice provisions -- where using the website MissingMoney.com (click to see if you have anything you can claim!), were enough:

> We conclude that the numerous types of notice provided by statute including publication, mailed notice by the holder, the ability to inspect public records, and the general notice provided by the statute itself, combine to provide sufficient notice to satisfy the requirements of due process.

Slip op. at 25.

C. *Penn Central* and *Lucas* Takings

1. Conflict Check: Hawaii Adds To Lower Court Regulatory Takings Split: Is Leaving Land Vacant On The Hope It Is Worth More In The Future "Economically Beneficial Use"?

The Hawaii Supreme Court has rendered a unanimous opinion in *Leone v. County of Maui*, No. SCAP-15-599 (Oct. 16, 2017), a case we've naturally been following because it involves regulatory takings (and we were involved in a similar case on a neighboring property).

The issue the court was presented with was whether leaving land in its vacant state court be considered an economically beneficial use. Short story is that the court held yes, it could, thus seeming to create a lower court split (hello, cert petition) with at least one other court, the Federal Circuit in *Lost Tree*, concluding that economically beneficial use means more than someone might buy it down the road.

2. Staten Island Wetlands Regulations Are A Penn Central Taking. A Penn Central Taking!

The New York Appellate Division's opinion in *City of New York v. Baycrest Manor, Inc.*, No. D59668 (Nov. 15, 2017) is an eminent domain case which involves the valuation of wetlands on Staten Island, and *Palazzolo*'s holding that long-existing restrictive regulations are not baked into a parcel's value.

The City claimed that the condemned property was not worth a whole lot because the wetlands regulations predated the condemnee's purchase. The owner,

by contrast, argued that it had a pretty good shot at prevailing on a regulatory takings claim, because the Supreme Court in *Palazzolo v. Rhode Island*, 533 U.S. 601 (2001) concluded that acquisition of land after the time the government imposes an allegedly restrictive regulation does not deprive the owner of the ability to challenge the restrictive regulation as a taking. The Supreme Court in that case held that prohibiting the a takings challenge would result in a "windfall" to the government, allowing the state to "shape and define property rights and reasonable investment-backed expectations." *Id*. at 626. Thus, because the state cannot "put an expiration date on the Takings Clause," the Court held that "[f]uture generations, too, have a right to challenge unreasonable limitations on the use and value of land." *Id*. at 627.

The Appellate Division in this case agreed with the property owner that *Palazzolo* took out the City's preexisting regulation argument, and that the owner had shown there was a reasonable probability that the wetlands regulations worked a regulatory taking under *Penn Central*, rejecting the City's argument that "a subsequent purchaser cannot challenge a preexisting regulation as a taking." Slip op. at 4.

Wait... did we say the owner proved a *Penn Central* taking?

Yes, yes we did. So it was a doubleplusgood decision: a court that gets both *Palazzolo* and *Penn Central*.

But it wasn't all great news, because the court wrapped up the opinion by agreeing with the condemnor that the valuation for the property should have been done the way the condemnor's appraiser said it should be done. The court reduced the just compensation award from nearly $400k to just over $150k.

Disappointing, but we're liking the court's *Palazzolo* and *Penn Central* analysis, even in spite of this letdown.

3. 9th Cir: City Rent Board Determining Owner "Made Enough" Profit Isn't A Penn Central Taking

Do we really need to tell you how a rent control regulatory takings claim fared in the Ninth Circuit? We didn't think so.

In *Colony Cove Properties, LLC v. City of Carson*, No. 16-562655 (Apr. 23, 2018), a three-judge panel reversed a district court jury verdict which concluded that the City was liable for a *Penn Central* regulatory taking for the mobilehome Rent Board's setting of a rent increase artificially low. The total award to the park

owner, including damages for lost rental income, attorneys' fees, and interest, was over $9 million.

The city and its amici predictably went ballistic and argued that the upholding the verdict threatened the very existence of mobilehome rent control. The court concluded that as a matter of law, the owner failed each of the three *Penn Central* factors.

First, the owner did not prove that the economic losses it suffered were sufficient, by comparing the before and after values of the land (overlooking the fact that the land wasn't the property interest which the property owner was alleged to have been taken).

> The jury concluded that Colony would have received approximately $3.3 million in additional income over an 8-year period if the Board had adopted the alternative GPM Analysis and factored debt service into the 2007 and 2008 rent increases. But the mere loss of some income because of regulation does not itself establish a taking. Rather, economic impact is determined by comparing the total value of the affected property before and after the government action. *See MHC Fin.*, 714 F.3d at 1127. Projected income streams can contribute to a method for determining the post-deprivation value of property, but the severity of the loss can be determined only by comparing the post-deprivation value to pre-deprivation value. Id.
>
> There was no evidence before the district court allowing a comparison of the pre-deprivation and post-deprivation values of the Property. Colony purchased the Property for approximately $23 million, and we assume that this number establishes the pre-deprivation value. But Colony presented no evidence, expert or otherwise, about the Property's post-deprivation value. Rather, the only evidence concerned the amount of rent claimed to be lost over an 8-year period because of the Board's refusals to approve higher increases. Even assuming that the lost rental income asserted by Colony—$5.7 million—equates to diminution in property value, that reduction would only be 24.8% of the assumed $23 million pre-deprivation value of the Property, far too small to establish a regulatory taking. Colony argues that post-deprivation "sale value is not the only permissible basis to consider economic loss." We agree—for example, the discounted future cash flows produced by an income-producing property can provide an appropriate valuation methodology. *See, e.g.*, *Cienega Gardens v. United States*, 503 F.3d 1266, 1282 (Fed. Cir. 2007) (determining economic impact by "compar[ing]

> the lost net income due to the restriction (discounted to present value at the date the restriction was imposed) with the total net income without the restriction over the entire useful life of the property (again discounted to present value)"). But Colony presented no evidence, by virtue of analyzing diminished income streams or otherwise, of the post-deprivation value of the Property.

Slip op. at 10-12 (footnote omitted).

The court also held that the owners failed the "investment backed expectations" prong of *Penn Central*, concluding the owners had no reasonable expectation that the Rent Board would take into account the owners' debt service when it considered a rent increase, as it had done in the past:

> Goldstein's experience as an owner of another mobile home park in Carson in the two decades before his purchase of the Property did not establish a reasonable expectation that the Board would consider debt service in all rent increase applications. As a general matter, an investor must account for "the burden of rent control" in its expectations about future increased rental income. *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1120–21 (9th Cir. 2010) (en banc). And, the Implementation Guidelines, adopted in 1998—long before the purchase of the Property—made plain that use of a GPM Analysis created no expectation to a particular rent increase. Moreover, the Board did not consider acquisition interest expenses in Goldstein's first application for a rent increase at his other park. Goldstein initially applied for a $57.85 rent increase for that park, $41.38 of which related to increased debt service. The Board, however, granted only a $12 rent increase, which did not account for the debt service. Thus, an objectively reasonable person could not have expected that all future rent increase applications seeking increases because of debt service would be granted.

Slip op. at 15. At most, the Board may consider debt service, but isn't bound to. And it certainly isn't compelled to raise rents to a particular level, according to the court.

Finally, the panel concluded that the "character of the government action" was mere rent control regulation, and we know that in the Ninth Circuit, rent control isn't one of those things that property owners are supposed to be worried about:

> The City's rent control ordinance is precisely such a program, striving to "protect[ ] Homeowners from excessive rent increases and allow[ ] a fair return on investment to the Park Owner." This central purpose of rent

> control programs "counsels against finding a Penn Central taking." MHC Fin., 714 F.3d at 1128.

Slip op. at 18.

4. Fla App: That Takings Dawg Don't Hunt: Sporadic Trespass By Deer Dog Hunters (And Their Dogs) Isn't A Permanent Physical Occupation

This case is one of what we call "regionally classic" cases that we come across from time to time. You know, cases that just fit into all your preconceived notions about a place. Beach cases from Hawaii. Gator law opinions from Southern states. Vermont = snow law, California, land and wineries. Here's another one of those from our Southern courts -- Florida's District Court of Appeals, to be precise -- that we think fits the bill.

In *Florida Fish and Wildlife Conservation Comm'n v. Daws*, No. 1D16-4839 (Apr. 10, 2018), the First District Court of Appeals held that owners whose properties were physically invaded by "deer dog hunters and their dogs during the forty-four days of the year when deer dog hunting is authorized" by the Commission, have not suffered a taking because these invasions were only temporary, and "do not rise to the level of permanent, physical occupation of [their] property." Slip op. at 8.

Now before you get all up in arms about the differences (if any) between temporary and permanent physical invasions (see this case, for example), the court didn't base its conclusion only on that distinction, but concluded that it wasn't a taking was because the deer dog hunters (and their dogs) were not authorized by the Commission to enter private property while hunting. Indeed, were trespassing. Thus, the owners

> are free to exclude the deer dog hunters and dogs from their property by pursuing criminal or civil remedies against the trespassing hunters and owners of the deer dogs. The FWC has not deprived Appellees of any right to pursue the third-party wrongdoers.

Slip op. at 8-9. In short, any invasions (temporary or otherwise) were not caused by the Commission, even though it had issued the deer dog hunters licenses to deer dog hunt, and after complaints by many of the landowners, the Commission had taken steps to try and stop the trespassing:

> The FWC limited the length of the deer dog hunting season to forty-four days per year, restricted the geographic area in which deer dog hunting was authorized within the Blackwater WMA, and installed fencing to separate the public lands from Appellees' private property. The FWC also adopted a responsible hunter rule, which authorized game wardens to respond to calls from private property owners when trespassing deer dog hunters or their dogs enter private property. And most recently, in 2016, the FWC required as a condition of issuing licenses and permits for deer dog hunting, that hunters equip their dogs with corrective collars that allow the hunters to control the movements of their dogs by shocking remotely any dog that trespasses onto private property.

Slip op. at 3. (We're guessing the dogs did not appreciate that last condition.)

Apparently none of those measures worked (read the dissenting opinion for more details of the burdens these invasions put on the property owners), and the trespasses continued.

Bad dog(s) for sure, but not takings.

DRAFT 1: July 22, 2017

Restatement (SCOTUS) of Property: What Happened to Use in *Murr v. Wisconsin*?

Robert H. Thomas[*]

I. INTRODUCTION

A casual observer of the U.S. Supreme Court's efforts over the years to formulate a regulatory takings doctrine could be forgiven if they were to conclude that the Justices were simply making things up as they went along. That certainly is the way it feels to some of us who try to apply the Court's takings rules in actual cases.[1] In most circumstances, a lawyer who attempts to predict their client's chances is embarking on a fool's errand, because there is no consistent pattern, unless the lack of consistency is itself a pattern. There are few clear rules, other than it is exceedingly difficult for owners to successfully challenge even those regulations which have devastating impact on the value of their property. The Court's latest foray into regulatory takings, *Murr v. Wisconsin*,[2] would not disabuse the observer of that conclusion.

I say that because *Murr*'s rule for what constitutes the "property" against which the owner's claimed loss is measured in takings cases where the owner possesses more than a single parcel is a confusing stew of mostly undefined factors: the "treatment of the land" under state law, the "physical characteristics" of the properties (which includes the parcels' topography and "the surrounding human and ecological environment"), and, most strangely, "the value of the property under the challenged regulation."[3] The larger parcel or "denominator" issue in Murr was a contest between which regulatory takings rule would apply, the categorical *Lucas* economic wipeout rule,[4] or the regulation-friendly *Penn Central* balancing test.[5] In other words, how much of what the Murrs owned would be examined to determine the economic effect of the regulations they claimed negatively affected one distinct piece of their holdings. The narrower the property

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[1] The Takings Clause of the U.S. Constitution provides, "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. This has been incorporated under the Fourteenth Amendment's Due Process Clause against states and their subdivisions. *See* Chicago, B. & Q. R. Co. v. City of Chicago, 166 U.S. 226, 235 (1897).

[2] Murr v. Wisconsin, 137 S. Ct. 1933 (2017).

[3] *Id.* at __ [slip op. 12].

[4] Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

[5] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

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interest was defined, the more likely it was the Murrs would be able to prove the regulation was a taking.

We shouldn't be surprised when the majority's solution in *Murr* proves to be unfathomable in practice, because none of the three parties in the case expressly proposed or advocated for the test which the majority adopted, which it conjured up nearly from whole cloth. *Penn Central* was another case where the Court simply made up a three-part test not advocated by any party, and it has resulted in decades of confusion.[6] I think *Murr* will develop the same reputation. As one of the lawyers in the case predicted, this standard represents "*Penn Central* squared,"[7] referencing the Court's widely-maligned three factor test for a taking. [8] Although *Penn Central* is the applicable standard in most regulatory takings cases to determine whether in all justice and fairness, regulating property should be compensated, it is also a test that is infamously unclear.[9] I characterize *Murr*'s multifactor test far less charitably. It federalizes the property question, an issue that, until now, has mostly been left to state law. It also transforms the merits test for whether a regulation is a taking into a threshold question of whether the claimant even owns property. A claimant who survives the property threshold must run the same gauntlet, and more, if she is lucky enough to have her case considered on the merits. It shifts the decision from one made by juries, to being made by judges.

I will be making three points. First, the narrow margin of victory in *Murr*, coupled with the Court's denial of certiorari only four days later in another case presenting the same question,[10] suggest the *Murr* factors are hardly set in stone, and could be modified by a different Court majority into a more understandable, practical, and workable rule, one based squarely in state property law. Second, although I won't spend much time deconstructing the *Murr* majority's three-factor test, I suggest that it simply missed what should have been the center of gravity in the case, the "three unities" which state and federal courts regularly apply in eminent domain cases to determine whether the taking of one parcel results in damages to another. Application of this test to determine how much of the claimant's property constitutes the denominator in regulatory takings cases—asking whether the plaintiff *uses* multiple parcels together, whether the parcels are *titled* jointly, and whether they are *physically* close—would place the emphasis in all takings cases—both straight and regulatory—where it should be: on objectively

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[6] *Penn Central*, 438 U.S. at 124. For a comprehensive deconstruction of the case, see Gideon Kanner, *Making Law and Sausages: A Quarter-Century Retrospective on* Penn Central Transportation Co. v. City of New York, 13 WILLIAM & MARY BILL OF RIGHTS J. 679 (2005) (noting how *Penn Central* majority made up the three factor test).

[7] Tr. at 35, Murr v. Wisconsin, No. 15-214 (U.S. Mar. 20, 2017).

[8] *Penn Central*, 438 U.S. at 124.

[9] *Penn Central*'s test has a poor reputation, even among those who advocate for a limited reading of the Takings Clause. *See* John D. Echeverria, *Making Sense of* Penn Central, 23 UCLA J. ENVTL. L. & POL'Y 171, 172 (2005) ("The next 'big thing'—perhaps the last big thing—in regulatory takings law will be resolving the meaning of the *Penn Central* factors.").

[10] Lost Tree Vill. Corp. v. United States, 707 F.3d 1286 (Fed. Cir. 2013); 787 F.3d 1111 (Fed. Cir. 2015), *cert. denied*, No. 15-1192, ___ U.S. ___, 2017 U.S. LEXIS 4278 (U.S. June 27, 2017).

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measurable evidence that the owner uses two or more parcels together as a single economic unit. Finally, I argue that the Supreme Court's adoption in *Murr* of a vague, difficult-to-apply test for takings claims under the Fifth and Fourteenth Amendments does not constrain state court from applying the three unities test under their respective state takings provisions. Until there's a more favorable environment at the Supreme Court, property owners should concentrate their efforts on state law and state courts.

II. Springing Executory Regulations

At heart, the question the Court was being asked to resolve in *Murr* is how much of an owner's entire property holdings can be used to measure the impact of a regulation on a single legally-separate piece. The *Murr* case started, as most regulatory takings cases must, in state court.[11] The four Murr siblings, owners of two adjacent parcels along Wisconsin's St. Croix River—one vacant (Lot "E"), the other having a small vacation cabin (Lot "F")—sought compensation because state and county regulations prohibited them from selling the vacant parcel to an unrelated owner, or developing it separately from the other.[12] The Murrs' parents originally owned the lots, purchasing them at different times and titling them separately.[13] They purchased Lot F in 1960, built the cabin, and the following year transferred title to the family's plumbing company.[14] Two years later the parents purchased the adjacent Lot E to hold for investment. They kept title in their names. Although both parcels are larger than one acre, due to a steep bluff, each has less than one acre of developable land.[15] At the time of the purchases, neither was subject to restrictive regulations, nor is there any indication that the parents could not have sold the lots for development to an unrelated third party.

Flash forward a decade, when Congress designated the St. Croix River for federal protection under the Wild and Scenic Rivers Act.[16] The designation required Wisconsin to create a management plan, and in 1976, the state environmental agency adopted rules "to ensure the continued eligibility of the Lower St. Croix River for inclusion in the national wild and scenic rivers system[.]"[17] These rules would "reduce the adverse effects of overcrowding and poorly planned shoreline and bluff area development . . . maintain property values, and . . . preserve and maintain the exceptional scenic, cultural and natural

[11] Under Williamson Cnty. Reg. Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1984), a property owner with a federal constitutional takings claim against a state or local government must ripen that claim by first seeking, and being denied, compensation from state courts.

[12] *Murr*, 137 S. Ct. at ___ [slip op. 1].

[13] *Id.* at ___ [slip op. 2].

[14] *Id*. at ___ [slip op. 3].

[15] *Id*. at ___ [slip op. 4].

[16] 16 U.S.C. §§ 1274(a)(6), (a)(9) (2017).

[17] WIS. STAT. § 30.27(1) (1973) ("The purpose of this section is to ensure the continued eligibility of the Lower St. Croix River for inclusion in the national wild and scenic rivers system and to guarantee the protection of the wild, scenic and recreational qualities of the river for present and future generations.").

characteristics of the water and related land[.]"[18] The Murrs' two parcels were classified as "rural residential,"[19] which meant that they were limited to one single-family home on each,[20] provided the parcel had more than "one acre of net project area."[21] Neither parcel qualified because of its topography: while they were both more than one acre, their actual buildable area was less, due to the bluff. The regulations contain a limited exception to the development ban for substandard "lots of record" which were "in the records of the deeds office" in 1976 when the regulations were adopted.[22] To qualify for this exception, however, the parcels could not be owned by the same owners, and until 1995, the parcels remained separately titled.

But two decades later in 1994, the plumbing company conveyed Lot F to the Murr siblings, and the following year, their parent conveyed Lot E to them.[23] This, according to the *Murr* majority's parenthetical mention, was the operative event which "merged" Lots E and F into one, because the four Murr siblings now held title to both:

> (There are certain ambiguities in the record concerning whether the lots had merged earlier, but the parties and the courts below appear to have assumed the merger occurred upon transfer to the petitioners.)[24]

Nothing, however, changed in the designation of the lots of record in the deeds office, so I can't be sure why the *Murr* majority and the lower courts assumed the parcels were "merged," as they apparently retained their separate legal identities.

Flash forward another decade, and the Murr siblings wanted to move the cabin to a different spot on Lot F. They thought they could sell the empty parcel, Lot E, to fund the cabin move.[25] The state regulations, however, prohibited the sale of the substandard parcel to an unrelated buyer.[26] The Murrs sought a variance from the St. Croix County agency with the power to relieve them from hardship, which would have allowed them to sell Lot E. The agency, as well as the reviewing state courts, denied the variance.[27] Thus, neither could be developed or sold by the Murr siblings, except in combination with the other parcel.[28]

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[18] WIS. ADMIN. CODE § NR 118.01 (2017).

[19] *Id.* § 118.04(4)(a).

[20] *Id.* § 118.06(1)(b) ("In the rural residential and conservation management zones, there may not be more than one single-family residence on each lot.").

[21] *Id.* § 118.06(1)(a)(2)(a) ("The minimum lot size shall have at least one acre of net project area.").

[22] *Id.* § 118.08(4).

[23] *Murr*, 137 S. Ct. at ___ [slip op. 4] (citing Murr v. St. Croix Cnty. Bd. of Adjustment, 796 N.W.2d 837, 841, 844 (2011).

[24] *Murr*, 137 S. Ct. at ___ [slip op. 4].

[25] *Murr*, 137 S. Ct. at ___ [slip op. 4].

[26] WIS. ADMIN. CODE § NR 118.04(4)(a)(2) (2017).

[27] *Murr*, 796 N.W.2d at 844.

[28] WIS. ADMIN. CODE § NR § 118.04(4)(a)(2) (2017) ("The lot by itself or in combination with an adjacent lot or lots under common ownership in an existing subdivision has at least one acre of net

After the denial of the variance, there's little question that to the Murr siblings, Lot E was regulated to near worthlessness, because standing alone it has little value to them. They can't build on it except in combination with their other parcel. Not only could the Murrs not use their second parcel unless combined with the other, they can't even sell so someone who could. Only when combined with the neighboring parcel which the Murrs also own could the regulations result in a reduction in value for the Murrs, and not a total economic loss. They instituted a complaint for a regulatory taking in Wisconsin state court seeking the payment of compensation. In short, the Murrs viewed Wisconsin's regulations as preventing their sale of Lot E to anyone but the State of Wisconsin.

III. *LUCAS*-LAND OR *PENN CENTRAL*-VILLE

The regulatory takings doctrine is built around the idea that in addition to eminent domain, other exercises of government power have such a dramatic effect on private property that they are considered to be the functional equivalent of an affirmative exercise of the condemnation power, giving rise to a self-executing obligation to compensate the owner.[29] Just compensation is the usual remedy in most takings cases.[30] In other words, the regulatory takings doctrine is not a limitation on government's power to regulate for the public good, but merely forces a realistic evaluation of the actual cost of regulation. The principle driving the analysis is whether it is fair to require a property owner to shoulder the entire economic burden of publicly-worthy regulations: "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant

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project area. Adjacent substandard lots in common ownership may only be sold or developed as separate lots if each of the lots has at least one acre of net project area.").

[29] *See* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 537 (2005) (The Court "recognized that government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster – and that such 'regulatory takings' may be compensable under the Fifth Amendment."); First English Evangelical Lutheran Church v. Cnty. of Los Angeles, 482 U.S. 304, 316 (1987) ("While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings."); Andrus v. Allard, 444 U.S. 51, 64 n.21 (1979) (federal power to protect endangered species measured against Takings Clause; "[t]here is no abstract or fixed point at which judicial intervention under the Takings Clause becomes appropriate"); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (Kohler Act enacted pursuant to state's police power went "too far").

[30] *See Lingle*, 544 U.S. at 536–37. In that case, the Court attempted to clear up some of the doctrinal confusion in takings, and explained:

> As its text makes plain, the Takings Clause 'does not prohibit the taking of private property, but instead places a condition on the exercise of that power.' In other words, it 'is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking.'

Id. (quoting *First English*, 482 U.S. at 314-15). In certain circumstances, declaratory or injunctive relief may be available. *See* E. Enters. v. Apfel, 524 U.S. 498, 522 (1998) ("Based on the nature of the taking alleged in this case, we conclude that the declaratory judgment and injunction sought by petitioner constitute an appropriate remedy under the circumstances, and that it is within the district courts' power to award such equitable relief.").

achieving the desire by a shorter cut than the constitutional way of paying for the change."[31]

In *Lingle v. Chevron U.S.A. Inc.*,[32] the Court reaffirmed that most regulatory takings cases are analyzed by applying a multi-factored balancing test which originated in the Court's earlier opinion in *Penn Central Transportation Co. v. City of New York*.[33] To determine whether a regulation works a taking and requires compensation, the factfinder looks at the economic impact of the regulation (the loss in property value resulting from the regulation), the property owner's "distinct investment-backed expectations," and the "character of the government action."[34] The *Penn Central* factors don't look at the label attached to the exercise of power, but focus on the impact of the regulation on the owner. The Takings Clause is 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," and this applies regardless of the power the government exercises.[35] No one factor of *Penn Central*'s three is dispositive, and courts continue to struggle with how to apply them in practice. If a property owner wins in the trial court, she has a good chance of losing on appeal. The bottom line, however, is that property owner success under *Penn Central* is very rare, and thus it is a very regulation-friendly standard.[36]

But *Lingle* also affirmed the Court's earlier rule in *Lucas v. South Carolina Coastal Council*,[37] that certain cases where a regulation can be shown to deprive the owner of "all economically beneficial us[e]" of property are analyzed without examining any of the other *Penn Central* factors.[38] In *Lucas*, the Court concluded that a near-total restriction on an owner's use of property is, from the owner's perspective, the same thing as condemning it. Thus, it isn't necessary to look at their expectations or the nature of the government action or the reasons for it. Property owners obviously have a much better chance of success in regulatory takings cases if they can have their claim considered under *Lucas*' categorical rule.

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[31] *Pa. Coal*, 260 U.S. at 416.

[32] 544 U.S. 528 (2005).

[33] 438 U.S. 104 (1978). *Lingle* labeled the *Penn Central* test the "default" test. *See Lingle*, 544 U.S. at 538-39; *see also* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 326 n.23 (2002) (quoting Palazzolo v. Rhode Island, 533 U.S. 606, 633 (2001) (O'Connor J., concurring) ("[O]ur polestar . . . remains the principles set forth in *Penn Central* itself," which require a "careful examination and weighing of all the relevant circumstances.")).

[34] *Penn Central*, 438 U.S. at 124-25 (citing Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962)).

[35] Armstrong v. United States, 364 U.S. 40, 49 (1960).

[36] *See*, *e.g*., Reoforce, Inc. v. United States, 853 F.3d 1249, 1269–71 (Fed. Cir. 2017); Cass Cnty. Joint Water Res. Dist. v. Brakke (*In re* 2015 Application for Permit to Enter Land for Surveys and Examination), 883 N.W.2d 844, 849 (N.D. 2016); FLCT, Ltd. v. City of Frisco, 493 S.W.3d 238, 272–76 (Tex. App. 2016); Lockaway Storage v. Cnty. of Alameda, 156 Cal. Rptr. 3d 607 (Cal. App. 2013).

[37] Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

[38] *Lingle*, 438 U.S. at 538 (quoting *Lucas*, 505 U.S. at 1019 (emphasis omitted)).

"The critical terms [in takings cases] are 'property,' 'taken' and 'just compensation,'"[39] and most courts approach such cases by tracking the text of the Fifth Amendment. First, by requiring the claimant to plead and prove that she owns "private property,"[40] after which the finder of fact determines whether the property was "taken," either by applying *Penn Central* or *Lucas*.[41] If it was, the factfinder also determines what compensation is "just."

The Murrs naturally wanted to be in *Lucas*-land with its greater probability of success. The right to use to use property, and the right to sell are fundamental sticks in the bundle of rights which make up our concept of private property, and the economic impact of Wisconsin's regulations on Lot E, viewed alone, was devastating: the Murr siblings couldn't sell it to an unrelated buyer at market value, and they couldn't develop it separately. It was reduced to a nominal stand-alone value. Thus, their claim identified the "property" which they alleged was taken as the vacant parcel, and the Murrs asserted the regulations deprived them of all economically beneficial use of Lot E.[42]

The government's goal, by contrast, was to move the case to *Penn Central*-ville. If the factfinder were required to consider the economic impact of the regulations on both parcels as a whole (and not separately), Wisconsin's forecast looked much brighter. The county and state argued that both of the Murr parcels constituted the "property" against which the effects of the regulation should be measured. To be sure, they could not use the vacant parcel separately, nor could they sell it, but they could use it in conjunction with the parcel on which the cabin was located, and indeed, it may have even added value to that parcel. The whole was greater than the sum of its parts.

The key battle in the case therefore wasn't "*was* property taken," but rather "*what* property?"[43] Was it Lot E alone, or Lots E and F considered together?[44] In

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[39] United States v. General Motors Corp., 323 U.S. 373, 377 (1945).

[40] *See*, *e.g.*, Boise Cascade Corp. v. United States, 296 F.3d 1339, 1343 (Fed. Cir. 2002), *cert. denied*, 538 U.S. 906 (2003) (stating that there is a two-step approach to takings claims, where the first step is for a court to determine "whether the plaintiff possesses a valid interest in the property affected by the governmental action, *i.e*., whether the plaintiff possessed a 'stick in the bundle of property rights'" (quoting Karuk Tribe of Cal. v. Ammon, 209 F.3d 1366, 1374 (Fed. Cir. 2000))); Resource Invs., Inc. v. United States, 85 Fed. Cl. 447, 478 (2009) ("Before assessing plaintiffs' categorical takings claim, this court must, as a threshold matter, determine whether plaintiffs possessed a property interest protected by the Fifth Amendment."), *aff'd*, 785 F.3d 660 (Fed. Cir. 2015), *cert. denied*, 136 S. Ct. 2506 (2016).

[41] *See* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 720-21 (1999) ("[W]e hold that the issue whether a landowner has been deprived of all economically viable use of his property is a predominantly factual question . . . [and that] question is for the jury.").

[42] *Murr*, 137 S. Ct. at ___ [slip op. 9].

[43] Steven J. Eagle, *The Four Factor* Penn Central *Regulatory Takings Test*, 118 PA. ST. L. REV. 601, 631 (2014).

[44] I have suggested that courts should not treat "property" as a threshold question when analyzing these cases. *See* Robert H. Thomas, *"Property" and Investment-Backed Expectations in Ridesharing Regulatory Takings Claims*, 39 U. HAW. L. REV. 301, 302 (2017). Instead of considering this a preliminary question, it should be a part of the merits analysis of the effect of the regulation on an owner's expectations.

short, the issue to be resolved is whether on the merits, the court will apply the *Lucas per se* test—a claim the Murrs were very likely to win—or the *Penn Central ad hoc* takings test which is heavily slanted in favor of the government. Answering that question one way or the other would, most likely, resolve the dispute on the merits.

IV. FEDERALIZING PROPERTY: *PENN CENTRAL* GONE WILD

The Wisconsin trial court agreed with the government. Appraisal testimony valued Lot E in its separately-regulated state at $40,000 (assuming it could be sold, which it could not), a nearly 90% loss of value of the parcel's worth of $398,000 as a separate developable lot.[45] There was no market for the property since it could not be sold, meaning value in its regulated state was zero. Lot F as a single improved lot was worth $373,000, and the two parcels treated as a single lot under the regulations $771,000.[46] The court concluded that the regulations had not severely impacted the value of the two parcels when considered as one. The Wisconsin Court of Appeals affirmed, similarly concluding that the regulations were not a taking of the Murrs' Lot E, because the Murrs also owned Lot F. When measured against their use of the two parcels combined, the court concluded their loss of use of the single parcel—otherwise a *Lucas* taking—was merely a diminution in value of the combination, and not a wipeout. This added to the inconsistencies among lower courts in how to determine the denominator in these cases.[47] The Wisconsin Supreme Court denied discretionary review.

Two of the parties (the Murrs and Wisconsin) urged the U.S. Supreme Court to adopt clearly-defined rules. Wisconsin advocated for the most rigid, a categorical rule in which state law, both the bitter and the sweet, controlled.[48] It argued that lot and parcel lines, and separate title, mean pretty much nothing in takings cases—because state law defines property, and the states are, in effect, free to redefine it by regulation. Fee simple metes-and-bounds are just lines on a map, and Wisconsin property law (on which the Murrs relied to define their property rights) also included the regulations which require combining substandard, adjacently-owned parcels. People don't own property parcel-by-parcel Wisconsin argued, but more like a Monopoly game in which an owner collects up different deeds, and what really matters is all of its holdings considered together; separately-titled lots need to have a "legal link" (wholly defined by the government), which is the key to

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[45] *Murr*, 137 S. Ct. at ___ [slip op. 5].

[46] *Id*.

[47] Petition for a Writ of Certiorari at 17-21, Murr v. Wisconsin, No. 15-214 (U.S. Aug. 14, 2015).

[48] Justice Kagan seemed to like the background principles include "all of state law"/bitter with the sweet argument advanced by the County's brief:

> And why should we do that? If we're looking to State law, let's look to State law, the whole ball of wax. In other words, saying: Well, when I buy those two lots, they're really not two lots anymore. According to State law, they are one lot.

Tr. at 17, Murr v. Wisconsin, No. 15-214 (U.S. Mar. 20, 2017).

defining property.[49] The Murrs argued for a more flexible standard (but still mainly categorical), standard, one that started with a presumption that a parcel's metes-and-bounds lines defined Takings Clause property, and placed the burden on the government to show that the owner used separately-titled parcels as a single integrated economic unit.[50] Contrasting the certainty that each of these parties urged, the County seemed to want to play the part of chaos agent, arguing for bootstrapping a *Penn Central*-type "factors" test into what constitutes property.

During oral argument, Justice Kennedy chided both the Murrs' and Wisconsin's counsel for advocating for a categorical rule, which he viewed as "wooden,"[51] and none of the resulting opinions advocated for a bright-line rule. In an opinion authored by Justice Kennedy, the five-Justice majority held that the Murrs' "property" was both parcels, considered together. The majority first acknowledged that for over one hundred years, the Court has "refrained from elaborating this principle through definitive rules."[52] Building on this, Justice Kennedy identified three main factors (some of which contain subfactors, because this list is not exhaustive) for courts to examine.

First, the "treatment of land . . . under local and state law." This looks at the actual metes-and-bounds of the legal parcel, but the purpose is to discern the owner's reasonable expectations about whether she owns one parcel or two. To make this determination, however, a judge doesn't look at the owner's actual use of one parcel with another, but at how much she knew or should have known about "background customs and the whole of our legal tradition."[53] The opinion acknowledged the rule in *Palazzolo* that acquiring property subject to restrictive regulations do not eliminate a potential takings claim,[54] but in the next sentence noted that a "reasonable restriction that predates a landowner's acquisition, however, can be one of the factors that most landowners would reasonably consider in forming fair expectations about their property."[55] Which neutralizes the *Palazzolo* rule, something the lower courts had been doing from nearly the

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[49] *Id.* at 34 ("Not at all, Your Honor. Our test is if two lots have a link, a legal link under State law, then they are one parcel. If they have no legal link under State law, then they are completely separate.").

[50] Petitioners' Brief on the Merits at 24, Murr v. Wisconsin, No. 15-214 (U.S. Apr. 11, 2016).

[51] "But are you—you're talking just about State law. It seems to me that your position is as wooden and as vulnerable a criticism as—as the Petitioner's. You say, whatever State law—basically you're saying, whatever State law does, that defines the property. But you have to look at the reasonable investment-backed expectations of the owner." Tr. at 34, Murr v. Wisconsin, No. 15-214 (U.S. Mar. 20, 2017).

[52] *Murr*, 137 S. Ct. at ___ [slip op. 7].

[53] *Id.* at ___ [slip op. 12].

[54] Palazzolo v. Rhode Island, 533 U.S. 606, 627 (2001) ("Were we to accept the State's rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause.").

[55] *Murr*, 137 S. Ct. at ___ [slip op. 12] ("the "expectations . . . an acquirer of land must acknowledge legitimate restrictions affecting his or her subsequent use and dispensation of the property").

moment the Court adopted it.[56] Second, the "physical characteristics" of the property:

> These include the physical relationship of any distinguishable tracts, the parcel's topography, and the surrounding human and ecological environment. In particular, it may be relevant that the property is located in an area that is subject to, or likely to become subject to, environmental or other regulations.[57]

Finally, the most troublesome in an already difficult list: judges will need to "assess the value of the property under the challenged regulation, with special attention to the effect of the burdened land on the value of other holdings."[58]

Applying these factors, the majority concluded the "state law" element cut against the Murrs. Although "substantial weight" should be given to how the land "is bounded or divided, under state law,"[59] the majority paid no attention to the lot lines, and concluded that Wisconsin's regulations, which considered the two lots as one, are what shaped the Murrs' property rights; the Murrs voluntarily put the lots under common ownership after the regulations were adopted.[60] They knew about the regulations, but in 1994 transferred the property anyway.[61] The amalgamated two-parcel denominator meant no *Lucas* taking.[62]

Chief Justice Roberts, joined by Justices Alito and Thomas, dissented. But they were not so much bothered by the outcome or the fact that the majority avoided bright-line rules, but the majority's specific factors.[63] Instead, they would adhere" with the "traditional approach" of defining constitutional property by looking at state law, and state law alone.[64]

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[56] *See*, *e.g*., Guggenheim v. City of Goleta, 638 F.3d 1111, 1120 (9th Cir. 2010 (en banc) ("Since the ordinance was a matter of public record, the price they paid for the mobile home park doubtless reflected the burden of rent control they would have to suffer."))..

[57] *Id.* at ___ [slip op. 13].

[58] *Id.* at ___ [slip op. 13].

[59] *Id.* at ___ [slip op. 12].

[60] *Id.* at ___ [slip op. 17]. This suggests that had the Murrs' plumbing company not conveyed Lot F to the siblings, but instead the siblings became the owners of the plumbing company, analysis of this factor would have turned out differently.

[61] *Id.* at ___ [slip op. 17] ("Petitioners' land was subject to this regulatory burden, moreover, only because of voluntary conduct in bringing the lots under common ownership after the regulations were enacted.").

[62] *Id.* at ___ [slip op. 19-20]. And, naturally, no *Penn Central* taking because "[p]etitioners cannot claim that they reasonably expected to sell or develop their lots separately given the regulations which predated their acquisition of both lots." *Id.* at ___ [slip op. 20].

[63] *Id.* at ___ [dis. op. 1] (Roberts, C.J., dissenting) ("This bottom-line conclusion does not trouble me; the majority presents a fair case that the Murrs can still make good use of both lots, and that the ordinance is a commonplace tool to preserve scenic areas, such as the Lower St. Croix River, for the benefit of landowners and the public alike.").

[64] *Id.* at ___ [dis. op. 2] (Roberts, C.J., dissenting).

> I think the answer is far more straightforward: State laws define the boundaries of distinct units of land, and those boundaries should, in all but the most exceptional circumstances, determine the parcel at issue.[65]

This provides certainty, a bright-line between what is mine and what is yours,[66] and would prevent "strategic unbundling" of property sticks in order to perfect a *Lucas* takings claim.[67] The dissent also chided the majority for bootstrapping the question of whether the regulation is reasonable into the threshold question of property, arguing "these issues should be considered when deciding if a regulation constitutes a 'taking,' and not "crammed in" the preliminary "property" determination.[68] Property becomes a matter of regulatory bundling case-by-case, rather than applying predictable principles, and gives the government two opportunities to trip up the property owner.[69] Property owners will most often lose in the calculus of their abstract rights when weighed against a "concrete regulatory problem."[70] The dissent would have sent the case back to the Wisconsin courts for a determination of the denominator by applying "ordinary principles of Wisconsin property law."[71]

The majority's multifactor, case-specific approach won't be much help at all to property owners trying to predict whether their expectations about their property will be deemed to be reasonable enough that they should rely on them. Officials are not much better off, because they cannot undertake the calculus the Takings Clause is supposed to have them ask (this is a worthy regulation, but can we afford

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[65] *Id.* at ___ [dis. op. 6] (Roberts, C.J., dissenting).

[66] *Id.* at ___ [dis. op. 6] (Roberts, C.J., dissenting) ("But the definition of property draws the basic line between, as P.G. Wodehouse would put it, *meum* and *tuum*. The question of who owns what is pretty important: The rules must provide a readily ascertainable definition of the land to which a particular bundle of rights attaches that does not vary depending upon the purpose at issue.").

[67] *Id.* at ___ [dis. op. 7] (Roberts, C.J., dissenting).

[68] *Id.* at ___ [dis. op. 8] (Roberts, C.J., dissenting).

[69] *Id.* at ___ [dis. op. 9-10] (Roberts, C.J., dissenting) ("The result is that the government's regulatory interests will come into play not once, but twice—first when identifying the relevant parcel, and again when determining whether the regulation has placed too great a public burden on the property."). Actually, this gives government three chances, not two. Because the plaintiff property owner in most cases, even in state court, will also need to demonstrate standing. *See* Town of Chester v. Laroe Estates, 137 S. Ct. 1645 (2017) (intervenor in a takings case must show Article III standing in order to pursue relief that is different from that which is sought by a party with standing).

[70] *Id.* at ___ [dis. op. 10-11] (Roberts, C.J., dissenting) (labeling the *Penn Central* test a "roll of the dice," and noting that "surely in most" cases the owner will lose).

[71] *Id.* at ___ [dis. op. 13] (Roberts, C.J., dissenting). Justice Thomas filed a separate dissenting opinion arguing the Court's approach to takings is on the wrong analytical footing. Instead of being grounded in the Takings Clause, the Court should examine whether the Fourteenth Amendment's Privileges or Immunities Clause "it would be desirable for us to take a fresh look at our regulatory takings jurisprudence, to see whether it can be grounded in the original meaning of the Takings Clause of the Fifth Amendment or the Privileges or Immunities Clause of the Fourteenth Amendment." *Id.* at ___ [dis. op. 1] (Thomas, J., dissenting) (citing Michael B. Rappaport, *Originalism and Regulatory Takings: Why the Fifth Amendment May Not Protect Against Regulatory Takings, but the Fourteenth Amendment May*, 45 SAN DIEGO L. REV. 729 (2008)).

to apply it here?).[72] Instead, the majority shifted the focus to the reasonableness of the regulation. And what, exactly, is included in "the "human and ecological environment?" Or, more importantly, what isn't? Apparently, in the majority's view, an owner should not only know of existing regulations, but—break out your crystal balls—they should be charged with anticipating possible future regulations. Given the tendency of the modern regulatory state to expand into any unregulated space, are there truly any future restrictions a reasonable property owner should not anticipate? This is especially true if the property is located in areas presenting "unique concerns" or "fragile land systems."[73] The majority faulted the Murrs for not realizing that merger provisions are common—and therefore, in the Court's view, reasonable—in land use regulations.[74] Maybe the Murrs should have waited for the Court to decide *Palazzolo*, a decision the majority failed to adequately distinguish.[75] Overall, however, I am left with the impression that the majority isn't all that concerned with the nuances of state property law (only the regulations), or bothered by the lack of clear rules in regulatory takings. As long as the regulation is, in the Justices' view, reasonable. Underling all this was the majority's belief that Wisconsin's regulation of the Murrs' property is a good thing. But the reasonableness of a regulation is not supposed to be part of the takings calculus, especially after the unanimous Court in *Lingle* rejected the "substantially advance" test as one of takings.[76] To even get to the takings question, the property owner either must concede the validity of the regulation, or a court must have concluded it was reasonable.[77] Unreasonable regulations cannot be enforced, and this is a

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[72] *See* Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1175 (Fed. Cir. 1994) ("The question at issue here is, when the Government fulfills its obligation to preserve and protect the public interest, may the cost of obtaining that public benefit fall solely upon the affected property owner, or is it to be shared by the community at large. In the final analysis the answer to that question is one of fundamental public policy. It calls for balancing the legitimate claims of the society to constrain individual actions that threaten the larger community, on the one side, and, on the other, the rights of the individual and our commitment to private property as a bulwark for the protection of those rights. It requires us to decide which collective rights are to be obtained at collective cost, in order better to preserve collectively the rights of the individual.").

[73] *Id.* at ___ [slip op. 13] (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1035 (1992) (Kennedy, J., concurring).

[74] *Id.* at ___ [slip op. 16].

[75] Palazzolo v. Rhode Island, 533 U.S. 606, 627 (2001). *Cf. Murr*, slip op. at 12 ("A valid takings claim will not evaporate just because a purchaser took title after the law was enacted. *See Palazzolo*, 533 U. S., at 627, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (some "enactments are unreasonable and do not become less so through passage of time or title"). A reasonable restriction that predates a landowner's acquisition, however, can be one of the objective factors that most landowners would reasonably consider in forming fair expectations about their property.").

[76] Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 536–37 (2005) (The Court explained that the Takings Clause is not designed to prohibit government action, but to secure compensation "in the event of *otherwise proper interference* amounting to a taking.") (emphasis added).

[77] *See Loveladies*, 28 F.3d at 1175 ("What is not at issue is whether the Government can lawfully prevent a property owner from filling or otherwise injuring or destroying vital wetlands. The importance of preserving the environment, the authority of state and federal governments to protect and preserve ecologically significant areas, whether privately or publicly held, through appropriate regulatory mechanisms is not here being questioned. There can be no doubt today that every effort

separate question of whether otherwise reasonable regulation result in a regulatory taking, a point Justice Kennedy has made in both condemnation and regulatory takings cases.[78] But *Murr* made this the central question in determining Takings Clause property, because the measure of the owner's expectation is the "reasonableness" of the regulation.[79] This is recursive, because it imports the takings question and makes it a threshold question of property. In order to understand whether she even possesses an interest worthy of protection—and to survive the government's motion for summary judgment—the owner will need to convince a judge that her interest was taken. Which front-loads the ultimate question on the merits (which a jury should decide), into a legal question for the judge. If the owner survives and gets to trial, she gets to prove it all over again. It is also a view of property as the product of positive law, because an owner's expectations are mostly, in the majority's thinking, shaped by the "human and ecological environment."

The majority also was worried that bright lines would encourage property owners to manipulate lot lines in order to avoid regulation or set up takings claims.[80] But maybe that's the point, because the majority's approach does not limit regulation one bit, and leaves property owners guessing. Clear rules would allow owners to game the system. But what is wrong with owners understanding the regulatory milieu, and reacting accordingly to maximize their outcomes? That's rational behavior, not, as the majority put it, "gamesmanship."[81] The result of *Murr* is asymmetrical, because regulators have a free hand to tailor "property" for each case, but owners should not. Besides, the case may have turned out differently if the Murr parents had not conveyed Lot F to their children directly, but had transferred their plumbing company (which owned Lot F) to the children instead, thus avoiding the common ownership provision in Wisconsin's regulations.[82] Constitutional property should not turn on whether the Murr siblings acquired the lot, or their parents' plumbing company.

Should the Court just tell us that as long as land use regulators avoid physically invading land, they are pretty much free to regulate it without serious judicial review to ensure the burdens of publicly-beneficial regulations are shared

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must be made individually and collectively to protect our natural heritage, and to pass it to future generations unspoiled.").

[78] *See* Kelo v. City of New London, 545 US. 469, 491 (Kennedy, J., concurring); *Lingle*, 544 U.S. at 548-49 (Kennedy, J., concurring) (whether a regulation is reasonable, or whether an exercise of eminent domain is for public use is a question under Due Process, and not the Takings Clause).

[79] *Murr*, 137 S. Ct. at ___ [slip op. 12] ("a "reasonable restriction that predates a landowner's acquisition, however, can be one of the factors that most landowners would reasonably consider in forming fair expectations about their property").

[80] *Id.* at ___ [slip op. 17].

[81] *Id.* at ___ [slip op. 17] ("The ease of modifying lot lines also creates the risk of gamesmanship.").

[82] *See Murr*, 137 S. Ct. at ___ [slip op. 17].

equally?[83] The Court could, I suppose, simply inform us that there's no such thing as a regulatory taking except in very limited circumstances, as it has done in substantive due process cases where in order to prevail, a plaintiff must convince a court that the government's conduct shocks the conscience.[84] But I don't think the Court is ready to go that far just yet, because as Justice Holmes famously opined, left unchecked by the Takings Clause, the police power—especially as it is aggressively pursued by the modern regulatory state—would eventually overwhelm the very idea of private property ownership.[85] Even the *Murr* majority continues to pay at least lip service to the principles behind the Takings Clause.

In that vein, *Murr* isn't entirely bad, and the decision has at least one silver lining.[86] All eight Justices who considered the case rejected Wisconsin's argument that state law alone governs the parameters of Fifth Amendment property interests. No member of the Court was willing to say that states have a totally free hand to define and redefine property, and even the three dissenters' reliance on state property law boundaries is limited to "all but the most exceptional circumstances."[87] Wisconsin's argument was built on a very Hobbesian foundation—the Murrs relied on Wisconsin property law to define the boundaries of the parcel they claim was taken, and the limiting regulations are also part of that body of law. The Murrs must take the bitter with the sweet, and property owners should know about these and similar ordinances nationwide. But state law has never been the be-all, end-all answer to the question of what constitutes "property" as Wisconsin argued, at least as far as what is a compensable property interest in takings.[88] Property advocates should take heart that no Justice was willing to accept the view that state and local governments can freely define these interests

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[83] The very first sentence in Justice Kennedy's opinion in *Murr* should give us a clue about what the five Justices in the majority view as important: "The classic example of a property taking by the government is when the property has been occupied or otherwise seized." *Id.* at ___ [slip op. 1].

[84] *See* Paul D. Wilson and Noah C. Shaw, *The Judge as Cartoon Character Whose Hat Flies Into the Air: The "Shocks The Conscience" Standard in Recent Substantive Due Process Land Use Litigation*, 42 URBAN LAWYER 677 (2010).

[85] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) ("When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more, until at last private property disappears."). Justice Holmes also gave us the notoriously difficult-to-apply maxim that "[t]he general rule, at least, is that, while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking." *Pa. Coal Co*., 260 U.S. at 416. Justice O'Connor later labeled Holmes' maxim "storied but cryptic." *Lingle*, 544 U.S. at 537 (citing *Pa. Coal Co*., 260 U.S. at 416) ("In Justice Holmes' storied but cryptic formulation, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."). "The rub, of course, has been—and remains—how to discern how far is 'too far.'" *Id*. at 538.

[86] John Adams proclaimed that "property must be secured or liberty cannot exist," and John Locke's SECOND TREATISE ON CIVIL GOVERNMENT (Part XI, section 138, if you want to get really specific),

[87] *Murr*, 137 S. Ct. at ___ [dis. op. 6] (Roberts, C.J., dissenting).

[88] *See* Preseault v. Interstate Commerce Comm'n, 494 U.S. 1, 22 (1990) (O'Connor, J., concurring) (state law defines property but that "is an issue quite distinct from whether the Commission's exercise of power over matters within its jurisdiction effected a taking of petitioners' property") (citing Kaiser Aetna v. United States, 444 U.S. 164, 174 (1979)).

without compensation. The Court has always suggested that property ownership is not one of those things completely subject to state definition or redefinition, and it doesn't appear any Justice is ready to jettison those principles just yet.

V. COVFEFE![89]

What could explain the majority's clouding of the waters, by adopting a multi-factor test that puts the focus on the validity of the regulations, something which the Court has repeatedly told us is not part of takings? Bear with me while I engage in a bit of supposition. The point of what follows isn't inside baseball speculation, only support for my thought that the *Murr* majority's multifactor analysis probably isn't all that secure.

I surmise that the majority may have predicted *Murr* would be one of the last chances for the Court's police power hawks to influence the development of regulatory takings doctrine for a long time. The Court granted certiorari and agreed to review the case on January 15, 2016.[90] On that date, the surrounding environment in which the case would be considered was much different than it ended up being. First, right up to the presidential election in November 2016, it appeared that candidate Hillary Clinton was the odds-on favorite to win. Thus, she would have the power during her tenure to nominate Justices who were predicted would lock in a generation of regulation-friendly decisions. Some legal commentators were rubbing their hands in anticipation.[91] Perhaps the four property-friendly Justices (Chief Justice Roberts, and Justices Scalia, Alito, and Thomas) believed that *Murr* represented one of their final chances to influence takings law before it inevitably swung leftward after the election. But less than one month after the Court accepted the case, on February 13, 2016, Justice Scalia died unexpectedly,[92] and the Republican-controlled Senate slow-walked President Obama's nomination of a replacement. Second, that alone may not have altered the predictions about the future direction of the Court, but all prognostications were blown out of the water in the November election, and fortunes were radically reversed: the all-but-certain future liberal majority now could see that their

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[89] Matt Flegenheimer, *What's a 'Covfefe'? Trump Tweet Unites a Bewildered Nation*, N.Y. TIMES (May 31, 2017) ("And on the 132nd day, just after midnight, President Trump had at last delivered the nation to something approaching unity—in bewilderment, if nothing else. The state of our union was . . . covfefe.") https://www.nytimes.com/2017/05/31/us/politics/covfefe-trump-twitter.html (last visited July 22, 2017).

[90] Docket, Murr v. Wisconsin, No. 15-214 (U.S.).

[91] *See*, *e.g*., Mark Tushnet, *Abandoning Defensive Crouch Liberal Constitutionalism*, BALKANIZATION (May 6, 2016) https://balkin.blogspot.com/2016/05/abandoning-defensive-crouch-liberal.html (last visited July 22, 2017) ("Liberals should be compiling lists of cases to be overruled at the first opportunity on the ground that they were wrong the day they were decided. . . . Of course all bets are off if Donald Trump becomes President.").

[92] Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016) https://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html (last visited July 22, 2017).

presumed dominance had evaporated overnight.[93] The Court's long delay in scheduling oral arguments suggests there was some behind-the-scenes maneuvering, perhaps signaling that the conservatives might be trying to muster support for a way to avoid a decision in the case. Maybe better to not decide, than risk the chance of it serving as a vehicle to upset existing takings doctrine and take it two steps back. But that never happened. So maybe the *Murr* majority, viewing the case as the last charge of Wyatt Earp and his immortals,[94] saw this as the last opportunity to make takings law harder, before it gets easier. A different Court may see things differently.

Another indicator that *Murr* didn't settle the issue was a case being considered contemporaneously in which the Court ultimately denied review. In *Lost Tree Village Corp. v. United States*,[95] the U.S. Court of Appeals concluded that the economic impact of the Corps of Engineers' denial of a Clean Water Act permit for development of a single parcel should be measured against the parcel alone, and not the parcel plus "a neighboring upland plat (Plat 55), and scattered wetlands in the vicinity owned by Lost Tree at the time the permit was denied."[96] The Federal Circuit concluded that the focus of the denominator question should be on whether the owner treated the multiple parcels "as part of the same economic unit."[97] After the case was remanded to the Court of Federal Claims (which concluded the federal government was liable for the taking of the stand-alone parcel), and the Federal Circuit affirmed, the government sought Supreme Court review, asking the Court to hear the case together with *Murr*.[98] Without comment, the Court denied review four days after issuing the opinion in *Murr*.[99] While a denial of certiorari isn't usually indicative of anything, the fact that the Court didn't grant the federal government's petition, hear the case together with *Murr* (in which the federal government was already arguing as amicus curiae), or vacate the Federal Circuit's judgment and remand for consideration in light of *Murr*, may indicate that that future takings litigants should take a hard look at *Lost Tree*'s "same economic unit" test, because the Court may do so. Or indicate that at least four Justices were not dissatisfied with the Federal Circuit's analysis. I don't think *Murr*'s multi-factor test will endure.

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[93] Paul Booth, *Getting Serious About 2018*, THE AMERICAN PROSPECT (July 5, 2017) http://prospect.org/article/getting-serious-about-2018 (last visited July 22, 2017) ("The Republican power stranglehold is tightening. The Supreme Court is theirs, for a generation.").

[94] *See* STEVEN LUBET, MURDER IN TOMBSTONE: THE FORGOTTEN TRIAL OF WYATT EARP (2004) (detailing the Earp vendetta ride).

[95] Lost Tree Vill. Corp. v. United States, 707 F.3d 1286 (Fed. Cir. 2013); 787 F.3d 1111 (Fed. Cir. 2015), *cert. denied*, No. 15-1192, ___ U.S. ___, 2017 U.S. LEXIS 4278 (U.S. June 27, 2017).

[96] *Id*. at 1288.

[97] *Id*. at 1293.

[98] Petition for a Writ of Certiorari at 29, United States v. Lost Tree Vill. Corp., No. 15-1192 (U.S. Mar. 22, 2016).

[99] Lost Tree Vill. Corp. v. United States, 787 F.3d 1111 (Fed. Cir. 2015), *cert denied*, No. 15-1192, ___ U.S. ___, 2017 U.S. LEXIS 4278 (U.S. June 27, 2017).

VI. A BARBECUE, A VOLLEYBALL COURT, OR INVESTMENT— IT SHOULD BE ABOUT THE OWNER'S JOINT USE

The lower courts' consideration of the denominator issue in regulatory takings case was inconsistent, as the Murrs' petition for certiorari pointed out.[100] These courts did not apply uniform standards, and instead seemed to prefer conflicting categorical rules. The Court's rejection of categorical rules, and adoption a multifactor test is the problem with *Murr*. Multifactor tests aren't by themselves bad. Because in straight takings cases—where the government is exercising its eminent domain power to affirmatively take property and it does not dispute its obligation to justly compensate the owner—courts have long experience in analyzing cases where the owner claims more than one parcel has been taken (or damaged, if under state law) by the condemnation.[101]

In these cases, to determine whether the owner is entitled to severance damages for the taking of one parcel which (allegedly) damages another, juries and appraisers look at the "three unities" (unity of use, title, and contiguity), and ask: are the two parcels *used* by the owner as an integrated whole, does the condemnee or a related owner have *legal rights* in the other parcel, and are the parcels *close* to each other? Also known as the "larger parcel or tract" rule, the three unities test is applied flexibly and holistically, and in these cases "no rigid rules can be prescribed."[102] The critical question after all, is whether the parcels are part of a larger tract or unified whole—with no single element being dispositive.[103] In other words, *factors*. How these balance out is a matter for the factfinder, not a threshold question of law for a judge.[104] If the factfinder concluded that on the whole the owner reasonably treated two parcels as an integrated whole, then the condemnor

[100] Petition for a Writ of Certiorari at 17-21, Murr v. Wisconsin, No. 15-214 (U.S. Aug. 14, 2015).

[101] For a recent example, see Cnty. of Kauai v. Hanalei River Holdings, Ltd., 394 P.3d 741 (Haw. 2017), which focused on joint use of multiple parcels by a single owner. *Id.* at 750 ("'the test generally used by courts to determine whether a parcel to be acquired by eminent domain proceeding is a part of a larger tract of land to entitle owners to severance damages is that there must be unity of title, physical unity and unity of use of the parcel taken and parcel left[]'") (quoting Honolulu v. Bonded Inv. Co., 511 P.2d 163, 165 (Haw. 1973)).

[102] *See*, *e.g*., Am. Sav. & Loan Assoc. v. Cnty. of Marin, 653 F.2d 364, 369 (9th Cir. 1981) (the court held the three unities factors "are not absolutely inflexible" but rather, "are working rules courts have adopted to do substantial justice in eminent domain proceedings") (citing United States v. Miller, 317 U.S. 369, 375-76 (1943); United States v. 429.59 Acres, 612 F.2d 459, 463-64 (9th Cir. 1980)). *See also* Barnes v. N.C. State Highway Comm'n, 109 S.E.2d 219, 224-25 (N.C. 1959) ("The factors most generally emphasized are unity of ownership, physical unity and unity of use. Under certain circumstances the presence of all these unities is not essential."); Terr. v. Adelmeyer, 363 P.2d 979, 985 (Haw. 1961) ("The facts and circumstances of each case must be considered to determine the applicable formula.").

[103] *See* 8A ROBERT C. BYRNE & JENEAN TARANTO, NICHOLS ON EMINENT DOMAIN § G16.02(2)(a) (Rev. 3d ed. 2015) ("It is important to note that the presence or absence of any or all of these factors is not absolutely determinative. They are merely working rules adopted to do justice to the owner(s) of the remainder.").

[104] M & R Inv. Co. v. State, 744 P.2d 531, 535 (Nev. 1987) ("Under the prevailing rule, identification of the larger tract is an issue of fact to be decided by the trier of fact.") (citing United States v. 8.41 Acres of Land, 680 F.2d 388 (5th Cir. 1982)).

is liable to pay compensation, even though it has not formally taken the separate parcel.

Most courts emphasize joint use of multiple parcels.[105] Title and physical proximity are relevant, but most often in conjunction with actual use by a single property owner.[106] One of the classic illustrations of larger parcel and severance damages is a business located on one side of a street, whose parking lot is on the other. If the parking lot is condemned, the business owner is entitled to present evidence of the economic impact of the loss of her parking lot on her business, and it is a question for trial whether the separation of the parcels make it more or less likely that she uses them together.[107] It would not have made sense in those examples to say that simply because a road separated the parcels and they did not abut, that the owners should have been barred from presenting evidence about how the loss of parking damaged the other parcel.

A case decided by the Hawaii Supreme Court illustrates the analysis and how joint use of multiple parcels by one owner is the key, and not things like topography and whether or how regulations may reduce or enhance the value. In *Honolulu v. Bonded Investment*,[108] the owner owned three contiguous lots: Lot 59, as well as the lots on either side of that parcel, Lots 65 and 60. Thus, "[t]here is no

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[105] *See*, *e.g.*, Doolittle v. Everett, 786 P.2d 253, 259 (Wash. 1990) ("[T]he factor most often applied by courts in determining whether land is a single tract is unity of use[.]"); Div. of Admin., State Dep't of Transp. v. Jirik, 471 So. 2d 549, 552 (Fla. Dist. Ct. App. 1985) ("[U]nity of use is generally given the greater emphasis. . . . [S]ome cases suggest that 'unity of use,' or integrated use and not physical contiguity is the test but that physical contiguity often has great bearing on the question of unity of use."); Sauvageau v. Hjelle, 213 N.W.2d 381, 389 (N.D. 1973) ("[T]racts physically separated from one another may constitute a 'single' tract if put to an integrated unitary use. . . . Integrated use, not physical contiguity, therefore, is the test."); State ex rel. Road Comm'n v. Williams, 452 P.2d 548, 549 (Utah 1969) ("[A]n award of severance damages to the remaining property is appropriate where two or more parcels of land, although not contiguous, are used as constituent parts of a single economic unit.").

[106] The leading eminent domain treatise notes "[c]ontiguity, in and of itself, is not usually conclusive. Rather, most cases refer to the contiguity element in conjunction with the unity of use or unity of ownership components." 8A ROBERT C. BYRNE & JENEAN TARANTO, NICHOLS ON EMINENT DOMAIN § G16.02(2)(a) (Rev. 3d ed. 2015) (citing United States v. 8.41 Acres of Land, 680 F.2d 388 (5th Cir. 1982); United States v. 5.00 Acres of Land, 731 F.2d 1207 (5th Cir. 1982); United States v. 6.90 Acres of Land, 685 F.2d 1386 (5th Cir. 1982); Town of Hillsborough v. Crabtree, 547 S.E.2d 139 (La. App. 2002); City of Winston-Salem v. Slate, 647 S.E.2d 643 (N.C. App. 2007); Dep't of Transp. v. Rowe, 531 S.E.2d 836 (N.C. App. 2002)).

[107] For an example, see Robert H. Thomas, *The Larger Parcel, Eminent Domain, And The World's Best Pastrami Sandwich*, INVERSECONDEMATION.COM (June 28, 2017), http://www.inversecondemnation.com/inversecondemnation/2017/06/the-larger-parcel-and-the-worlds-best-pastrami-sandwich.html (last visited July 22, 2017). *See also* Barton v. City of Norwalk, 135 A.3d 711, 725 (Conn. App. Ct. 2016) (condemnation of parking area resulted in inverse condemnation of building across the street because loss of parking substantially destroyed landowner's ability to operate his business on that property), *aff'd*, 2017 Conn. LEXIS 193 (Conn. July 4, 2017); State v. Rittenhouse, 634 A.2d 338, 343-45 (Del. 1993) (condemnation of parking lot resulted in taking of building across street, whose owner used parking lot to serve tenants of building).

[108] Honolulu v. Bonded Inv. Co., 511 P.2d 163, 165 (Haw. 1973).

question the three lots could comprise one tract of land."[109] The city condemned all three, and Bonded asserted that all three together should be considered the larger parcel.[110] Bonded, however, didn't use all three parcels together: it was underway with a condominium project on Lots 59 and 60, and had plans for a separate condo project on Lot 65.[111] The court concluded that the owner's use of Lot 65, separate from its joint use of Lots 59 and 60, "is controlling here on the question of whether Lots 65, 59 and 60 constituted one tract of land."[112] Because Bonded used Lot 65 separately from the other two, only Lots 59 and 60 could be treated as a single larger parcel:

> The owners having thus separated the use of Lot 65 from other lots, it could no longer be said that there was such "connection, or relation of adaptation, convenience, and actual and permanent use between them, as to make the enjoyment of the parcel taken, reasonably and substantially necessary to the enjoyment of the parcel left, in the most advantageous and profitable manner in the business for which it is used."[113]

The flexibility of the three unities test's focus on use can also be illustrated by cases in which the owner uses two parcels as an integrated whole, even though the parcels are physically separated. For example, in *Baetjer v. United States*,[114] the U.S. Court of Appeals for the First Circuit held the district court "erred in ruling that the [property owner's] lands on Puerto Rico had not been severed in the legal sense from their lands on Vieques."[115]The parcels at issue were separated by seventeen nautical miles of water,[116] yet the court correctly focused on the owner's joint use of the land as a sugar cane plantation, to conclude the taking of one damaged the other. The court rejected the government's argument "that no damages for severance can ever be allowed unless the property taken is physically contiguous to the property of the owner remaining after the taking."[117] The court held:

> Integrated use, not physical contiguity, therefore, is the test. Physical contiguity is important, however, in that it frequently has great bearing on the question of unity of use. Tracts physically separated from one another frequently, but we cannot say

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[109] *Id*. at 164.

[110] *Id*. ("The basic issue to be decided here is whether Lots 65, 59 and 60 comprise one parcel or tract of land.").

[111] *Id*. at 166 ("It is clear to us that the owners not only by choice and design had separated the use of Lot 65 from Lots 59 and 60.").

[112] *Id*. (footnote omitted).

[113] *Id*. (quoting Peck v. Superior Short Line Ry. Co., 31 N.W. 217, 218 (Minn. 1887)). *See also* Barnes v. N.C. State Highway Comm'n, 109 S.E.2d 219 (N.C. 1959); City of Menlo Park v. Artino, 311 P.2d 135 (Cal. App. 1957).

[114] Baetjer v. United States, 143 F.2d 391, 395 (1st Cir.) ("[T]racts physically separated from one another may constitute a 'single' tract if put to an integrated unitary use[.]"), *cert. denied*, 323 U.S. 772 (1944).

[115] *Id*. at 395.

[116] *Id*. at 393 n.1.

[117] *Id*. at 393.

> always, are not and cannot be operated as a unit, and the greater the distance between them the less is the possibility of unitary operation, but separation still remains an evidentiary, not an operative fact, that is, a subsidiary fact bearing upon but not necessarily determinative of the ultimate fact upon the answer to which the question at issue hinges.[118]

Baetjer is an example of a court properly recognizing the on-the-ground realities rather than adhering to amorphous factors rendered impractical and unrealistic when applied in real situations. The owner in Baetjer actually used the parcels together, in accordance (apparently) with existing laws and regulations, or at least not in violation. Having done so, it would not have been surprised if it had claimed that a determination of whether a different or new regulation rendered one parcel worthless, the value of the other parcel could be taken into account.

A decision I discussed earlier, *Lost Tree Village Corp. v. United States*,[119] is an example of the determination of the denominator in a regulatory takings case properly focused on an owners' integrated use. After the Corps of Engineers denied a Clean Water Act permit which would have allowed Lost Tree to dredge and fill wetlands on Plat 57, Lost Tree brought a takings action in the U.S. Court of Federal Claims (CFC). Lost Tree purchased Plat 57 in 1974, part of an acquisition of land in the area which took place over two decades.[120]Over the next two decades, Lost Tree developed its other parcels in what the CRC found was a "'piecemeal' manner, by 'opportunistic progression,' rather than strictly following any master development plan."[121] The court also found that the development of Plat 57 was "physically and temporally remote" from its development of its other nearby parcels.[122] But the CFC concluded that as a matter of law that Lost Tree's "property" for purposes of its takings claim was not only Plat 57, but an adjacent separately-platted lot, plus "scattered wetlands still owned by Lost Tree within the community of John's Island."[123] That placed the court's takings analysis on the merits within *Penn Central*, and not *Lucas*, because Lost Tree alleged the Corps' denial of the CWA permit reduced the value of Plat 57 standing alone from over $4 million to $27,500, a loss of 99.4%.[124]

The Federal Circuit focused on the economic realities and how owners such as Lost Tree—a sophisticated land developer—and held Lost Tree had treated Plat 57 separately. It had not used the lot as a "single economic unit" in conjunction with its other parcels.[125] The CWA permit application was not part of an integrated project, and thus Plat 57 could be analyzed alone. The owners' actual conduct, and

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[118] *Id*. at 395 (footnote omitted).

[119] Lost Tree Vill. Corp. v. United States, 707 F.3d 1286 (Fed. Cir. 2013); 787 F.3d 1111 (Fed. Cir. 2015), *cert. denied*, No. 15-1192, ___ U.S. ___, 2017 U.S. LEXIS 4278 (U.S. June 27, 2017).

[120] *Id*. at 1288.

[121] *Id*. at 1289 (quoting Lost Tree Vill. Corp. v. United States, 100 Fed. Cl. 412, 431-32 (2011)).

[122] *Id*. at 1291 (quoting *Lost Tree*, 100 Fed. Cl. at 433).

[123] *Id*. (quoting *Lost Tree*, 100 Fed. Cl. at 433).

[124] *Lost Tree*, 787 F.3d at 1114.

[125] *Lost Tree*, 707 F.3d at 1293 (quoting Forest Props., Inc. v. United States, 177 F.3d 1360, 1365 (Fed. Cir. 1999)).

its actual use of the separate lot, revealed that it used Plat 57 was treated as a stand-alone lot, and therefore the takings analysis should use it alone as the denominator.[126] Although the court didn't label its analysis an application of the three unities test, it examined at titling and contiguity, and ultimately focused on Lost Tree's objectively-measurable intent (originally as investment and not development); in other words, use.[127]

Some courts have declined to apply the three unities test, because they view regulatory takings analysis as different from eminent domain, and the three unities test is used determine severance *damages*, and not *liability* for a taking:

> The County acknowledges that these cases concern damages in condemnation actions. It suggests that 'they are the only available judicial analysis of this issue and plaintiff is suing in inverse condemnation.' We reject this suggestion. The issue is not the same in condemnation cases and in inverse condemnation cases. In condemnation cases the issue is damages: How much is due the landowner as just compensation? In inverse condemnation the issue is liability: Has the government's action effected a taking of the landowner's property? In the latter the boundaries of the property allegedly taken must be determined by taking jurisprudence rather than the law of eminent domain.[128]

But that isn't really accurate. The test is employed in eminent domain cases where the owner claims the government is actually taking or damaging more land than it is affirmatively condemning, which is very much the same in regulatory takings. The only difference is that the power which the government is exercising in condemnation is the eminent domain power, and in regulatory takings cases is something else. As the Court has reminded, the core question a regulatory takings claim is trying to solve is whether a regulation is so restrictive that it limits the owner's rights so severely that it has an impact similar to the government's exercise of eminent domain.[129]

VII. State Courts as the Bulwarks of Property

Nearly all regulatory takings cases which challenge state or local regulations must be brought in state court, and apply state takings law.[130] State courts applying their own takings clauses are not bound by *Murr*, except as a floor below which

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[126] *Id*. at 1293-94.

[127] *Id*. at 1295. On remand, the Claims Court determined the Corps' denial of the permit reduced the value of Plat 57 alone from over $4 million, to $27,500, a loss of 99.4%, and the Federal Circuit affirmed. The Federal Circuit rejected the federal government's claim that leaving land with 0.6% of value in its regulated state isn't a *Lucas* taking, because "residual value" isn't an economically beneficial use. *Lost Tree*, 787 F.3d at 1114-15.

[128] Am. Sav. & Loan Assoc. v. Cnty. of Marin, 653 F.2d 364, 368 (9th Cir. 1981).

[129] In Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 537 (2005), the Court noted that "government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster[.]"

[130] *See* Williamson Cnty. Reg. Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1984).

they may not go.[131] And it is an exceedingly low floor. Which means that state courts, applying state takings law, need not utilize *Murr*'s factors. Applying the three unities test in those courts would have several advantages.

First, it comports with common understandings of property, and keeps courts well away from reviewing the reasonableness of the regulations. The Murrs argued that their separately platted parcels should have been treated separately, at least as the starting point, and before they could be considered a single parcel in order to measure the impact of the regulations, the government needed to show more than the same owners owned two adjoining parcels which the regulations themselves rendered "substandard." The *Murr* majority placed great stock in the reasonableness of Wisconsin's regulations, because similar regulations are employed nationwide and have been for decades.[132] But what is that when compared to a millennium of expectations in distinct land title and boundaries? Title to fee simple parcels in the foundation on which our concept of private property is built:

> Nearly all privately owned real estate in the United States is held in fee simple absolute, or fee simple for short. Every law student learns that the fee simple is the most extensive of all the estates in land—endless in duration, unencumbered by future interests, alienable, bequeathable, and inheritable. Behind these descriptive elements lies the implicit normative message that the fee simple represents the endpoint of real property's evolution, a more or less final answer to the question of how a modern society should structure access to land [133]

Land titles are measured by their boundaries.[134] They have been the building block on which property law and ownership, and common understandings of what it means to own land has been built. Ask a real person (not a lawyer, a local agency regulator, or a judge) about ownership of land, and chances are they will talk about a parcel, defined by its metes-and-bounds.

Second, the three unities would steer federal constitutional analysis clear of an area it has always purported to shy away from, defining property. Or, more precisely, it would continue constitutional respect for state property rules. The Court's long-established maxim is that while the Constitution protects property

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[131] *See* Ilya Somin, *A Floor Not a Ceiling: Federalism and Remedies for Violations of Constitutional Rights in* Danforth v. Minnesota, 102 N.W. U. L. REV. 365 (2008) ("Few doubt that states can provide greater protection for individual rights under state constitutions than is available under the Supreme Court's interpretation of the Federal Constitution."). .

[132] *Murr*, 137 S. Ct. at ___ [slip op. 15] ("The merger provision here is likewise a legitimate exercise of government power, as reflected by its consistency with a long history of state and local government merger regulations that originated nearly a century ago.").

[133] Lee Fennell, *Fee Simple Obsolete*, 91 N.Y.U. L. REV. 1456, 1456-57 (2016) (footnotes omitted).

[134] *See* HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE 7 (2000) (arguing that the certainty which comes with a system of land titling and deeds is one of the reasons why capitalism has succeeded).

interests, it doesn't define them, and allows state law to establish its boundaries.[135] In *Kaiser Aetna v. United States*[136] for example, the Court recognized that the owner's reasonably reliance on state property law (as odd as it might seem to an outsider) gave rise to certain expectations which "had the law behind it," and thus could not be interfered with in the absence of compensation.[137] That the *Murr* majority messed it up perhaps should not surprise us. This is the Court, after all, which informed us in 1984 in *Williamson County* that a Tennessee property owner could not raise its regulatory takings claim in federal court because Tennessee's courts would entertain a claim for compensation under Tennessee law.[138] It turned out this was not correct: it wasn't until nearly three decades later that the Tennessee Supreme Court actually held that.[139] My point isn't that the U.S. Supreme Court is a good predictor of how state courts treat state law, but rather can be a pretty poor one. It should avoid, where possible, guessing about what state law is, especially property.[140] The three unities test is squarely grounded in existing state law about what interests an owner possesses are integrated enough that interfering with them results in an obligation to pay compensation. State courts—the courts which would be applying the regulatory takings tests because of *Williamson County*—are already very familiar with the three unities test in eminent domain cases. *Murr* plunges courts into this question of local law and on-the-ground facts as a question of law and not fact, which by itself isn't problematic, except after *Murr*, it is a question of *federal* law.

Third, title and lot lines—the dirt—aren't alone dispositive, and focusing on an owner's actual use of multiple parcels also takes into account that property is a bundle of interests.[141] There are fundamental background principles of a state's

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[135] Damon v. Hawaii, 194 U.S. 154, 158 (1904) ("A right of this sort is somewhat different from those familiar to the common law, but it seems to be well known to Hawaii, and, if it is established, there is no more theoretical difficulty in regarding it as property and a vested right than there is regarding any ordinary easement or *profit a prendre* as such. The plaintiff's claim is not to be approached as if it were something anomalous or monstrous, difficult to conceive and more difficult to admit. Moreover, however anomalous it is, if it is sanctioned by legislation, if the statutes have erected it into a property right, property it will be, and there is nothing for the courts to do except to recognize it as a right.").

[136] Kaiser Aetna v. United States, 444 U.S. 164 (1979).

[137] *Id.* at 178.

[138] Williamson Cnty. Reg. Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 196 (1984) ("Under Tennessee law, a property owner may bring an inverse condemnation action to obtain just compensation for an alleged taking of property under certain circumstances.").

[139] *See* Beech v. City of Franklin, 2017 U.S. App. LEXIS 7079 (6th Cir. 2017) (noting that until 2014, the Tennessee Supreme Court had not recognized a right under Tennessee law to recover for regulatory takings, and limited inverse condemnation actions to cases involving only physical occupation and "nuisance type" takings) (citing Phillips v. Montgomery Cnty., 442 S.W.3d 233 (Tenn. 2014)).

[140] *Cf.* Expressions Hair Design v. Schneiderman, No. 15-1391, slip op. at 9 (U.S. Mar. 29, 2017) (Sotomayor, J., concurring) (federal courts should certify uncertain questions of state law to state courts).

[141] United States v. General Motors Corp., 323 U.S. 373, 378 (1945) ("property" as used in the Constitution includes "the right to possess, use and dispose of it"). *See also* Horne v. Dep't of Agriculture, 135 S. Ct. 2419, 2427 (same).

"property and nuisance" law, for example, that transcend a state's ability to redefine them by regulate them out of existence without compensation.[142] These include the right to physically exclude,[143] the right to transfer, and, most importantly, the right to make economically beneficial use of property,[144] regardless of state definitions.[145] Thus, whether the Murr siblings actually used Lots E and F together as a single economic parcel should have been the dispositive proof in the case, and the Court should have sent it back to the Wisconsin courts to make that determination. Their parents bought it for investment purposes. It enhanced the value of Lot F. But the only actual use the siblings and their families made of Lot E was to play volleyball.[146] This would also limit Murr to the circumstances presented in the case. Under the majority's multifactors, regulators won't necessarily be limited by the circumstances presented there, because nothing in the opinion limits application of its multifactor property test only to those cases in which the plaintiff owns multiple, contiguous parcels. The *Murr* "parcel as a whole" test could be applied to segment by regulation the expectations of the owner of a single parcel, since the focus is on the reasonableness of the regulations in place at the time of the owner's acquisition.

Fourth, the three unities accounts for regulatory impacts on how owners actually use their multiple parcels without taking *Murr*'s parcel as a whole test to its logical limits, which would mean that the more affluent the plaintiff, the less the complete loss of a single separate parcel will have on her overall wallet. The more parcels owned, the less a taking of a single parcel hurts. There's some inherent appeal with the argument because eminent domain is focused on the loss to the owner and not the gain to the taker, but there doesn't seem to be a limiting principle, unless the Court is ready to say that the more wealthy a property owner is, the less she deserves Constitutional protection because she can absorb the impacts of

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[142] Lucas v. S. Carolina Coastal Council, 505 U.S. 1003, 1029 (1992) ("Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership.")

[143] *See*, *e.g*., Palmer v. Atlantic Coast Pipeline, LLC, No. 1160630 (Va. July 13, 2017) (fundamental right to exclude may also be subject to certain common law privileges, such as the right of a potential condemnor to enter the land for a survey to determine its suitability).

[144] *Lucas*, 505 U.S. at 1017 ("Perhaps it is simply, as Justice Brennan suggested, that total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation.") (citing San Diego Gas & Electric Co. v. San Diego, 450 U.S. 621, 652 (1981) (Brennan, J., dissenting)).

[145] *See* Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980); PruneYard Shopping Center v. Robins, 447 U.S. 74, 93-94 (1980) (Marshall, J., concurring) ("Quite serious constitutional questions might be raised if a legislature attempted to abolish certain categories of common-law rights in some general way."); Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envt'l Protection, 560 U.S. 702, 713 (2010) (noting "[s]tates effect a taking if they recharacterize as public property what was previously private property")..

[146] Justice Kennedy thought the Murrs used at portion of the vacant parcel for a barbecue pit, but Justice Ginsburg correctly noted they used it to play volleyball. Tr. at 25, Murr v. Wisconsin, No. 15-214 (U.S. Mar. 20, 2017).

regulation spread across all of her landholdings.[147] I doubt there are five votes for that. And even if the Court were inclined to go there, the practicalities would take over—the more wealthy a property owner, the more sophisticated she is likely to be—the more sophisticated, the more likely she would be able to structure ownership of multiple parcels in such a way to avoid formal common ownership, so any such rule could fairly easily be avoided or overcome.

Finally, the three unities test disincentivizes the gamesmanship the majority was so worried about. Of course, in eminent domain takings, the owner is very likely looking for arguments which will include more in how his property is defined, while in regulatory takings cases, the dynamic is exactly opposite, because the smaller the owner's denominator, the more likely it is that she can show a total *Lucas* wipeout. That doesn't mean the rule I suggest is inapplicable, just that it can be equally applied and minimize the opportunities for the gamesmanship which the Court seemed so concerned with. But certainty breeds gamesmanship. If the players know the rules ahead of time, they can conform their conduct to maximize the likelihood that their circumstances fit within whatever the governing rule is. Why that's a bad thing, neither the majority nor the dissent explains. Neither the majority's nor the dissent's tests for property adequately account for the government's power to shape regulations in a way to minimize its liability for takings in specific cases.

There was nothing incompatible with the Murrs' argument that metes-and-bounds title is the presumptive starting point for analysis of the larger parcel in regulatory takings. Title is the starting point in eminent domain cases, and it should be the starting point when determining the property in regulatory takings cases as well. *Murr* created a metaphysical, social justice warrior test for property that undercut a millennium of common law principles, deprived juries of the opportunity to decide what is and what isn't reasonable reliance on metes-and-bounds, and took the power to define property away from both property owners and state and local legislators, and handed it judges. The *Murr* majority gives lower court judges a chance to play Justice Kennedy for a day and decide what counts as property (for today, but may not be tomorrow), all based on what a judge believes is fair, or isn't, or is or isn't worthy of being compensated, or whether the government can really afford to pay, all because a judge concludes the regulation is reasonable. It is the specific factors which the *Murr* majority settled on, and the way the Court applied them, that will create the difficulties down the road.

[147] *See Lost Tree*, 707 F.3d at 1292-93 ("Second, the 'parcel as a whole' does not extend to all of a landowner's disparate holdings in the vicinity of the regulated property," because the Supreme Court in *Lucas* "characterize[ed] as 'extreme' and 'unsupportable' the state court's analysis in *Penn Central Transportation Co. v. New York City*, 42 N.Y.2d 324, 333-34, 366 N.E.2d 1271, 397 N.Y.S.2d 914 (1977), *aff'd*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978), which examined the diminution in a particular parcel's value in light of the total value of the takings claimant's other holdings in the vicinity.").

VIII. CONCLUSION

For more than a century, the Court has been telling us that it wasn't willing to give us definitive rules in regulatory takings cases, and it is time we start taking it at its word. As in many of these cases, *Murr* creates many more questions than it clears up, but it should remove any doubt that the present majority is looking for a new direction towards clarity, and indeed is willing to make muddy waters even muddier.[148] After seeming to have abandoned the reasonableness of the regulation as a takings test, the majority has now resurrected it as part of the preliminary property question. Property analysis under *Murr* will inevitably focus on the challenged regulation and what it allows, rather than the actual use the owner has made of the parcels. It transforms an objectively measurable factual determination by a jury into an issue resolved by a judge. Being more familiar with both property law and eminent domain principles, state courts may do a better job.

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[148] *Murr*, 137 S. Ct. at ___ [slip op. 7].

DRAFT 3: February 11, 2018

BACK TO THE FUTURE OF LAND USE REGULATION

ROBERT H. THOMAS*

I. INTRODUCTION

As always, I bring you greetings from the land of *Midkiff*,[1] the land of *Kaiser Aetna*.[2] The jurisdiction in which the legislature thought it was a good idea to try and drive gasoline prices lower by adopting a rent control statute for certain gas stations on the theory that the station owners would naturally pass on the savings to consumers.[3] As you recall, the United States Supreme Court in *Lingle* held that this scheme should not be analyzed under the Just Compensation Clause, but under the Due Process Clause.[4] The Court concluded that as a question of due process and government power, Hawaii's scheme survived the rational basis test,[5] even though in reality—and predictably—the statute did not come anywhere close to accomplishing what it purportedly set out to accomplish: Hawaii continues to have some of the highest gasoline prices in the nation, thank you very much.[6]

I raise all this both as an introduction to my remarks and as background for our panel, "The Future of Land Regulation and Tribute to David Callies."[7] But before we can talk about land use law's future, we must delve into its past. Because the rational basis test, which we have now seen over the years

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[1] Haw. Hous. Auth. v. Midkiff,467 U.S. 229 (1984).

[2] Kaiser Aetna v. United States, 444 U.S. 164 (1979).

[3] *See* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005).

[4] *Id*. at 540 ("We conclude that this formula prescribes an inquiry in the nature of a due process, not a takings, test, and that it has no proper place in our takings jurisprudence.").

[5] *Id*. at 544.

[6] *See* GasBuddy, *Top 10 Lowest Gas Prices in Hawaii*, https://www.gasbuddy.com/GasPrices/Hawaii (last visited Nov. 26, 2017).

[7] William & Mary Law School, *Schedule of Events*, http://law.wm.edu/academics/intellectuallife/conferencesandlectures/propertyrights/scheduleofevents/index.php (last visited Nov. 26, 2017). For the presentation by my fellow panelist Professor Ely, see James W. Ely, *David Callies and the Future of Land Use Regulations* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3109942 (last visited Jan. 27, 2018).

Electronic copy available at: https://ssrn.com/abstract=3122115

inexorably creep into takings and eminent domain law—had its genesis as we all know, in zoning and land use law. Today, I'll focus on two cases, one old, one new.

II. J.C. HADACHECK GETS PLAYED

We usually identify *Euclid v. Ambler Realty Company*[8] as the first constitutional land use case, and indeed, it was the first Supreme Court decision—by the Sutherland Court, no less—to uphold "everything in its place" and separation-of-uses zoning.[9] What we now refer to as Euclidean zoning, quite naturally. But I like to think that modern land use jurisprudence really began a decade earlier at the height of the Progressive Era, involving property which today is the nondescript corner of what could be just about any urban city street in America: this part of what is now the Arlington Heights neighborhood in Los Angeles contains little of overwhelming interest, just the usual commercial buildings, residences, traffic signals, and small businesses. A self-storage facility. Pretty typical in a Commercial district, here the "C-4 District." Nothing at all, in fact, to indicate that just over a century ago, this was the site of what was to become one of the most important land use cases in U.S. history—the place that gave us the first Supreme Court decision that dealt with how the expanding power to regulate the uses of property meshes with private property rights. This area—the block southeast of the corner of Pico and Crenshaw Boulevards—was once a brickyard at the edge of the city, owned by Joseph C. Hadacheck.

The Supreme Court's opinion in *Hadacheck v. Sebastian*,[10] upholding his conviction for violating a newly-adopted ordinance which prohibited brickyards in certain districts—and denying his request for a writ of habeas corpus—does not give the real flavor of the case. This neighborhood was once outside of the city limits. Indeed, Hadacheck's property's title predated the city itself and went back to the original Mexican land grant—as most Central and Southern California land titles do—to a former alcalde of the Los Angeles Pueblo. This parcel was originally a part of the massive Rancho Los Cienegas. Eventually, the rancho was subdivided and parceled off, and Hadacheck purchased the parcel in 1902 because the clay deposits made it an ideal place to manufacture the bricks needed to build the rapidly expanding metropolis. California, you see, "did not have great paving brick manufactur-

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[8] Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

[9] *See* Constance Perin, EVERYTHING IN ITS PLACE – SOCIAL ORDER AND LAND USE IN AMERICA (1977).

[10] Hadacheck v. Sebastian, 239 U.S. 394 (1915).

Electronic copy available at: https://ssrn.com/abstract=3122115

ers like other states mainly because of the scarcity of good vitrified clay deposits."[11] This property was prime: as the Court noted, the "clay upon his property is particularly fine, and clay of as good quality cannot be found in any other place within the city where the same can be utilized for the manufacture of brick."[12]

Brickmaking, as you might expect, was a messy affair, involving large hole in the ground to dig out the clay, and fire-stoked drying kilns. When Hadacheck's manufacturing plant was far from downtown, the noise, dust, and smoke it produced was not a big problem. But Los Angeles was growing, and in 1909, the Hadacheck property was annexed by the city and became subject to its jurisdiction. The surrounding land—the site of at least one other brickyard—came into the sights of the land speculators and developers. In the mid-aughts, the nearby area was developed as single-family homes. Some of these homes were, and remain today, pretty nice. Mostly arts-and-crafts style. One of these developments—developed by "a syndicate of a dozen prominent business men"—was an area they labeled "Victoria Park." That had a nice ring to it, and today, the area is still called Victoria Park.

Tony residences nearby a noisy, smoke-and-dust-belching industrial site is not a recipe for the status quo. Victoria Park, you see, is just a few blocks from the Hadacheck site and was even closer to another brickyard, Hubbard & Chamberlain, located across the street from the residential development. And over a hundred years ago, this meant the same thing it would mean today: a conflict between an existing, possibly undesirable use, and late-coming residents (whom today we might label "NIMBY's").[13] This might have resulted in a your run-of-the-mill tort or nuisance case, with a claim by the residential owners that Hadacheck's use of his property interfered with theirs, and a defense by him that he was there first, and thus they "came to the nuisance." [14]

But it didn't play out that way. The City Council of Los Angeles, over the veto of Mayor George Alexander, used its police powers to adopt an ordinance prohibiting brickyards in "certain districts." And when referring to "certain districts" the Council pretty much meant this area. Because the only two

[11] Dan L. Mosier, *History of Brickmaking in California*, CALIFORNIA BRICKS (2003), http://calbricks.netfirms.com/brickhistory.html.

[12] *Hadacheck*, 239 U.S. at 405.

[13] "NIMBY," an acronym for "not in my back yard," is used to describe those who object to development, primarily on the grounds that it is too close to their own property. *See* Michael B. Gerrard, *The Victims of NIMBY*, 21 FORD. L. REV. 495 (1993).

[14] *See*, *e.g.*, Sturges v Bridgman LR 11 Ch D 852 (1879) (private nuisance claim not defeated by the fact that the plaintiff moved to the area, and that the defendant's noxious use predated the plaintiff's arrival).

brickyards subject to this ordinance were Hadacheck's and the other brickyard, Hubbard & Chamberlain, located directly across Pico from the entrance to Victoria Park.

Remember that "syndicate of a dozen prominent business men" who developed Victoria Park, whose residents were now overwhelmed by the nearby brickyards? One of those "business men" was none other than Josias J. Andrews, who just so happened to be a member of the Los Angeles City Council, and who chaired the Council's Legislative Committee. According to a contemporary account, Mr. Andrews:

> ... is a Progressive and he is altogether progressive in profession and practice in the broadest sense of the word. He was twice elected to the city council and during the time of his service was active in procuring the passage of various progressive measures. He was a strenuous advocate of the law which later as incorporated in the city charter limiting the height of new buildings, and was instrumental in having it passed.[15]

Brickyards in other parts of Los Angeles where Councilman Andrews didn't have investments were not subject to similar ordinances, and even where there were conflicts with residences, existing brickyards were given several years to wind down.

But not in this case. The ordinance made it a crime to continue to operate, and apparently Mr. Hadacheck tried to do other things with his land: he obtained a building permit for a two-story residential building on Pico, and there's evidence he allowed the use of the clay pit as a dump site. But he kept up the brickmaking, because he was charged with a misdemeanor and convicted under the ordinance and was remanded to the custody of the Los Angeles police chief.

You already know the rest of the story: Hadacheck brought a habeas corpus action challenging the constitutionality of his confinement, arguing that the regulations severely devalued his property (he argued that before the regulations, the property was worth $800,000, but after, only $60,000), and that he was being singled out.[16] He also argued the land was not really useful for anything but brick manufacturing (a claim belied in hindsight by the future use of the site as blocks of single-family homes). The residences there today are modest and not up to the Victoria Park standard, mind you, but they are still pretty nice.

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[15] JAMES MILLER GUINN, A HISTORY OF CALIFORNIA AND AN EXTENDED HISTORY OF LOS ANGELES AND ENVIRONS: ALSO CONTAINING BIOGRAPHIES OF WELL-KNOWN CITIZENS OF THE PAST AND PRESENT, VOLUME 3 695-96 (1915).

[16] *Hadacheck*, 239 U.S. at 405.

Even though the courts accepted Hadacheck's argument he was not creating a nuisance, he lost in the California Supreme Court, and eventually in the U.S. Supreme Court, which held that it didn't matter that the brickyard wasn't a common-law nuisance, because the city could exercise its police power to prohibit uses, even where those uses predated the regulation:

> It may be that brickyards in other localities within the city where the same conditions exist are not regulated or prohibited, but it does not follow that they will not be. That petitioner's business was first in time to be prohibited does not make its prohibition unlawful. And it may be, as said by the supreme court of the state, that the conditions justify a distinction. However, the inquiries thus suggested are outside of our province.
>
> There are other and subsidiary contentions which, we think, do not require discussion. They are disposed of by what we have said. It may be that something else than prohibition would have satisfied the conditions. Of this, however, we have no means of determining, and besides, we cannot declare invalid the exertion of a power which the city undoubtedly has because of a charge that it does not exactly accommodate the conditions, or that some other exercise would have been better or less harsh. We must accord good faith to the city in the absence of a clear showing to the contrary and an honest exercise of judgment upon the circumstances which induced its action.[17]

In short, the "rational basis" test. This was the police power being exercised, and who are we—mere judges—to question what the City says it needs, and what counts as a good faith attempt to keep the city beautiful, absent a clear showing of dirty pool? (This sounds a lot like Justice Kennedy's test for eminent domain pretext in *Kelo v. City of New London*[18] some ninety years later; but more on that in a minute.)

The rest, as they say, is history: the *Hadacheck* decision became the foundation on which the constitutionality of all zoning law is built, and today, we still have yet to resolve completely the tension between the police power to regulate property, and the rights of private property owners.

But what of Mr. Hadacheck? After he lost his brickyard business, what became of him? We don't exactly know for certain. But we do know that in nearby Rosedale Cemetery, there's a grave for one "J.C. Hadacheck" who died in 1916 at the young age of 48, less than seven months after the Court issued

[17] *Hadacheck*, 239 U.S. at 413-14.
[18] Kelo v. City of New London, 545 US. 469 (2005).

its opinion. Is this the same "J.C. Hadacheck" who petitioned the Supreme Court? We're not sure, but we wouldn't be surprised. Not knowing for sure, our imagination wanders to a fanciful conclusion in which Mr. Hadacheck—having been played by the City Council, the NIMBY's, and the courts—simply gave up the ghost after realizing that even though he made the bricks that had built the city, his usefulness, and his time, had passed.

III . REASON AND LAND USE REGULATION

Unlike Mr. Hadacheck, the rational basis test, in one form or another has survived the ninety-plus years in between, even having been transported into eminent domain law, first by *Midkiff*, the case from my home turf which equated the power to appropriate property for public use with compensation, with the power to regulate it without compensation, and then, in *Kelo*, the Court formally Eucidizing eminent domain by concluding that if a taking could conceivably be considered part of a comprehensive plan, the public use of the property is, in the words of Justice Douglas in *Berman v. Parker*, "well-nigh conclusive," even if the specific transfer was to take property from A, and give it to B. Professor Haar would no doubt approve.[19]

The reasonableness test has also crept into regulatory takings law, most recently in *Murr v. Wisconsin*,[20] the case in which the Court addressed the "denominator" or "larger parcel" issue by defining property for takings purposes by applying a confusing stew of mostly undefined factors which do not focus on a property owner's expectations and actual use of her land, but shifts the inquiry to the reasonableness of the regulation by looking at things like the "treatment of the land" under state law, the "physical characteristics" of the properties (which includes the parcels' topography and "the surrounding human and ecological environment"), and, most strangely, "the value of the property under the challenged regulation."[21] This environment is not limited to existing regulations, but owners are also charged with anticipating possible future regulations. Especially if the parcels are located in areas presenting "unique concerns" or "fragile land systems."[22] The majority faulted

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[19] *See* Charles M. Haar, *"In Accordance With a Comprehensive Plan"*, 68 HARV. L. REV. 1154 (1955).

[20] Murr v. Wisconsin, 137 S. Ct. 1933 (2017). For my initial thoughts on *Murr*, see Robert H. Thomas, *Restatement (SCOTUS) of Property: What Happened to Use in Murr v. Wisconsin?* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3007166 (last visited Feb. 11, 2018).

[21] *Id.* at 1938.

[22] *Id.* at 1946 (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1035 (1992) (Kennedy, J., concurring).

the Murrs for not realizing that merger provisions are common in zoning schemes—and therefore, in the Court's view, reasonable.[23] Underlying the majority's opinion was its belief that regulation of the Murrs' property is a good thing. But the reasonableness of a regulation is not supposed to be part of the takings calculus—especially after the unanimous Court in *Lingle* rejected the "substantially advance" test as one of takings[24]—because to even get to the takings question, the property owner either must concede the validity of the regulation, or a court must have concluded it was reasonable.[25] As I argued in an amicus brief in *Lingle*, this is the "public use" half of the regulatory takings equation, since if a regulation does not benefit the public, the court should invalidate it, not require compensation.[26] Unreasonable regulations cannot be enforced, and this is a separate question of whether an otherwise reasonable regulation results in a regulatory taking and requires compensation, a point Justice Kennedy has made in both condemnation and regulatory takings cases.[27] But *Murr* made this the central question in determining the preliminary question of Takings Clause property, because the measure of the owner's expectation and property right is the "reasonableness" of the regulation.[28]

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[23] *Id.* at 1947.

[24] Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 536–37 (2005) (The Court explained that the Takings Clause is not designed to prohibit government action, but to secure compensation "in the event of *otherwise proper interference* amounting to a taking.") (emphasis added).

[25] *See Loveladies*, 28 F.3d at 1175 ("What is not at issue is whether the Government can lawfully prevent a property owner from filling or otherwise injuring or destroying vital wetlands. The importance of preserving the environment, the authority of state and federal governments to protect and preserve ecologically significant areas, whether privately or publicly held, through appropriate regulatory mechanisms is not here being questioned. There can be no doubt today that every effort must be made individually and collectively to protect our natural heritage, and to pass it to future generations unspoiled.").

[26] *See* Brief Amici Curiae of Charles W. Coupe, Robert Nigel Richards, Joan Elizabeth Coupe, and Joan Coupe in Support of Respondent, *Lingle v. Chevron, U.S.A., Inc*., No. 04-163 at 15-16 (2005) https://www.jdsupra.com/post/documentViewer.aspx?fid=76a1ff2c-b4bb-4891-b016-fadeed60cd89 (last visited Feb. 11, 2018).

[27] *See* Kelo v. City of New London, 545 US. 469, 491 (Kennedy, J., concurring); *Lingle*, 544 U.S. at 548-49 (Kennedy, J., concurring) (whether a regulation is reasonable, or whether an exercise of eminent domain is for public use is a question under Due Process, and not the Takings Clause).

[28] *Murr*, 137 S. Ct. at 1945 ("a "reasonable restriction that predates a landowner's acquisition, however, can be one of the factors that most landowners would reasonably consider in forming fair expectations about their property").

IV. THE FUTURE OF "PROPERTY"

Now that we've covered the past, we turn to the future and our second case. As background, you might think that as a property rights lawyer, I'd be downright tickled when my home court—which as Professor Callies noted, may not be the friendliest court in the land for property owners and property rights—goes against the grain and actually recognizes a new constitutional property right. A right that, as far as I can tell, no other court, state or federal, has ever recognized. But despite the Hawaii Supreme Court's recognition of a property right, however, I cannot say I'm on board. Because in *In re Maui Electric Co.*,[29] the court concluded the Sierra Club possesses a constitutional property right in a "clean and healthful environment" entitling the organization to due process protections. This allowed it to intervene in a Public Utilities Commission (PUC) petition regarding a power purchase agreement for a by-then defunct electric plant on Maui.

First, some background. Maui Electric filed an application with the State PUC, seeking the Commission's approval of an agreement between the utility and Hawaiian Commercial and Sugar Company which, if approved, would allow a rate increase to account for the additional production charges associated with the Puunene power plant, a coal-powered facility on former sugar lands in central Maui which transformed bagasse, the byproduct of sugar production, into electric power. Sierra Club asked intervene in the administrative process under the PUC's rules, seeking to asserting its own claims as well as several of its Maui-based members: the power plant, the petition asserted, would "impact Sierra Club's members' health, aesthetic, and recreational interests. Sierra Club also asserted its organizational interest in reducing Hawaii's dependence on imported fossil fuels and advancing a clean energy grid."[30] It argued its members were concerned that the Puunene plant relied too heavily on coal in order to meet its power obligations under the existing agreement, and also that its members were concerned "about the public health and visibility impacts of burning coal."[31]

That's pretty vague stuff, and seems more like a policy question than something best resolved by an adjudicative proceeding. But under existing judicial standing rules in similar cases in original jurisdiction actions brought in Hawaii courts, nothing too outside the norm in these type of environmental policy cases: there's little doubt that if this were a case brought in a Hawaii trial court, that Sierra Club adequately alleged judicial standing. Anyone

[29] In re Maui Elec. Co., 408 P.3d 1 (Haw. 2017).
[30] *Id.* at ___ [slip op. at 5].
[31] *Id.*

questioning that conclusion need only recall the so-called *Superferry* case in which the Hawaii Supreme Court held that Sierra Club had standing to raise an environmental challenge to the subsequently-defunct interisland ferry because the ferry would threaten the organization with four types of injury: (1) endangered species could be adversely impacted by a high-speed ferry; (2) the Superferry could increase the introduction of alien species across the islands; (3) surfers, divers, and canoe paddlers who use the Maui harbor could suffer adverse impacts; and (4) the threat of increased traffic on the road next to the harbor entrance. Again, that's a vague connect-the-dots logic to gain standing; but for better or worse, that is the current state of Hawaii's standing doctrine.[32]

However, the *Maui Electric* case was not an original jurisdiction action, it was an administrative proceeding in the PUC under the agency's administrative rules, governed by a different standard, one based on the Hawaii Administrative Procedures Act.[33] Under the APA, an outsider may intervene in a "contested case" (a quasi-judicial adjudicative administrative process) when an agency rule or a statute gives the party a seat at the table, or when intervention is required by law because the agency is determining that party's rights. In this case, Sierra Club claimed that allowing the power agreement jeopardized its statutory rights, as that it possessed a constitutional property right. Thus, the Hawaii Constitution's due process clause gave it the right to intervene in the PUC proceedings.[34]

Neither the PUC nor the court of appeals bought Sierra Club's theory. The Commission denied intervention and decided Maui Electric's application without the Club's presence. The Club appealed to the Hawaii Intermediate Court of Appeals which agreed with Maui Electric and dismissed the appeal for lack of jurisdiction. It concluded that because Sierra Club was not "aggrieved" by the PUC's decision (because the PUC correctly excluded the Club form the case), the appellate court did not have jurisdiction. This issue had been brewing in Hawaii's agencies and lower courts for some time, and presenting the Hawaii Supreme Court the opportunity to make this ruling had been on wish lists at least since former Governor Neil Abercrombie appointed the majority of the five-Justice court back in 2014. But until this case, the issue (and others with a similar approach—recognizing certain

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[32] *See* Stewart A. Yerton, *Procedural Standing and the Hawaii Superferry Decision: How a Surfer, a Paddler, and an Orchid Farmer Aligned Hawaii's Standing Doctrine with Federal Principles*, 12 ASIAN-PAC. L. & POL'Y J. 330 (2010).

[33] Hawaii Administrative Procedures Act, HAW. REV. STAT. ch. 91 (2017).

[34] *See* Kaleikini v. Thielen, 237 P.3d 1067, 1082-83 (Haw. 2010).

rights which are set out in the Hawaii Constitution as property, for example)—had never secured the necessary three votes.

Not so this time. The three-Justice majority rejected two arguments which could have avoided this difficult and groundbreaking result. First, by the time the case reached the court, the Puunene plant was offline, a victim of Hawaii's loss of the sugar industry. The last sugar plantation had been shuttered, which meant no bagasse. No bagasse meant no power plant. Thus, Maui Electric argued Sierra Club's appeal was moot, and that the Supreme Court should dismiss. Alternatively, the majority might have avoided the constitutional issue by combing through the PUC's enabling statutes concluding that Sierra Club possessed a statutory (and not a constitutional) right to intervene. But the majority rejected both arguments, first concluding that the case, even though moot, was nonetheless crying out for resolution by the court (the so-called "public interest" exception to the usual mootness rules), then also rejecting Sierra Club's claim for a statutory right to intervene.[35]

Having disposed of these preliminaries, the court reached the constitutional question: does the Hawaii Constitution recognize Sierra Club's environmental concerns as a "property" interest entitling it to procedural due process? Three Justices said yes. The majority based its conclusion on Article XI, section 9 of the Hawaii Constitution:

> Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.[36]

The majority held that this provision created a legitimate claim of entitlement to a clean and healthful environment, and thus qualified as "property." It "is a substantive right guaranteed to each person," and thus could be enforced by any person, including Sierra Club.[37] The majority noted that the

[35] *See Maui Elec.*, 408 P.3d at ____ [slip op. at 12-15] for the majority's mootness analysis, and ___ [slip op.19-21] for its rejection of the statutory argument.

[36] HAW. CONST. art XI, § 9.

[37] *Maui Elec.*, 408 P.3d at ____. *Citizens United* lovers, rejoice: in Hawaii's courts, corporations are persons entitled to constitutional rights. The constitutional provision at issue here provides "Each *person* has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any *person* may enforce this right against any party,

court had earlier held that Native Hawaiian rights—rights also set out in the Hawaii Constitution—are "property" rights, and that environmental concerns are no different.[38]

Interestingly, the majority seemed to anticipate criticisms of its conclusion by noting that the constitutional text itself limited this property right to being exercised within the framework of existing environmental statutes, rules, and ordinances. This will, the majority reasoned, keep things in check, and the slope would not be slippery. What made the majority's reasoning interesting is that it concluded the very PUC statutes which it had earlier rejected as providing Sierra Club with the right to intervene were environmental statutes that recognized Sierra Club's constitutional property right to intervene:

> We therefore conclude that HRS Chapter 269 is a law relating to environmental quality that defines the right to a clean and healthful environment under article XI, section 9 by providing that express consideration be given to reduction of greenhouse gas emissions in the decision-making of the Commission. Accordingly, we hold that Sierra Club has established a legitimate claim of entitlement to a clean and healthful environment under article XI, section 9 and HRS Chapter 269.[39]

After reaching the conclusion that Sierra Club owns property in a clean and healthful environment, the majority held this interest was sufficiently important that the PUC had a duty to provide a hearing before it deprived the Club of its property:

> The risks of an erroneous deprivation are high in this case absent the protections provided by a contested case hearing, particularly in light of the potential long-term impact on the air quality in the area, the denial of Sierra Club's motion for intervention or participation in the proceeding, and the absence of other proceedings in which Sierra Club could have a meaningful opportunity to be heard concerning HC&S's performance of the Agreement.[40]

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public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law." HAW. CONST. art. I, § 9 (emphasis added). The *Maui Electric* majority held that Sierra Club, a corporation, has a property right under this provision meaning that Sierra Club is a "person."

[38] *Maui Elec.*, 408 P.3d at ____ [slip op. at 23] (citing In re Īao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications, 287 P.3d 129, 142 (Haw. 2012)).

[39] *Maui Elec.*, 408 P.3d at ____.

[40] *Id.* at ___.

Finally, in a critical footnote, the majority made it clear that the result is immune from future legislative tinkering. This is a ruling based on the Hawaii Constitution, and thus no mere legislature can mess with it too much.[41]

I'm not going to walk through the complete rationale of the two-Justice dissent, because it is a relatively short 20 pages. In sum, Chief Justice Recktenwald concluded that neither the PUC statutes nor Hawaii's due process clause gave Sierra Club the property right to intervene in the power plant's PUC application. The dissenters warned of unintended consequences which will flow from this decision:

> Respectfully, the Majority's expansive interpretation of what constitutes a protected property interest in these circumstances may have unintended consequences in other contexts, such as statutes where the legislature has mandated consideration of specific factors by executive agencies when implementing a statute.[42]

The dissenters concluded that the majority didn't need to undertake a constitutional analysis, because if denied administrative intervention in the PUC, Sierra Club simply could have employed those loose standing rules which I mentioned earlier and instituted an original jurisdiction action. Same result, without blurring lines and calling it a "property" right. Consequently, the dissenters viewed the recognition of a property right in the environment as unnecessary, and a result driven by the majority's policy determinations.

My biggest question about the majority's conclusion is this: if the most fundamental aspect of owning "property" is the right to exclude others from the *res*, how in the world do members of the public have the right to exclude other members of the public from a clean and healthful environment? As the U.S. Supreme Court held in *Nollan v. California Coastal Commission*,[43] "[w]e have repeatedly held that, as to property reserved by its owner for private use, 'the right to exclude [others is] 'one of the most essential sticks in the

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[41] *See Maui Elec.*, 408 P.3d at ____ & n.33 [slip op. at 43] ("Our ultimate authority is the Constitution; and the courts, not the legislature, are the ultimate interpreters of the Constitution.").

[42] *Id*. at ___ (Recktenwald, C.J., dissenting).

[43] Nollan v. California Coastal Commission, 483 U.S. 825 (1987)

bundle of rights that are commonly characterized as property."[44] (Or maybe Stevie Wonder said it better when he sang "this is mine, you can't take it.")

Either way, the ability to keep others off of what you own—and have the law back you up—is one of the defining sticks in the bundle of rights which we call property. Thus, I think the majority didn't confront the real foundational question built into the arguments: could Sierra Club's environmental concerns even be shoehorned into the concept of "property" as that term has been used for thousands of years? Doesn't "property" as used in the Hawaii Constitution's due process clause mean *private* property? After all, as far as I can tell, every other time the court has dealt with property in Hawaii's due process clause, it has either expressly defined, or implicitly assumed, that the property interest at stake was private property, and not a right that looks more like something "owned" collectively by everyone. Yes, the court's ruling was only that environmental concerns are a property right in the context of procedural due process ("new" property), but there's no reason to distinguish due process property from other forms of property.[45] Essentially what the majority accomplished was a subtle redefinition of "property" from a private right to a public resource.

I appreciate the Hawaii Supreme Court's commitment to opening courthouse doors to resolve claims, especially when the claims involve the environment and are made by those who profess to protect it. As I noted earlier, the court's standing doctrine for original jurisdiction cases sets the bar so low that it is, for all practical purposes, a mere pleading speed bump, and not a realistic barrier to courts becoming embroiled in political and policy questions perhaps best left to the political branches. The standing rule, as our courts have held, is a "prudential rule of judicial self-governance" for courts exercising their original jurisdiction, and does not, technically speaking, govern their appellate jurisdiction in appeals under the Administrative Procedures Act. But as a result of the *Maui Electric* case, the barn doors are wide open in both. On that, I think the dissenting opinion got it right when it concluded that rejecting administrative standing would mean only that Sierra Club could have instituted an original action in a Maui trial court. Thus, the courthouse door could remain open without needlessly undermining the concept of property.

As I noted earlier, this decision was a long time coming, and anyone paying attention has been expecting this shoe to drop whenever the Justice Pollack-

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[44] *Id.* at 831 (quoting Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433 (1982); Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)).

[45] *See* Robert H. Thomas, *"Property" and Investment-Backed Expectations in Ridesharing Regulatory Takings Claims*, 39 U. HAW. L. REV. 301, 311 (2017).

led branch of the court could garner that critical third vote. Now that it has, this naturally leads to the follow up question, what could be next? It stands to reason the next candidate for the other shoe to drop is "public trust" rights, which in the recent telescope cases just missed a third vote.[46] There, Justice Pollack and Justice Wilson concurred, concluding that both Native Hawaii and public trust are "property" interests. They argued that article XI, section 1 of the Hawaii Constitution created a property interest in natural resources which are to be administered for public benefit.[47] Now that this same telescope case is back in the Supreme Court, I would not be surprised if the same three Justices who found that environmental concerns are property take a hard look at extending that rationale.[48]

But despite this mission creep into eminent domain and takings law, traditional Euclidean zoning as the primary tool for regulating land use—and therefore restricting property rights—isn't as in-vogue as it once was, and a new set of tools are being employed to restrict, justifiably or not, an owner's ability to exercise property rights and use her land as she sees fit. Thus, we see "form-based codes," the resurrection of Planned Unit Developments (both of which are mixed-use, not-quite-Euclidean land use regulations).[49] We have the rise of environmental law—our jurisdiction, as Professor Callies has pointed out in a study, certain claimants enjoyed a nearly ninety percent success rate in the Hawaii Supreme Court over a ten-year stretch.[50] And, as

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[46] Mauna Kea Anaina Hou v. Bd. of Land & Natural Res., 363 P.3d 224 (Haw. 2015).

[47] *See id*. at 355 (Pollack, J., concurring).

[48] If environmental concerns grounded in the Hawaii Constitution are property, and Native Hawaiian interests are property, and if public trust principles are property, are there other, similar interests in the constitution where "property" might be discovered? There is at least one provision which deserves a hard look, because it reads a lot like sections 1 and 9:

> The State shall conserve and protect agricultural lands, promote diversified agriculture, increase agricultural self-sufficiency and assure the availability of agriculturally suitable lands. The legislature shall provide standards and criteria to accomplish the foregoing.

HAW. CONST. art. XI, § 3. Farmers and ranchers may want to consider raising arguments similar to those which carried the day in *Maui Electric*. After all, we don't have a hierarchy of state constitutional rights, where some rights are more equal than others, do we?

[49] *See* Daniel R. Mandelker, *New Perspectives on Planned Unit Developments*, 52 REAL PROP. PROB. & TRUST L. J. 229, 231 & n.3 (2017).

[50] *See* David L. Callies, Emily Klatt, and Andrew Nelson, *The Moon Court, Land Use, and Property: A Survey of Hawaii Case Law 1993-2010*, 33 U. HAW. L. REV. 635, 636-37 (2011) (The Hawaii Supreme Court's "record on preserving private property rights guaranteed by the U.S. Constitution's Fifth and Fourteenth Amendments in the face of regulatory

Professor Callies has also pointed out in an area on the cutting edge, native rights, and religious and cultural rights, sea-level rise, and "sustainability," are the new frontiers in property rights. Thus, we've seen the concept of public trust expanded from its traditional Roman law roots to cover all sorts of things, not only regarding navigable waters and riparian property, but finding the public trust applies to wildlife,[51] and all natural resources including water.[52] Thus, the Hawaii Supreme Court could conclude that our state Constitution's public trust provision, which was added only recently and which purported to transform all water rights and natural resources into public property, did not interfere with property rights or upset existing expectations, because, lo-and-behold, the century-plus of existing jurisprudence recognizing private rights in water and natural resources, including beaches, were simply mistaken, and those property owners never actually owned anything at all.[53] Thus also we have the public trust compelling decades' worth of study before a Kauai family can bottle and sell 745 gallons of water per day—an amount roughly equivalent to a single residential household in usage[54]—a decision which a past Brigham-Kanner Prize winner who is an expert on the public trust, has characterized as a very unusual application of the public trust doctrine.[55] Thus, my prediction, for what it is worth, is that the public trust will become the preferred tool for land use

challenges is, on the other hand, appalling, particularly given the increasing emphasis on preserving such rights in our nation's highest court.").

[51] *See*, *e.g.*, Center for Biological Diversity, Inc. v. FPL Group, Inc., 83 Cal. Rptr. 3d 588, 595-596 (Cal. Ct. App. 2008) ("While the public trust doctrine has evolved primarily around the rights of the public with respect to tidelands and navigable waters, the doctrine is not so limited. '[T]he public trust doctrine is not just a set of rules about tidelands, a restraint on alienation by the government or an historical inquiry into the circumstances of long-forgotten grants.'") (quoting Joseph Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, 14 U.C. DAVIS L. REV. 185, 186 (1980)).

[52] *See* HAW. CONST. art. XI, § 7 ("The State has an obligation to protect, control and regulate the use of Hawaii's water resources for the benefit of its people.").

[53] *See* McBryde Sugar Co. v. Robinson, 504 P.2d 1330 (Haw. 1973). In Robinson v. Ariyoshi, 676 F. Supp. 1002 (D. Haw. 1987), the U.S. District Court held that the Hawaii Supreme Court's decision in *McBryde* was a judicial taking).

[54] *See* Kauai Springs, Inc. v. Planning Comm'n of Kauai, 324 P.3d 951, 983 (Haw. 2014) (Hawaii's public trust doctrine requires that when considering whether to issue zoning permits to allow an industrial use on land zoned for agriculture, the Planning Commission determine whether the applicant's use of water would might affect "the rights of present and future generations in the waters of the state").

[55] *See* Thomas Merrill, *The Public Trust Doctrine: Some Jurisprudential Variations and Their Implications*, 2015 DISTINGUISHED GIFFORD LECTURESHIP IN REAL PROPERTY (Nov. 5, 2015).

control, because it can be so powerful and it takes only a court majority to adopt it and not a legislative majority.

V. CONCLUSION

Allow me to conclude by noting that Professor Callies' work and scholarship have been ahead of the practicing bar in the public trust arena, and that (unlike a lot of legal scholarship), we lawyers actually find his writings useful to the practice of law. Which reminds me that this is where we come in as property lawyers: to shape and develop the law in such a way that the paramount place of property rights is not forgotten, and is celebrated. It may be an uphill climb, but one that is worth pursuing.

Finally, a reminder: you don't need to be a true believer in order to engage, and Professor Callies is a prime example. He certainly didn't start his career on the side of light. Indeed, one of his first major scholarly publications, THE TAKING ISSUE,[56] has been called by one of the people for whom the Brigham-Kanner Prize is named a "propaganda screed" to attack the concept of regulatory takings.[57] *Strong letter to follow!* But the road to Damascus can be a long one, and Professor Callies eventually—and rightly—came around. A lifetime teaching and practicing in Hawaii can do that to you.[58] As they say in golf, "it's not how you drive, it's how you arrive," and Professor David Callies certainly has arrived. Land use regulation is here to stay, and its reach is expanding. But thanks to Professor Callies, so has the notion that property rights are a bulwark of liberty and individual rights, and an essential part of the land use calculus. Congratulations, David.

* * * *

[56] FRED BOSSELMAN, DAVID CALLIES, AND JOHN BANTA, THE TAKING ISSUE: AN ANALYSIS OF THE CONSTITUTIONAL LIMITS OF LAND USE CONTROL (1973).

[57] Gideon Kanner, *Helping the Bear, Or "The Taking Issue" Was a Failed Propaganda Screed. So Why Is It Being Celebrated?*, http://gideonstrumpet.info/2013/09/helping-the-bear-or-the-taking-issue-was-a-failed-propaganda-screed-so-why-is-it-being-celebrated/ (last visited Nov. 26, 2017).

[58] *See*, *e.g.*, Public Access Shoreline Hawaii v. Hawaii Cnty. Planning Comm'n, 903 P.2d 1246, 1268 (Haw. 1995) (the Hawaii Constitution allows Hawaiians to exercise traditional practices, even on private property, and "[o]ur examination of the relevant legal developments in Hawaiian history leads us to the conclusion that the western concept of exclusivity is not universally applicable in Hawaii.").

No. 17-712

In The
Supreme Court of the United States

KEVIN BROTT, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION OF REVERSIONARY PROPERTY OWNERS, OWNERS' COUNSEL OF AMERICA, THE PROPERTY RIGHTS FOUNDATION OF AMERICA, INC., PIONEER INSTITUTE, INC., AND PROFESSOR SHELLEY ROSS SAXER IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Can the federal government take private property and deny the owner the ability to vindicate his constitutional right to be justly compensated in an Article III Court with trial by jury?

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INTEREST OF AMICI CURIAE[1]

National Association of Reversionary Property Owners. NARPO is a Washington state non-profit 501(c)(3) educational foundation whose primary purpose is to educate property owners on the defense of their property rights, particularly their ownership of property subject to railroad right-of-way easements. Since its founding in 1989, NARPO has assisted over 10,000 property owners nationwide, and has been involved in litigation concerning landowners' interests in land subject to active and abandoned railroad right-of-way easements. *See*, *e.g.*, *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1 (1990) (amicus curiae); *Nat'l Ass'n of Reversionary Property Owners v. Surface Transp. Bd.*, 158 F.3d 135 (D.C. Cir. 1998). NARPO has also participated as amicus curiae in other takings cases involving railroad rights-of-way. *See*, *e.g.*, *Romanoff Equities, Inc. v. United States*, 815 F.3d 809 (Fed. Cir. 2016).

Owners' Counsel of America. Owners' Counsel of America is an invitation-only national network of the most experienced eminent domain and property rights attorneys. They have joined together to advance, preserve, and defend the rights of private property owners, and thereby further the cause of liberty,

1. Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for the parties received notice of the intention to file this brief three days prior to the due date of this brief; counsel for the parties have acknowledged notice and consented to the filing of this brief. Pursuant to Rule 37.6, amici affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

because the right to own and use property is "the guardian of every other right," and the basis of a free society. *See* James W. Ely, *The Guardian of Every Other Right: A Constitutional History of Property Rights* (3d ed. 2008). OCA is a non-profit 501(c)(6) organization sustained solely by its members. Only one member lawyer is admitted from each state. OCA members and their firms have been counsel for a party or amicus in many of the property cases this Court has considered in the past forty years, and OCA members have also authored and edited treatises, books, and law review articles on property law and property rights.

Pioneer Institute, Inc. Pioneer is an independent, non-partisan, privately funded research organization. It seeks to improve policy outcomes through civic discourse and intellectually rigorous, data-driven public policy solutions based on free market principles, individual liberty and responsibility, and the ideal of effective, limited and accountable government. Pioneer identified this case through *PioneerLegal*, its new public-interest law initiative, which is designed to work for changes to policies, statutes, and regulations that adversely affect the public interest in policy areas that include economic freedom and government accountability.

Property Rights Foundation of America, Inc. Founded in 1994, PRFA is a national, non-profit educational organization based in Stony Creek, New York, dedicated to promoting private property rights.

Professor Shelley Ross Saxer. Professor Saxer is Vice Dean and Laure Sudreau-Rippe Endowed Professor of Law at Pepperdine University School of Law, where she has taught courses in real property, land use, community property, remedies, environ-

mental law, and water law. She has also authored numerous scholarly articles and books on property and takings law. *See*, *e.g.*, Shelley Ross Saxer, David L. Callies & Robert H. Freilich, Land Use (American Casebook Series) (7th ed. forthcoming); Grant Nelson, Dale Whitman, Colleen Medill, and Shelley Ross Saxer, Contemporary Property (4th ed. 2013); Shelley Ross Saxer & David Callies, *Is Fair Market Value Just Compensation? An Underlying Issue Surfaced in* Kelo, in Eminent Domain Use and Abuse: Kelo in Context (Dwight Merriam & Mary Massaron Ross, eds. 2006); Shelley Ross Saxer, *"Rails-to-Trails": The Potential Impact of* Marvin M. Brandt Revocable Trust v. United States, 48 Loy. L.A. L. Rev. 345 (2015).

Amici are filing this brief because this case involves fundamental questions about whether Congress can limit the forum where property owners vindicate their Constitutional right to just compensation, a right which this Court has recognized as "self-executing," and therefore not subject to claims of sovereign immunity. We believe our viewpoint and this brief's highlighting of this Court's *Lee* case will be helpful to the Court.

SUMMARY OF ARGUMENT

The government does not enjoy its usual sovereign immunity when it takes property, either affirmatively or inversely, and this Court has repeatedly confirmed that the Just Compensation Clause is "self-executing." *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315 (1987) ("We have recognized that a landowner is entitled to bring an action in inverse condemnation as a result of 'the self-executing character of the constitutional provision with respect to compensation.'").

But what does this mean, exactly? Even as the Sixth Circuit recognized that property owners have a right to compensation that springs from the Constitution itself and the right to sue does not depend upon a waiver of sovereign immunity, it held that Congress is not compelled to provide an Article III forum to vindicate that right. Or indeed, any forum at all. Thus, even if the forum Congress created—the Article I non-jury Court of Federal Claims (CFC)—is not constitutionally adequate, well, that's good enough. In the words of the Sixth Circuit, "[t]he Fifth Amendment details a broad right to compensation, but does not provide a means to enforce that right. Courts must look to other sources (such as the Tucker Act and the Little Tucker Act) to determine how the right to compensation is to be enforced." *Brott v. United States*, 858 F.3d 425, 432-33 (6th Cir. 2017). That is sovereign immunity by another name.

However, we think this Court said it best in *United States v. Lee*, 106 U.S. 196 (1882), the takings lawsuit over what today is Arlington National Cemetery, when it held that courts (referring to Article III courts, and not what is, in essence, a Congressional

forum), must be available for those whose property has been taken:

> The [government's argument it cannot be sued] is also inconsistent with the principle involved in the last two clauses of article 5 of the amendments to the constitution of the United States, whose language is: 'That no person * * * shall be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation.' . . . Undoubtedly those provisions of the constitution are of that character which it is intended the courts shall enforce, when cases involving their operation and effect are brought before them.

Id. at 218-19.

The story of how the private estate of General Robert E. Lee's family became Arlington National Cemetery is at the center of this case: the Court held that Lee's heir was entitled—after a jury trial in an Article III court—to ownership of the property. The Court affirmed that in our system, unlike those in which monarchs rule over their subjects, the federal government could be sued in its own courts, and that the government had violated Lee's due process rights and had taken Arlington without compensation. *Lee* may have been rendered 135 years ago, but the principles which the Court enunciated on sovereign immunity, the independent federal judiciary, and the Fifth Amendment, are still highly relevant today.

ARGUMENT

I. THE SELF-EXECUTING RIGHT TO JUST COMPENSATION

Takings cases are different from run-of-the-mill lawsuits because the Constitution itself mandates just compensation when property is taken. The Sixth Circuit concluded the Fifth Amendment's Just Compensation requirement was "self-executing," and that there need not be a waiver of sovereign immunity in order to sue. The court concluded, however, that Congress can limit how property owners exercise that right. The court made no attempt to reconcile that conclusion with the notion that a right cannot truly be "self-executing" if the legislature can limit or curtail that right by depriving owners of the usual Article III forum. That conclusion is contrary to this Court's takings jurisprudence, which holds that the Fifth Amendment is not merely precatory, but has a "self-executing character . . . with respect to compensation." *First English*, 482 U.S. at 315.

This recognition began with Justice Brennan's dissent in *San Diego Gas & Elec. Co. v. City of San Diego*, where he wrote, "[a]s soon as private property has been taken . . . the landowner has already suffered a constitutional violation, and the self-executing character of the constitutional provision with respect to compensation is triggered." *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 654 (1981) (Brennan, J., dissenting on other grounds). Six years later, Justice Brennan's dissent was adopted by the majority in *First English*, 482 U.S. at 315, which held that just compensation must be provided once a taking has occurred, and that landowners are "entitled" to bring an action. That case involved a temporary regulatory taking by a

municipality, but the principle is equally applicable when the United States takes property as it did here when it seized plaintiffs' reversionary interests and converted what should have been their private property into a public recreational park. *Id.* The Court also noted that Justice Brennan's dissent in *San Diego Gas & Electric Co.*, 450 U.S. at 654-655 relied on *Jacobs v. United States*, 290 U.S. 13 (1933), "that claims for just compensation are grounded in the Constitution itself." *First English*, 482 U.S. at 315 (quoting *United States v. Clarke*, 445 U.S. 253, 257 (1980)); *see also First English*, 482 U.S. at 316 n.9 ("[I]t is the Constitution that dictates the remedy for interference with property rights amounting to a taking"). Thus, Petitioners have a right to compensation, regardless of whether Congress recognizes that right. In sum, "the right to just compensation could not be taken away by statute *or be qualified*" by a statutory provision. *Jacobs*, 290 U.S. at 17 (emphasis added).

In other words, the right to recover just compensation for property taken by the federal government cannot be burdened by Congress' withholding of jurisdiction from the district courts, and assigning major takings claims to the CFC. Nothing in the Constitution hinges a property owner's ability to bring a claim asserting a violation of the self-executing right to compensation on a legislatively-created limitation. Indeed, the very point of constitutional rights is that they cannot be interfered with by a legislature, a principle which extends back to at least *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-77 (1803) ("[i]t is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may

alter the constitution by an ordinary act"). This principle it at its zenith where property rights are at stake. As this Court more recently concluded, this [is an] "essential principle: Individual freedom finds tangible expression in property rights." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 61 (1993). The Court has also observed, "the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. . . . That rights in property are basic civil rights has long been recognized." *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972) (citations omitted). The Framers recognized that the right to own and use property is "the guardian of every other right" and the basis of a free society. James W. Ely, The Guardian of Every Other Right: A Constitutional History of Property Rights (3d ed. 2008) (noting John Adams' proclamation that "property must be secured or liberty cannot exist").

II. ARLINGTON'S LESSON: WE ARE NOT "SUBJECTS," AND THE GOVERNMENT IS NOT IMMUNE

We don't need to travel all the way back to *Marbury*, however, for a definitive rejection of the concept of sovereign immunity when property has been expropriated for public use. The Sixth Circuit's holding here is directly contrary to the Arlington Cemetery case, *United States v. Lee*, 106 U.S. 196 (1882), in which the Court held that the federal government does not enjoy immunity from suit in district court, and indeed, the hallmark of our American system is that we do not have monarchs lording over us who must first consent before they can be sued in the nation's courts. In addition to being on-

point authority, the background of the case itself is fascinating.[2]

The case was decided nearly two decades after the federal government occupied the Virginia homestead of Robert E. Lee during the Civil War and created Arlington National Cemetery in 1864. The property came to the Lees via Mary Lee, General Lee's wife, who was the great granddaughter of Martha Washington. One might assume, as we did, that Union forces simply seized the land as one of the prizes of war after Mrs. Lee fled in the early days of the conflict. But even in times of war or rebellion, legal rules were observed. While the Union could seize private property, everyone recognized that the Takings Clause required payment of compensation. *See* Gaughan, *The Arlington Cemetery Case*, 37 J. of Sup. Ct. Hist. at 2 & n.3 ("'Unquestionably, in such cases, the government is bound to make full compensation to the owner' of property seized by the military.") (quoting *Mitchell v. Harmony*, 54 U.S. 115, 134 (1851)). In response, and in order "to punish leading Confederates and raise revenue for the Union war effort," Congress adopted the Doolittle Act, a provision which required rebel property owners to pay a land tax. Gaughan, *The Arlington Cemetery Case*, 37 J. of Sup. Ct. Hist. at 2, 4.[3] Mrs. Lee owed $90, but

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2. The legal history of Arlington has been studied by Professor Anthony J. Gaughan, who wrote an article, *The Arlington Cemetery Case: A Court and a Nation Divided*, 37 J. of Sup. Ct. Hist. 1 (2012), and a book, The Last Battle of the Civil War: United States Versus Lee, 1861-1883 (2011), about the *Lee* litigation.

3. For more on the fascinating history of Arlington, see Robert M. Poole, *How Arlington National Cemetery Came to Be*,
(…footnote continued on next page)

when a cousin, a Washington, D.C. lawyer, attempted to pay the tax on her behalf, the commissioners refused to accept payment because in their interpretation of the statute, the property owner, Mrs. Lee, was required to pay the tax in person. Of course that never happened. The taxes were not paid, and the Treasury Department eventually auctioned the property, which the War Department purchased at the tax sale, and irrevocably converted to a cemetery. Neither General Lee nor Mrs. Lee ever made a claim for the seizure before their deaths.

But twelve years after the war ended, their son Custis Lee—who would have inherited Arlington had the federal government not taken it and claimed title—sued the government for a violation of his due process rights and for a taking. *Lee v. Kaufman and Strong*, 15 Fed. Cas. 162 (D. Va. 1878), *aff'd sub nom.*, *United States v. Lee*, 106 U.S. 196 (1882). *See also* Gaughan, *The Arlington Cemetery Case*, 37 J. of Sup. Ct. Hist. at 8 ("His lawsuit alleged that the government's officers had violated the Fifth Amendment's due process clause by claiming title to Arling-

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Smithsonian Magazine (Nov. 2009), *available at* http://www.smithsonianmag.com/history/how-arlington-national-cemetery-came-to-be-145147007/?no-ist (last visited Dec. 11, 2017). *See also* Robert M. Poole, On Hallowed Ground: The Story of Arlington National Cemetery 24 (2010) ("Former Army comrades who had admired Lee now turned against him. None was more outspoken than Montgomery C. Meigs, a fellow West Point graduate who had served amicably under Lee in the engineer corps but who now considered him a traitor who deserved hanging. 'No man who ever took the oath to support the Constitution as an officer of our Army or Navy . . . should escape without the loss of all his goods & civil rights & expatriation,' Meigs wrote that spring.").

ton on the basis of an invalid tax sale. In addition, Custis Lee contented that the government's officers had violated the amendment's takings clause by failing to compensate Mary Lee for the estate.").He originally brought suit in Virginia state court against two federal government officials, but the case was removed by the defendants to the district court, where the case was considered by a jury. The jury ruled against the officials, and held that Lee retained ownership of the property. Gaughan, *The Arlington Cemetery Case*, 37 J. of Sup. Ct. Hist. at 8 ("The presence of the national cemetery made the estate's return to the Lees impossible. What Custis Lee sought instead was formal legal recognition of his ownership of Arlington. He hoped that a victory in the courts would persuade Congress to finally pay compensation to him in accordance with the government's obligations."). The United States appealed to this Court, making two arguments.

First, it argued it could not be liable for a taking because it, not the Lees, possessed title. The War Department had legally purchased the property at auction after Mrs. Lee failed to pay the $90 in Doolittle Act taxes. Custis Lee's countervailing argument that Mrs. Lee could not be responsible for failure to pay because a cousin had tendered payment but had been refused, was insurmountable because this Court had ruled in two successive cases that in-person payment was not required by the statute, and formal tender was unnecessary because it would have been futile. *See Bennett v. Hunter*, 76 U.S. 326 (1869) (tax auction unlawful if owner attempted to pay); *Tacey v. Irwin*, 85 U.S. 549 (1873) (a formal tender of payment was not necessary because the commissioners would have refused the offer because

the owner was not there in person).Thus, because there was no need for Mrs. Lee to personally appear and tender payment, the federal government's claim to possess title to Arlington was fatally weak.

The government's second defense was that it was immune from being sued without the consent of Congress. Since Lee's ownership was a foregone conclusion due to the *Bennett* and *Tacey* decisions, what really what was at stake in the *Lee* litigation "was whether Custis Lee could bring his suit in the first place." Gaughan, *The Arlington Cemetery Case*, 37 J. of Sup. Ct. Hist. at 9. As Professor Gaughan writes, the immunity argument "was novel," and new to American law:

> The Justice Department had an audacious goal in the *Lee* case. It sought to deny the courts' jurisdiction over Fifth Amendment takings cases that lacked congressional consent. The government's lawyers insisted that the task of providing a remedy for aggrieved parties under the Fifth Amendment should be left "to the discretion of congress and not to the courts." With no American case law available to support their provocative position, the government's lawyers relied on precedents from English courts. . . . The Justice Department's lawyers contended that, like English judges, American judges should recognize that "the domain of sovereign power is forbidden ground" to the courts and that "judicial authority" must never "trespass upon the prerogatives, property, instrumentalities, or operations of this sovereign power."

Id. at 9-10 & n.26 (citing *Kaufman*, 15 Fed. Cas. at 170, 186, 188).

The Court rejected the sovereign immunity argument, and affirmed the District Court, which had concluded, "[t]he courts are open to the humblest citizen, and there is no personage known to our laws, however exalted in station, who by mere suggestion to a court can close its doors against him." *Kaufman*, 15 Fed. Cas. at 189-90. All of this Court's Justices agreed that Lee retained title, and that the commissioners wrongly required Mrs. Lee to appear in person and pay. The Court's majority also concluded that the government officials could be sued in federal court because in the United States, "there is no such thing as a kingly head to the nation, nor to any of the states which compose it." *Lee*, 106 U.S. at 205.

The *Lee* majority opinion undermines the Sixth Circuit's holding that "[t]he Fifth Amendment details a broad right to compensation, but does not provide a means to enforce that right. *Brott*, 858 F.3d at 432. The *Lee* majority held that it was "difficult to see on what solid foundation of principle the exemption from liability to suit rests," and that the English version of sovereign immunity had no place in American courts. Specifically, sovereign immunity is "inconsistent" with the Takings Clause, as shown by this passage, which is worth quoting at length:

> The [government's argument it cannot be sued] is also inconsistent with the principle involved in the last two clauses of article 5 of the amendments to the constitution of the United States, whose language is: 'That no person * * * shall be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation.' Conceding that the property in controversy in this case is de-

voted to a proper public use and that this has been done by those having authority to establish a cemetery and a fort, the verdict of the jury finds that it is and was the private property of the plaintiff, and was taken without any process of law and without any compensation. Undoubtedly those provisions of the constitution are of that character which it is intended *the courts shall enforce, when cases involving their operation and effect are brought before them*. The instances in which the life and liberty of the citizen have been protected by the judicial writ of habeas corpus are too familiar to need citation, and many of these cases, indeed almost all of them, are those in which life or liberty was invaded by persons assuming to act under the authority of the government. *Ex parte Milligan*, 4 Wall. 2. If this constitutional provision is a sufficient authority for the court to interfere to rescue a prisoner from the hands of those holding him under the asserted authority of the government, what reason is there that *the same courts* shall not give remedy to the citizen whose property has been seized without due process of law and devoted to public use without just compensation?

Looking at the question upon principle, and apart from the authority of adjudged cases, we think it still clearer that this branch of the defense cannot be maintained. It seems to be opposed to all the principles upon which the rights of the citizen, when brought in collision with the acts of the government, must be determined. In such cases there is no safety for

> the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the government, professing to act in its name. There remains to him but the alternative of resistance, which may amount to crime. The position assumed here is that, however clear his rights, no remedy can be afforded to him when it is seen that his opponent is an officer of the United States[.]

Lee, 106 U.S. at 218-19 (emphasis added). The Court's conclusion that property owners cannot sue the United States directly, but could sue government officials for the same claims, is no impediment to liability here. *See id.* at 204. If the officials who took plaintiffs' property without compensation should have been named as the defendants rather than the United States itself, it is merely a matter of pleading nomenclature, and not substance. *See id.* (rejecting argument that the "judgment must depend on the right of the United States to property held by such persons as officers or agents for the government"). The American people are sovereign, not "subjects." *Id.* at 208-09.

The Court also affirmed the principle that Article III courts have jurisdiction to hear and decide cases in which the executive or legislative branch takes property in violation of the Fifth Amendment. The Court focused on the paramount role of the judiciary (and by that it meant the Article III judiciary, not what is today the Article I CFC). *See* 28 U.S.C. § 171 (a) ("The court [of federal claims] is declared to be a court established under article I of the Constitution of the United States."). *Cf.* Decl. of Independence

(July 4, 1776) ("He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary powers. He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries."). The *Lee* majority emphasized that life-tenured judges, part of a separate branch of government, are the enforcers of the rights to liberty and property:

> The [government's] defense stands here solely upon the absolute immunity from judicial inquiry of every one who asserts authority from the executive branch of the government, however clear it may be made that the executive possessed no such power. Not only that no such power is given, but that it is absolutely prohibited, both to the executive and the legislative, to deprive any one of life, liberty, or property without due process of law, or to take private property without just compensation.
>
> These provisions for the security of the rights of the citizen stand in the constitution in the same connection and upon the same ground as they regard his liberty and his property. It cannot be denied that both were intended to be enforced by the judiciary as one of the departments of the government established by that constitution.

Lee, 106 U.S. at 208. This is America, and we do not treat the government with "reverence" or as if it possesses divine rights:

> Notwithstanding the progress which has been made since the days of the Stuarts in strip-

> ping the crown of its powers and prerogatives, it remains true to-day that the monarch is looked upon with too much reverence to be subjected to the demands of the law as ordinary persons are, and the king-loving nation would be shocked at the spectacle of their queen being turned out of her pleasure garden by a writ of ejectment against the gardener. The crown remains the fountain of honor, and the surroundings which give dignity and majesty to its possessor are cherished and enforced all the more strictly because of the loss of real power in the government. It is not to be expected, therefore, that the courts will permit their process to disturb the possession of the crown by acting on its officers or agents.

Id. at 208-09. The Court concluded:

> There is in this country, however, no such thing as the petition of right, as there is no such thing as a kingly head to the nation, or to any of the states which compose it. There is vested in no officer or body the authority to consent that the state shall be sued except in the law-making power, which may give such consent on the terms it may choose to impose. *The Davis*, 10 Wall. 15. Congress has created a court in which it has authorized suits to be brought against the United States, but has limited such suits to those arising on contract, with a few unimportant exceptions.
>
> What were the reasons which forbid that the king should be sued in his own court, and how do these reasons apply to the political body

> corporate which we call the United States of America? As regards the king, one reason given by the old judges was the absurdity of the king's sending a writ to himself to command the king to appear in the king's court. No such reason exists in our government, as process runs in the name of the president and may be served on the attorney general, as was done in the case of *Chisholm v. State of Georgia*. Nor can it be said that the dignity of the government is degraded by appearing as a defendant in the courts of its own creation, because it is constantly appearing as a party in such courts, and submitting its rights as against the citizens to their judgment.

Id. at 205-06.

The *Lee* case remains critically important because it emphasized the enduring principle that in the United States, "[n]o man in this country is so high that he is above the law." *Id.* at 220. This includes the government itself. As Professor Gaughan writes, "[i]n rejecting the Justice Department's argument, the Supreme Court affirmed the nation's commitment to the rule of law. . . . The fundamental lesson of *United States v. Lee* was that, in the American legal system, the rule of law constrains the action of every government officer, including the President." Gaughan, *The Arlington Cemetery Case*, 37 J. of Sup. Ct. Hist. at 17.

The principle that the federal government is not immune from suit in its own courts—and that property owners cannot be forced to vindicate their right to just compensation in a forum of the government's choosing—was firmly reinforced in *Lee*. "Courts of

justice are established, not only to decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the government." *Lee*, 106 U.S. at 220.

CONCLUSION

This Court should grant the petition and review the judgment of the Sixth Circuit.

Respectfully submitted.

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Foreword: "Property" and Investment-Backed Expectations in Ridesharing Regulatory Takings Claims

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I. INTRODUCTION

The sharing economy: enterprises such as Uber,[1] Lyft,[2] Air BnB,[3] and . . . DogVacay.[4] As we are constantly reminded by the enterprises themselves, they are not taxicab companies, or hotels, or pet boarding services. They are merely technology platforms, which allow peer-to-peer sharing. They put riders together with drivers, hosts with guests, and pet owners with those willing to look after Fido for a few days. But they sure do look a lot like the industries they are trying so hard to *not* be, no?

The technology behind ridesharing enterprises is evolving at lightning pace, and because of that, the legal issues which arise when trying to fit these sharing enterprises into existing regulatory regimes can result in decisions that draw competing philosophies into focus. Police power hawks believe that these things should—like just about everything else—be subject to pervasive regulation. The public needs to be protected! Libertarians applaud free market forces at play. Let a thousand flowers of thought bloom! The property rights advocates . . . well, as I will suggest in this essay, we end up with a somewhat mixed bag.

I say that because these interests draw me in opposite directions. I am not a big fan of regulations which limit entry into markets, and which stifle innovation. But I also favor a regulatory system, if it must exist, which allows investment and reliance, without fearing the government will just decide one day to ignore its own regulatory requirements and exempt others similarly situated from the regulations which govern existing participants.

This essay will review several cases which the sharing economy has thus far produced, cases where taxicab companies have sued municipalities for

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[1] UBER, http://www.uber.com (last visited June 18, 2017).

[2] LYFT, http://www.lyft.com (last visited June 18, 2017).

[3] AIRBNB, http://www.airbnb.com (last visited June 18, 2017).

[4] DogVacay recently rebranded itself as Rover. *See* ROVER, http://www.rover.com (last visited June 18, 2017). Sidebar: this last one reminds me of Jack Handey's faux sponsor of *Saturday Night Live*'s "Unfrozen Caveman Lawyer" skit, "Dog Assassin" ("When you can't bear to put him to sleep, maybe it's time to call . . . Dog Assassin."). *See Sound of Young America: Jack Handey, Author, TV Writer and Creator of "Deep Thoughts*,*"* NPR (May 30, 2008) (downloaded using iTunes).

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allowing ridesharing services to operate without medallions, most often employing a regulatory takings theory. I argue that the approach employed by these courts wrongly focus on the property interests involved, rather than where the real analytical question resides: what are the investment-backed expectations of those already providing vehicle-for-hire services in the marketplace. Shifting the analysis from artificial distinctions between property for purposes of the Takings Clause and other forms of property, would, I conclude, put the focus where it should be—an owner's expectations when she obtains a taxicab medallion. Doing so would place these questions in the proper takings context, to be measured along with the other factors which courts consider in most regulatory takings cases.

II. A CRASH COURSE IN REGULATORY TAKINGS

The regulatory takings doctrine is built on the idea that certain exercises of government power have such a dramatic impact on private property that they are the functional equivalent of an affirmative exercise of eminent domain, and the government should either back off the regulation, or compensate the property owner. Most courts approach these cases by tracking the text of the Fifth Amendment,[5] and asking, in order: does the claimant own "private property," has the property been "taken," and if so, what compensation is "just."[6]

The government may not intend to condemn property—it is only regulating it, most often under the "police power"—but as Justice Holmes famously opined, left unchecked by the Takings Clause, the police power would eventually to swallow up the very notion of private property.[7] The

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[5] The Takings Clause of the U.S. Constitution provides, "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

[6] United States v. General Motors Corp., 323 U.S. 373, 377 (1945) ("The critical terms are 'property,' 'taken' and 'just compensation.'"). The most common remedy in regulatory takings cases is an award of just compensation. *See* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 536–37 (2005). In *Lingle*, the Court explained:

> As its text makes plain, the Takings Clause 'does not prohibit the taking of private property, but instead places a condition on the exercise of that power.' First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 314 (1987). In other words, it 'is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking.' *Id*. at 315 (emphasis in original).

Id. Although in certain circumstances, declaratory or injunctive relief may be available. *See* E. Enters. v. Apfel, 524 U.S. 498, 522 (1998) ("Based on the nature of the taking alleged in this case, we conclude that the declaratory judgment and injunction sought by petitioner constitute an appropriate remedy under the circumstances, and that it is within the district courts' power to award such equitable relief.").

[7] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) ("When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of

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principle driving the analysis is whether it is fair to require a single property owner (or a class of property owners) to shoulder the entire economic burden of worthy regulations: "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[8]

Justice Holmes also gave us the catchy but notoriously difficult-to-apply maxim that "[t]he general rule, at least, is that, while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking."[9] What "goes too far," and where the line is between regulations that may be applied without paying compensation, and a taking is one that has confounded the courts ever since.[10] In the ensuing decades, the Supreme Court struggled to draw that line, finally settling in *Lingle v. Chevron U.S.A. Inc.*[11] on a takings jurisprudence that, although continuing to be difficult to apply, at least was at least doctrinally clear.

In certain "relatively narrow" circumstances, it is easy to determine there's been a taking, and the Supreme Court has established two categories of regulations that will be deemed *per se* takings triggering the right to compensation. First, "where government requires an owner to suffer a permanent physical invasion of her property—however minor—it must provide just compensation."[12] Second, a *per se* taking also occurs when a regulation deprives an owner of "'all economically beneficial us[e]' of her property."[13] But *Lingle* also affirmed that most regulatory takings cases

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human nature is to extend the qualification more and more, until at last private property disappears.").

[8] *Id.* at 416; *see* Armstrong v. United States, 364 U.S. 40, 49 (1960) (holding that the Just Compensation Clause is 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.").

[9] *Pa. Coal Co.*, 260 U.S. at 416. More than a half-century later, Justice O'Connor, writing for a unanimous Court, would label Justice Holmes' "goes too far" formula "storied but cryptic." *Lingle*, 544 U.S. at 537 (citing *Pa. Coal Co.*, 260 U.S. at 416) ("In Justice Holmes' storied but cryptic formulation, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.")

[10] "The rub, of course, has been—and remains—how to discern how far is 'too far.'" *Lingle*, 544 U.S. at 538.

[11] 544 U.S. 528 (2005).

[12] *Id.* In support, the Court cited Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), which held that a law requiring property owners to allow installation of a small cable box on buildings was a taking, and Nollan v. California Coastal Commission, 483 U.S. 825 (1987), a case analyzing a takings claim where an agency required landowner to dedicate a public easement as a condition of development approvals. *Id.*

[13] *Lingle*, 544 U.S. at 538 (quoting Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992) (emphasis omitted)).

should be treated by the courts by applying a multi-factored balancing test which originated in the Court's earlier opinion in *Penn Central Transportation Co. v. City of New York*.[14] To determine whether a regulation "goes too far" when there is no physical invasion or near-total deprivation of economic benefit, a court examines the economic impact of the regulation (the loss in value experienced by the claimant resulting from the regulation), the property owner's "distinct investment-backed expectations," and the "character of the government action."[15]

Courts continue to struggle with what these factors actually mean.[16] No one factor of *Penn Central's* three is dispositive, and judges tend to throw them into a blender and somehow try to balance one versus the rest.[17] In other words, "regulatory taking" is shorthand for the notion that government's power to enact regulations affecting private property operates on a continuum, and when it crosses an equitable boundary determined in most cases by reference to a multitude of case-specific facts, the label attached to the exercise of power is irrelevant, and what matters is the impact of the regulation on the owner.[18] Against this backdrop, I next discuss several cases about ridesharing and takings.

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[14] 438 U.S. 104 (1978).

[15] *Id*. at 124–25 (citing Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962)). *Lingle* labeled the *Penn Central* test the "default" test. *See Lingle*, 544 U.S. at 538–39; *see also* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 326 n.23 (2002) (quoting Palazzolo v. Rhode Island, 533 U.S. 606, 633 (2001) (O'Connor J., concurring) ("[O]ur polestar . . . remains the principles set forth in *Penn Central* itself," which require a "careful examination and weighing of all the relevant circumstances.")).

[16] John D. Echeverria, *Making Sense of* Penn Central, 23 UCLA J. ENVTL. L. & POL'Y 171, 172 (2005) ("The next 'big thing'—perhaps the last big thing—in regulatory takings law will be resolving the meaning of the *Penn Central* factors.").

[17] *See*, *e.g*., Reoforce, Inc. v. United States, 853 F.3d 1249, 1269–71 (Fed. Cir. 2017); Cass Cnty. Joint Water Res. Dist. v. Brakke (*In re* 2015 Application for Permit to Enter Land for Surveys and Examination), 883 N.W.2d 844, 849 (N.D. 2016); FLCT, Ltd. v. City of Frisco, 493 S.W.3d 238, 272–76 (Tex. App. 2016).

[18] *See Lingle*, 544 U.S. at 537 (The Court "recognized that government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster—and that such 'regulatory takings' may be compensable under the Fifth Amendment."); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 316 (1987) ("While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings."); Andrus v. Allard, 444 U.S. 51, 64 n.21 (1979) (federal power to protect endangered species measured against Takings Clause; "[t]here is no abstract or fixed point at which judicial intervention under the Takings Clause becomes appropriate"); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (Kohler Act enacted pursuant to state's police power went "too far").

III. SEVENTH CIRCUIT TO TAXIS: GET A CAT!

A panel of the U.S. Court of Appeals for the Seventh Circuit in two opinions authored by Judge Richard Posner (did you really expect anyone else would draw this assignment?), concluded that holdovers from the legacy economy—the owners of city-issued taxi medallions and permits—did not have their property taken under the Fifth Amendment when the city allowed ridesharing services to operate.[19]

The court acknowledged that the taxicab industry is "tightly regulated" by municipalities.[20] Indeed, you can't operate a taxicab without a medallion or permit from the local municipality.[21] And ridesharing services, although somewhat regulated, are certainly subject to much less government gatekeeping, in that you don't need major government permission to start chauffeuring people around for money via ridesharing services. That was the point the plaintiff taxicab operators objected to: we relied on the government-controlled market, which created a property right in our medallions and permits, they argued, and letting these interlopers do essentially the same thing we do without also having to get a medallion is a taking of our government-sanctioned property.

The panel rejected the claim in both cases,[22] calling the taxicab operators' claim "absurd."[23] Although it agreed that taxicab medallions are "property," the court held that there was no taking because owning a medallion is a property right to operate a taxicab, and isn't a property right to stop others from driving people around the city for money: "The City has created a property right in taxi medallions; it has not created a property right in all commercial transportation of persons by automobile in Chicago."[24]

The panel acknowledged that if the cities were to have outright confiscated the taxicab medallions (which would have prohibited the

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[19] *See* Joe Sanfelippo Cabs, Inc. v. City of Milwaukee, 839 F.3d 613 (7th Cir. 2016); Ill. Transp. Trade Ass'n v. City of Chi., 839 F.3d 594 (2016), *cert. denied*, 197 L. Ed. 2d. 761 (2017).

[20] *Ill. Transp. Trade Ass'n*, 839 F.3d at 596 ("companies are tightly regulated by the City regarding driver and vehicle qualifications, licensing, fares, and insurance"); *see also Joe Sanfelippo Cabs, Inc.* at 614–15 (discussing municipal regulation of taxicabs in Milwaukee).

[21] *See* MILWAUKEE, WIS., CODE OF ORDINANCES § 100-50 (2017).

[22] See *Joe Sanfelippo Cabs, Inc.*, 839 F.3d at 615; *Ill. Transp. Trade Ass'n*, 839 F.3d at 596–97.

[23] *See Joe Sanfelippo Cabs, Inc.*, 839 F.3d at 615 ("The plaintiffs' contention that the increased number of permits has taken property away from the plaintiffs without compensation, in violation of the constitutional protection of property, borders on the absurd.").

[24] *Ill. Transp. Trade Ass'n*, 839 F.3d at 597.

taxicab operators from operating taxicabs), it would be a taking.[25] The panel reasoned:

> A variant of such a claim would have merit had the City confiscated taxi medallions, which are the licenses that authorize the use of an automobile as a taxi. Confiscation of the medallions would amount to confiscation of the taxis: no medallion, no right to own a taxi, . . . though the company might be able to convert the vehicle to another use.[26]

But allowing Uber and Lyft to run services that *look* like taxicabs (but are not taxicabs) "is not confiscating any taxi medallions; it is merely exposing the taxicab companies to new competition—competition from Uber and the other transportation network providers."[27] The court pointed to what it concluded were critical differences between the two: you can't physically hail down an Uber or Lyft vehicle on the street but must use a smartphone application to do it for you, and a taxi's fare structure is determined by the city, while ridesharing services' are not.[28] And that, to the court, was the critical difference. Thus, ridesharing services are not taxicabs, and Uber and Lyft are as different from cabs as dogs are from cats. The court proclaimed:

> Here's an analogy: Most cities and towns require dogs but not cats to be licensed. There are differences between the animals. Dogs on average are bigger, stronger, and more aggressive than cats, are feared by more people, can give people serious bites, and make a lot of noise outdoors, barking and howling. Feral cats generally are innocuous, and many pet cats are confined indoors. Dog owners, other than those who own cats as well, would like cats to have to be licensed, but do not argue that the failure of government to require that the "competing" animal be licensed deprives the dog owners of a constitutionally protected property right, or alternatively that it subjects them to unconstitutional discrimination.[29]

In the same way that many cities require dogs to have a license, but not cats, the city can determine that taxicabs need a medallion, while ridesharing services do not.[30]

Because Uber and Lyft are not taxicabs, allowing them to drive people around the city for money doesn't interfere with the rights of taxicabs to drive people around the city for money. The court told the taxi medallion owner that if they think Uber and Lyft have a competitive edge over

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[25] *Id.* at 596.
[26] *Id.* (internal citation omitted).
[27] *Id.*
[28] *See id.* at 597–98.
[29] *Id.*
[30] *See id.*

traditional taxicab services, then they should get with the program and start competing (or perhaps start driving for Uber or Lyft).

IV. "YOU KEEP USING 'TAXI MEDALLION.' I DO NOT THINK IT MEANS WHAT YOU THINK IT MEANS!"[31]

In *Abramyan v. Georgia*,[32] the Georgia Supreme Court concluded that taxicab operators have no property interest in their taxi medallions which would allow them to stop ridesharing services from operating in the same space.[33] The Georgia legislature adopted a statute which made it easier for ridesharing services to operate, by limiting the power of local governments to regulate ridesharing and taxi services.[34] The statute prohibited local governments from adopting any new ordinances requiring either taxicabs or "vehicles for hire" to obtain a Certificate of Public Necessity, otherwise known as a taxi medallion.[35] These medallions subject taxicabs to "an extensive regulatory scheme."[36]

The previous version of the statute required Georgia taxis *and* vehicles for hire to obtain a medallion in order to operate.[37] As a result of the amended statute, Georgia municipalities could increase the number of ridesharing vehicles, and the medallion owners asserted that this interfered with their "exclusive right to provide rides originating in the city limits which charged fares based on time and mileage."[38] They asserted, in effect, that they had a government-sanctioned monopoly on taxicab-like services, and that the legislature's new law loosening that monopoly was a regulatory taking.[39]

The Georgia Supreme Court applied Georgia takings law (which mirrors, in large part, Fifth Amendment law), and concluded that government-issued licenses can be "property" protected by the regulatory takings doctrine, but that the medallion owners didn't quite possess the exclusive rights they

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[31] *See* Nobody115 & Brad, *You Keep Using That Word, I Do Not Think It Means What You Think It Means*, KNOW YOUR MEME (JUNE 27, 2012), http://knowyourmeme.com/memes/you-keep-using-that-word-i-do-not-think-it-means-what-you-think-it-means ("You Keep Using That Word, I Do Not Think It Means What You Think It Means" is a phrase used to call out someone else's incorrect use of a word or phrase during online conversations. It is typically iterated as an image macro series featuring the fictional character Inigo Montoya from the 1987 romantic comedy film THE PRINCESS BRIDE.").

[32] Abramyan v. Georgia, No. S17A0004, 2017 Ga. LEXIS 385 (May 15, 2017).

[33] *Id.* at *5–8.

[34] *See id.* at *1–2.

[35] *Id.* at *1.

[36] *Id.* at *2.

[37] *See id.* at *1–2.

[38] *Id*. at *3.

[39] *See id.*

argued they did.[40] A medallion isn't a government promise to enforce a monopoly, nor is it a guarantee that the government would limit the number of competitors offering the same or similar services:

> Further, even if this Court were to assume arguendo that former OCGA § 36-60-25 (a) and the regulatory scheme enacted by the City of Atlanta—which, together, control the application, transferability, use, renewal, and revocation of CPNCs [taxi medallions], as well as permit CPNC holders to use their medallions as collateral for a secured loan—created a protected property right, the harm about which Appellants complain is not amongst the rights associated with the taxi medallion.[41]

A municipality could have, for example, simply increased the number of medallions.[42] Yes, a medallion is a monopoly of sorts, but it isn't one that is limited in size. The regulating municipality can always increase the number of medallions, even if that "waters down" the value of the existing medallions.[43] And that's what happened here. No property interest meant no taking, and the court did not need to analyze the claims further. In essence, the court concluded that the legislature was responding to changing economics, and was within its authority to have opened the ride-for-hire market to more competition, and didn't need to "pay for the change."[44]

V. WHAT THE KING GIVETH, THE KING MAY TAKETH AWAY?

Our final case is *Boston Taxi Owners Association v. City of Boston*,[45] a case in which a federal district court rejected a takings claim that was premised on the city's failure to enforce its medallion requirements against ridesharing services.[46] The owners of taxi medallions thought that they had

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[40] *Id.* at *4–5.

[41] *Id.* at *5–6.

[42] *See id*. at *6–7 (citing Minneapolis Taxis Owners Coalition, Inc. v. City of Minneapolis, 572 F.3d 503 (8th Cir. 2009) (rejecting a takings claim when a municipality increased the number of medallions it issued)) ("Appellants have pointed to no law that would have prevented the City of Atlanta or the legislature from increasing the [medallion] limit (and thus, the number of drivers) as those variables changed, and there is no reasonable basis to conclude that any property interest Appellants may have in their respective [medallions] extends to exclusivity or a limited supply of [medallions].").

[43] *See id.*

[44] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922) ("We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.").

[45] 84 F. Supp. 3d 72 (D. Mass. 2015).

[46] *Id.* at 78 ("Plaintiffs assert that the City has effectively taken the exclusive rights to operate taxicabs within Boston from medallion owners without just compensation by its

some kind of special relationship with the city,[47] perhaps understandably so. After all, taxi medallions are tough to get, are expensive, require the owner to comply with stringent regulations, and are the only commercial vehicles which can pick up passengers on the street (in other words, be "hailed"). But apparently, this relationship wasn't special enough, because the city, according to the plaintiff, wasn't doing much of anything to crack down on ridesharing services like Uber, Lyft, and Sidecar.[48] While their models differ somewhat, at their core these services allow owners of private vehicles to give rides to passengers that might otherwise be using taxis. And this meant trouble for the owners of taxi medallions because this lower-cost competition hurts their bottom line.[49] The owners sought a preliminary injunction.[50]

The bulk of the court's order rejecting the relief is devoted to the likelihood of success on the merits part of the injunction test, and the court concluded it was very unlikely that the plaintiffs would be able to show either a taking, or a violation of their equal protection rights.[51] The court held that the owners did not possess a property interest in the market value of a taxi medallion, which is derived through the closed nature of the taxi market.[52] The court reasoned, "[u]ltimately, purchasing a taxicab medallion does not entitle the buyer to 'an unalterable monopoly' over the taxicab market or the overall for-hire transportation market."[53]

It's that word "unalterable" that lies at the heart of the court's rationale. Yes, you thought you had a relationship with the city, but you operators mistakenly thought that part of the deal in return for you going through the hoops of getting a medallion was that the city would not let others compete with you unless they also went through those same hoops. It wasn't.

The court continued:

> Finally, the Court fails to perceive how the City's decision *not* to enforce Rule 403 against TNCs constitutes a "taking" of plaintiffs' property. The City's inaction undoubtedly permits new companies to offer services that directly compete with traditional taxicab services but simply allowing increased

continuing decision not to enforce Rule 403 against TNCs.").

47 *See id.* at 79–80.

48 *See id.*

49 *See id.* at 81 ("The City's inaction undoubtedly permits new companies to offer services that directly compete with traditional taxicab services but simply allowing increased market competition, which may ultimately reduce the market value of a medallion does not constitute a taking.").

50 *See id.* at 77.

51 *Id.* at 78–82.

52 *Id.* at 79–80.

53 *Id*. (internal citations omitted).

> market competition, which may ultimately reduce the market value of a medallion does not constitute a taking.[54]

Taxis owe their existence to the highly regulated market into which the operators voluntarily injected themselves.[55] In other words, if you live by the sword . . .[56] However, even if a medallion is a property interest, the plaintiff's claim was not that the city rendered taxicab medallions valueless, only that by not enforcing the rules against rideshare services, it made those medallions *less* valuable, which put the analysis, according to the court, in *Penn Central*'s three factors territory. The court focused on the owners' "investment-backed expectations" and held that they are "significantly tempered" because the market is highly regulated. Live by the sword . . . Ironically, that the market is highly regulated and controlled seems to be the operators' exact point. Their claim is that the city was not policing the monopoly well enough.

VI. SOME THOUGHTS ON THE TAKINGS ANALYSIS

The various analyses these courts undertake—all focused on defining the property interest—are not completely satisfying, and, I suggest, detract from the correct approach, which should focus the taking calculus on the "investment-backed expectations" *Penn Central* factor, in which the question of "property" is baked in.

I first take issue with the Seventh Circuit's conclusion that ridesharing services are wholly different than taxicabs. These services—at least from the consumer's standpoint—operate a heck of a lot like taxis do. You hail a ride (not with your arm and a sharp whistle, but with your fingers and your smartphone), you get in, you go, you get where you are going, you pay the driver (again, with the app, not by handing the driver cash or your credit card). Is that enough of a difference to say that ridesharing isn't taxicabbing? On that, I am mostly with the taxicab operators. Having used Uber and Lyft more than a few times, they sure do seem like taxis with some very inconsequential differences.

But to the Seventh Circuit panel, those distinctions were enough. Whether to regulate ridesharing services the same as taxicabs was within the discretion of the city, in the same way that many cities require pet dogs to have a license, but not cats. Don't like having to obtain a license for

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[54] *Id*. (emphasis added).

[55] *See id.* at 79 (citing Dennis Melancon, Inc. v. City of New Orleans, 703 F.3d 262 (5th Cir. 2012), for the proposition that "a protected property interest simply cannot arise in an area voluntarily entered into . . . .").

[56] *See id*. ("The Court agrees that the market value in a taxicab medallion, which is derived solely from the strict regulation of taxicabs in the City, cannot constitute a protected property interest in the context of the Takings Clause.").

your pet? Be sure to get a cat. You don't want to get a taxi medallion? Drive an Uber. That seems like a very blithe approach to those who may have invested hundreds of thousands of dollars in a taxicab medallion, perhaps rightfully believing that the city had a *pet* license requirement. To those who already relied on the regulatory system in place to invest in a medallion, and who thought this was a high barrier to entry into the driving-people-around-for-money market? Chumps.[57] Like the *Boston Taxi* court's approach, this is a case of "what the King giveth, the King may taketh away," much like the cases which hold that there is no property right in the continued existence of a statute.[58] And that is really the Seventh Circuit panel's main thrust.[59] You shouldn't rely on a regulation, unless the things you are relying on are welfare benefits, or employment, or other forms of "New Property," a holding implicit in the panel's conclusion that medallions are "property," just not property for purposes of this takings claim.[60] Owners of New Property can rely. But not here, this is Old Property. Why there's a difference, I can't really say.

The Georgia Supreme Court's approach is also less than satisfying. The government's ability to expand the regulated market really doesn't go to whether you possess property, but rather the nature of what the property right entails. This is an owner-centric analysis about expectations, and not whether the plaintiff has a "legitimate claim of entitlement" to a taxicab medallion.[61] Each of the three opinions that we reviewed above concluded that the plaintiffs' taxi medallions were "property," just not property for purposes of takings analysis. The Seventh Circuit even concluded that if the municipalities were trying to revoke the medallions, the owners would undoubtedly possess property entitling them to due process. But "property" for purposes of takings analysis is a different story, according to the court. It shouldn't be. Instead of focusing on what the nature and scope of the property interest owned by the plaintiffs, and treating it as a separate,

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[57] Ever since Chief Justice Roberts made "chumps" a legal term of art, I am committed to employing that term every time the opportunity presents itself. *See* Arizona State Legislature v. Independent Redistricting Comm'n, 135 S. Ct. 2652, 2677 (2015) (Roberts, C.J., dissenting) ("What chumps!"). You should too.

[58] *See*, *e.g*., American Pelagic Fishing Co. v. United States, 379 F.3d 1363 (Fed. Cir. 2004).

[59] *See* Ill. Transp. Trade Ass'n v. City of Chi., 839 F.3d 594, 599 (2016), *cert. denied*, 197 L. Ed. 2d. 761 (2017) ("A 'legislature, having created a statutory entitlement, is not precluded from altering or even eliminating the entitlement by later legislation.'").

[60] I'm referring to entitlements. *See* Goldberg v. Kelly, 397 U.S. 254, 262 n.8 (1970) (citing Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964)) ("It may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity.'").

[61] *See* Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972) (defining property for Due Process purposes as a "legitimate claim of entitlement.").

threshold analysis as these courts do, I think the better approach is to conclude the plaintiffs own property because they have a government-backed license to operate taxicab services. This is a license that has "the law behind it,"[62] and thus should be easily considered property within the meaning of both the Takings Clause and the Due Process Clause. The analysis each of our courts undertake on what the owners' legitimate expectations were, and the extent to which they invested into the licensing scheme based on those expectations—in other words, *Penn Central*'s "legitimate investment-backed expectations" factor—is the more appropriate home for these questions.

Third, what of the *Boston Taxi* court's reasoning that taxicab licenses are merely government-issued licenses, and because the market has been highly regulated, the owners do not possess Fifth Amendment property? This too is less than satisfying. The entrance of app-based ridesharing services has revealed one thing perhaps not evident before: that there's really not much of a need for tight regulation of the ride-for-hire market, at least as a gatekeeping function. The *Boston Taxi* court's analysis should be reserved for such things where the license at issue truly is a government gift, and the market would not exist but for the government.

The paradigmatic example of that, in my view, is the Hawaiʻi Supreme Court's decision in *Damon v. Tsutsui*,[63] which turned on whether a lessee had offshore fishing rights allegedly granted to his predecessor during the Hawaiian Kingdom period. Exclusive fishing rights were originally created in 1839 when the King (who, as the sovereign, possessed allodial title to all land and fishing rights) "gave" a portion of them "to the common people."[64] These rights—which granted fishing rights to tenants of the locality (the ahupuaʻa, for those knowledgeable in Hawaiian property concepts), as long as they remained tenants—were eventually codified by statute. The *Damon* court made it clear that these rights were limited and stemmed from, and thus were dependent upon, the King's original gift: "But for this gift or grant the tenants would not have had any rights; and they have them only to the extent and with limitations expressed in the grant."[65]

After annexation of Hawaiʻi by the United States in 1898, the Hawaiʻi Organic Act of 1900 repealed these laws, exempting those who could show "vested rights" by judicial confirmation. Those who did not confirm their fishing rights were not "vested" under the Act and were subject to the repeal of the King's gift: "In our opinion those persons who became tenants after April 30, 1900, as did Tsutsui in 1929, did not have any

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[62] Kaiser Aetna v. United States, 444 U.S. 164, 178 (1978).
[63] 31 Haw. 678 (Terr. 1930).
[64] Haalelea v. Montgomery, 2 Haw. 62, 65 (Kingdom 1858).
[65] *Damon*, 31 Haw. at 688.

'vested' rights within the meaning of the Organic Act and therefore the repealing clause was operative as against them."[66]

But the ability to use a fishery attached to a specific parcel of land which was originally gifted from the sovereign is a long way from piloting a car on city streets. The fishing right at issue in *Damon* was solely the product of positive law that could be altered or repealed by the sovereign, while the latter is more akin to a right shared by everyone, and has a normative component immunizing it from undue government regulation without condemnation and payment of just compensation. As Justice Thurgood Marshall once noted:

> Quite serious constitutional questions might be raised if a legislature attempted to abolish certain categories of common-law rights in some general way. Indeed, our cases demonstrate that there are limits on governmental authority to abolish "core" common-law rights, including rights against trespass, at least without a compelling showing of necessity or a provision for a reasonable alternative remedy.[67]

I conclude by asking what difference does it make whether a court undertakes this analysis as part of its "property" determination, or as part of the *Penn Central* inquiry? The big difference, in my view, is that the *Penn Central* factors are inherently fact-based, and "depends largely upon the particular circumstances [in each] case."[68] In other words, shifting the analysis from the threshold "property" question to the owner's specific investment-backed expectations would allow some of these claims now dismissed by summary judgment to be determined by juries. These should be case-specific factual inquiries and not only a determination of the legal nature of the interest allegedly taken. Instead of being placed in the hands of judges, these questions should be resolved by juries.[69]

VII. CONCLUSION

Shifting the analytical focus from the "property" question to *Penn Central*'s investment-backed expectations would clarify the way courts approach ridesharing takings claims, allow these questions to be viewed in their larger context, and would permit juries, not judges, to make the determination of whether there's been a taking.

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[66] *Id*. at 693.

[67] PruneYard Shopping Center v. Robins, 447 U.S. 74, 93–94 (1980) (Marshall, J., concurring).

[68] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

[69] *See* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 720–21 (1999) ("[W]e hold that the issue whether a landowner has been deprived of all economically viable use of his property is a predominantly factual question . . . [and that] question is for the jury.").