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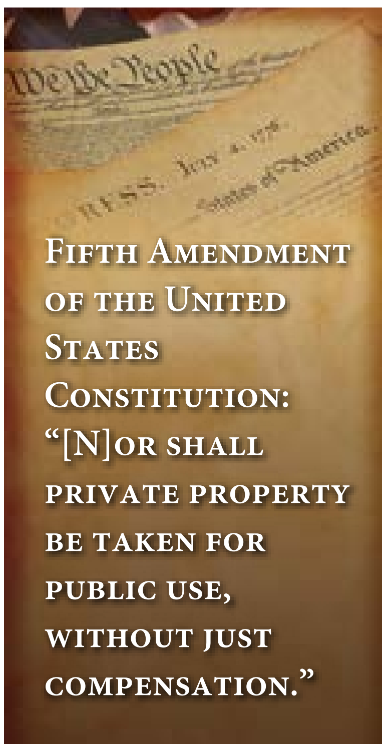

When Just Compensation Is Due for "Regulatory Takings" of Private Property

By Jeremy Talcott & Todd Gaziano

Executive Summary: *While many people are aware of—and rightly angered by—governmental eminent domain abuses that have been publicized over recent decades, far fewer focus on the more frequent and systematic destruction of property rights through regulation at all levels of government. The Fifth Amendment of the U.S. Constitution provides protection against these severe restrictions on the use and value of property, and the Supreme Court has established several tests for courts to use when confronted with these "regulatory takings." At their core is a simple principle: when regulation "goes too far" in limiting property rights, government must pay compensation for the loss. Pacific Legal Foundation (PLF) has successfully litigated regulatory takings cases for decades as part of its mission to establish precedent in support of the constitutional protections of private property rights. On March 20, 2017, the Supreme Court will hear oral arguments in another PLF regulatory takings case,* Murr v. Wisconsin, *where the Supreme Court will determine how property is defined in a regulatory takings analysis. The ultimate issue is whether owners of adjoining parcels of property are due compensation when regulations prohibit development on one of them. We argue that, absent special circumstances, each legally defined and separate lot is the proper unit for measuring the impact of a regulation and that the destruction of all economic value of one lot requires compensation.*

I. Introduction: The Constitution's Protections of Property Rights and the Role of Public Interest Law Firms to Help Protect Them

The framing generation understood that the right to use and enjoy property was the foundation of many other important rights and liberties.[1] The Founders hoped to construct a structure of limited federal government that would maximize individual liberty while providing strong protection of private property rights. Even so, the right to freely use property was thought to be insufficiently guaranteed in the Constitution drafted in Philadelphia in 1787. The Constitution was ratified only after its advocates promised to provide additional, explicit protections for property and liberty in a Bill of Rights.[2]

The explicit protections of property adopted in the Bill of Rights include: the right to possess and carry firearms in the Second Amendment; to be free from the quartering of soldiers in our homes (except in wartime and pursuant to statute) in the Third Amendment; to be secure against any unreasonable searches or seizures of property in the Fourth Amendment; and to receive compensation for government takings of our property in the Fifth Amendment. Initially, these protections applied to limit the power only of the Federal Government, but with the passage of the Fourteenth Amendment after the American Civil War, these rights were also made enforceable against state governments.

Americans recently celebrated the 225th anniversary of the Bill of Rights. Yet the rights it guarantees cannot protect themselves, and their contours are not always clear. Citizens must remain vigilant in defending them, including using the courts when necessary. Those who support greater government power come up with seemingly infinite reasons why, in a modern society, individual rights should be construed narrowly or give way entirely to allow greater government

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control. Public interest legal firms exist to push back on such government encroachments, especially when private litigants can be easily overwhelmed by the institutional resources of the local, state, or federal government.

Public interest law firms with varying specialties seek justice in individual cases and preserve everyone's fundamental rights with precedent-setting court victories. This paper addresses a large area of Pacific Legal Foundation's work that has resulted in nine wins for property rights in the Supreme Court of the United States. This spring, the Supreme Court will take up another aspect of our property rights protections: the right to be compensated for "regulatory takings" of private property. That case, *Murr v. Wisconsin*, is discussed primarily in section IV, but its importance is evident only when it is placed in context within the larger struggle for property rights protection.

Having one's home or business physically taken by the government is traumatic and worthy of careful legislative and judicial controls. But, short of physical takings, the government engages in regulation and other actions that diminish property values. These restrictions are far more common and affect many more people. To the extent possible, the scope and cost of government regulation should be reduced. But it is unrealistic to expect government regulation to markedly diminish anytime soon, and it is especially unlikely to happen as a result of political forces alone.

Thus, it is essential to improve the framework of legal rules that govern compensation for government regulations that go too far or that fall especially heavily on certain property owners. After all, the burdens of government action should generally be shared by society as a whole. Improving legal protections of property will also ensure justice and fairness for the individuals least able to battle restrictive government regulations. Requiring reasonable compensation for government takings will also provide two related social benefits. First, it disciplines regulatory agencies to focus on less costly approaches and regulatory alternatives to achieve the same or similar ends. And second, when cost reduction is not possible or isn't fully implemented, it spreads those costs more broadly and fairly, which lessens friction and increases support for government actions.

Watch " Paradise Lost: A Family's U.S. Supreme Court Property Fight" to learn more about *Murr v. Wisconsin*.

II. The Fifth Amendment Guarantee of Compensation for "Takings," and Different Types of Takings

The concluding clause of the Fifth Amendment states: "nor shall private property be taken for public use, without just compensation." Some people refer to it as the "Just Compensation Clause," and others, the "Takings Clause," but it contains both elements. Unlike clauses that prohibit the government from ever abridging free speech rights or religious liberty, or denying a jury in a criminal trial when requested, the Takings Clause implicitly recognizes that government has a sovereign power of "eminent domain," which allows it to take private property without the owner's consent.

Though takings of property are permitted, the Fifth Amendment puts two very important restrictions on that power. First, government may not take property unless it intends to put it to a "public use." The Founders rightly worried that individuals might lobby government to take property from the powerless and give to the well-connected, so they limited the power to public uses, such as roads, parks, and government buildings. Second, government must pay "just compensation" for whatever property it takes. After all, government might take much more property than it needed if it were able to get it for free, instead of considering whether the public benefit was worth paying the fair value of the property.

There are different types of government takings, and they each present different issues of interpretation and construction in particular cases. The two important categories addressed in this paper are taking physical possession and title of property, and regulations that diminish the use and value of property.[3]

1. A physical taking of possession and title

The government sometimes takes physical possession of land or personal property. When government engages in a physical taking of land or its improvements using the power of eminent domain, title formally passes to the government as well. Although the Fifth Amendment recognizes this power, it can still be abused. One abuse of eminent domain occurs when a government entity takes title to private property and—instead of devoting it to a traditional

public use like a road or government building—transfers it to another private party, claiming that the transfer confers a benefit on the public.

In 2005, the Supreme Court wrongly upheld such a taking-from-A-to-give-to-B scheme in *Kelo v. City of New London*,[4] holding that any transfer of property that qualified as a "public purpose" was also a "public use." Even worse, that case instructs courts to give deference to what politicians in legislatures say the public purpose is, meaning something as nebulous as a possibility of increased tax collections can suffice. In the wake of that decision, many states turned to legislative action to reinforce the protection of property rights.[5] Americans should continue to seek legislative limits on the eminent domain power, but because the *Kelo* decision does not reflect the proper understanding of the Fifth Amendment's language, they should also press the Supreme Court to overrule it.

The property protected by the Fifth Amendment isn't limited to land. When government seeks to obtain possession of any physical private property, the same protections apply. For example, the government sometimes orders farmers to turn over a portion of their crops, pursuant to agricultural programs. In 2015, the federal government tried to evade paying compensation for an order taking a portion of a California farmer's raisin production by characterizing it as a tax. But the Supreme Court correctly held that whether it is land or raisins, when the government wants to take physical possession of property, they have to pay for it. While the government may require forfeiture of property because of wrongdoing by the owner, the protections of the Fifth Amendment apply in full force to people making lawful use of their property.

> "[I]f regulation goes too far it will be recognized as a taking."
> *Pennsylvania Coal Co. v. Mahon* (1922).

When the government takes possession and title to property or orders property to be turned over, the Supreme Court has established that the right measure for compensation is generally the fair-market value at the time the government takes the property. While this may seem like a straightforward proposition, the exercise of the eminent domain power still presents many concerns for the owners whose property has been taken. This paper does not address them in any detail, except to note here that government officials often attempt to pay less in compensation than the market value, and even that may be much less than the actual value of the property to the original owner, who often loses a cherished home or business along with its future potential, as well as any sentimental or other important value.[6]

2. Regulations or other government actions that diminish property use and value or cause a physical invasion of that property

As mentioned above, the government can use its power of eminent domain to take legal title of all or part of someone's property, so long as it is for a public use, and just compensation is paid. However, government often wants to change the nature of landowners' use of their property without going so far as taking possession or title of their property. For example, a government may grant itself temporary access to some portion of the land, or prevent the owner from excluding a third party, or forbid certain types of use or development of the property. While the Supreme Court has acknowledged the right of government to place restrictions on property use, these types of legislative acts can still run afoul of the Fifth Amendment's protections. After all, government could otherwise heavily burden land use but avoid paying compensation simply by choosing not to take title to the property.

The Revolutionary era and early state practice contain evidence that the founding generation required compensation for a variety of government actions that devalued private property. And by the time the Fourteenth Amendment was ratified, placing the restrictions of the Fifth Amendment on the states, the practice was common.[7] These devaluations of property are often referred to as "regulatory takings," and they trigger payment under the Just Compensation (or Takings) Clause of the Fifth Amendment when the loss of use or devaluation of property is substantial.

Almost 100 years ago, the Supreme Court began to better define the parameters for when regulatory takings require compensation. In a landmark decision, the Supreme Court explained "that while property may be regulated to a certain extent [without any liability], if regulation goes too far it will be recognized as a taking."[8] But determining what "goes too far" needed (and even today still needs) to be fleshed out further by the courts.[9]

Accordingly, the courts have developed different standards under the Fifth Amendment to evaluate different types of potential regulatory takings. Two categories of regulatory takings are governed by relatively objective standards, which provide fair notice to both the government and property owners of when compensation is due. The broadest category of regulatory takings, however, is currently evaluated under a multi-factor test that provides

less predictability for both the regulated landowner and the government.

III. Types of Regulatory Takings and the Corresponding Legal Standards for Compensation

There are two main categories of regulatory takings. The first is when the government authorizes a physical invasion (or occupation) of the property, whether by government itself or a third party. The second is when government regulates a piece of property so heavily that it "goes too far" and fairness and justice require the payment of just compensation. In some cases, the regulation results in a denial of all economically viable use of the property. The Supreme Court has characterized regulations that cause physical invasions or deny all economically viable use as categorical or "per se" takings that trigger the compensation requirement. But even if the regulation does not cause physical invasion or deny all economically viable use, the regulation may still require compensation under the multi-factor analysis.

1. Physical invasion without taking possession or title

Some legislation or regulation authorizes the government or a third party to physically enter private property and use a portion of it. Rather than take legal title of the property (which would always require compensation), the regulation simply eliminates the owner's legal right to exclude government or a third party from the property. The Supreme Court has rightly held these types of physical invasions to be per se takings that require compensation. After all, the right to exclude is a fundamental aspect of property ownership.[10]

A good example of this type of regulatory taking is the New York City ordinance that forced apartment building owners to allow cable television wires and boxes to be affixed to their structures.[11] Even though the footprint of the box and cable was small, a "Horton Hears a Who" principle applies: an invasion is an invasion no matter how small. Another example is the confiscation of money for a regulatory purpose, even if it is a small portion of a larger sum.[12] Since money is property, any amount being taken is a taking itself, and cannot be remedied by compensation of any less than the full amount. This contrasts with instances where the government acquires money through lawfully imposed taxes that should apply equally to all similarly situated taxpayers.

Even when the government "invades" property by flooding it with water, it may be required to pay compensation for property that is taken or destroyed. In *Arkansas Game and Fish Commission v. United States*,[13] Arkansas sued the federal government for seasonal releases of water from a dam, arguing that the federal government knew the water would inundate the state's property and destroy its trees. The Supreme Court held that government-induced flooding that damages property may be compensable. Not every temporary halt to use or enjoyment of property is subject to compensation,[14] but when the government itself enters the property or causes the physical invasion and a non-trivial loss, compensation is generally required.

2. Denial of all economically beneficial use ("*Lucas*" analysis)

Rather than physically invading and using private property itself, government instead may flex its regulatory power to limit the owner's private use of property. The Supreme Court has long upheld the right of local governments to place restrictions on the use of property through the "police power," which allows states to regulate in the interest of health, safety, welfare, and morals. By regulating under this police power, many communities have imposed such severe limits on land use and development that they leave landowners without any remaining economically viable use.

In 1992, the Supreme Court evaluated just such a case. In *Lucas v. South Carolina Coastal Council*,[15] a landowner had purchased two parcels of beachfront property on a barrier island off the South Carolina coast. The owner, David Lucas, hoped to build single-family residences on the lots, similar to the many other homes that existed in the area. In 1988, however, the South Carolina legislature passed the "Beachfront Management Act" and created a line along the coast beyond which no more homes could be built. The goal was to preserve the beach for tourism by setting aside areas of local flora and fauna. Lucas's property was immediately made useless for anything other than temporary camping.

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While the Court recognized the strong state interest in protecting the coastline for the public, it reaffirmed that the costs of providing untouched land for all the state's citizens to enjoy should be shouldered by all of those citizens, not by individual landowners. Because David Lucas had been left with a property that was deprived of all economically viable use, the Court held that this was also a per se

regulatory taking. When a regulation destroys all of the economically viable use of a property, the owner is entitled to compensation.

3. Regulatory takings under the multi-factor analysis ("*Penn Central*" analysis)

Most government regulation of property is not a physical invasion and does not deny all economically viable use of private property, but still may have such a severe impact on private property that it "goes too far" and should be recognized as a compensable taking.[16] The Supreme Court has created a multi-factor test for evaluating these types of regulatory takings. While there has been sustained debate about the legitimacy and coherence of this test, it has occupied a central role in regulatory takings law for almost 40 years.[17]

The case where this test originated, *Penn Central Transportation Company v. City of New York*,[18] is still widely used to analyze regulatory takings. *Penn Central* involved a historical landmark designation of the Grand Central Terminal in New York City. The owner, Penn Central Transportation Company, wished to build a multistory office building above the Terminal. The city denied the necessary permits, stating that the "majestic approach" of the building would be diminished by a 55-story tower on top of it, despite the presence of existing skyscrapers surrounding the terminal. Penn Central argued that it was being deprived of the right to develop its property and put it to a more productive use. After all, without the Landmarks Preservation Act, it was clear that Penn Central would have been allowed to build upwards, and get a substantial return on its investment in the form of rents.

The Supreme Court held that Penn Central was not entitled to compensation for the loss of its right to develop. Essentially, the Court decided that the restriction had not "gone too far" in limiting Penn Central's development rights. The Court then recited a list of factors to consider when reviewing regulatory takings claims:
(1) the economic impact of the regulation,
(2) the investment-backed expectations of the owners, and
(3) the character of the government's action.

Examining these factors, the Supreme Court held that while Penn Central Transportation Company lost its "air rights" to develop above the terminal, it still retained substantial economic benefit from the use of the Terminal. Accordingly, the Court rejected the takings claim.

Lower courts and commentators have correctly noted that the multi-factor approach is vague, subjective, and excessively malleable. It is also not apparent why the subjective "investment-backed expectations" of an owner should limit or create government liability. Either the government has taken the use and value of property or it has not, regardless of what the owner might have hoped to do with the property.

Some scholars have suggested that when the *Penn Central* opinion discussed the "parcel as a whole" concept, it established a fourth factor to consider.[19] If the Supreme Court had treated the air rights lost by Penn Central as a

Architectural drawing of proposed addition to Grand Central Terminal.

separate right, the regulation would have effected a total destruction of that property interest. The Court instead looked at the loss of the air rights in combination with the remaining rights in the property, which included the right to use and rent the structure already in place. Under that analysis, the Court found that the loss of air development rights was not a substantial interference with the entire parcel owned by Penn Central at this site. Although the language within the opinion established only that a single legal parcel could not be further segmented into air rights, the true meaning of "parcel as a whole" has been debated both academically and in the courts. Which brings us to the case of *Murr v. Wisconsin*.

IV. What Is at Stake in *Murr v. Wisconsin*, and Why the "Relevant Parcel" Question Is So Important

In essence, what is at stake in *Murr v. Wisconsin* is how to determine the unit of property that is being regulated for takings analysis. Because the regulatory takings analysis considers the magnitude of impact on the parcel, determining the relevant parcel of property can be a very important question for property owners trying to obtain

compensation. Recall that in *Penn Central* the Supreme Court held that it would not sever air rights from the "parcel as a whole" and analyze the impact of the regulation on the air rights alone. But the Court didn't provide much guidance on what *does* constitute the parcel as a whole.

People buy property in legally defined lots. Sometimes they buy several lots next to each other. If government later forbids the use or development of one of those adjoining lots, is the single lot that is regulated the relevant "parcel as a whole?" If it is, the *Lucas* test should apply, requiring compensation as a per se taking. But if all of the adjoining lots were considered together as the proper unit for takings analysis, then government has only restricted part of the total property. This makes a regulatory taking less likely because the magnitude of the impact is not measured against the single, discrete parcel, but is measured against all the adjoining lots together, thus diluting the impact.[20]

In 1960, William and Dorothy Murr purchased a small parcel of land along the St. Croix River in Troy, Wisconsin. The Murrs built a small, three-bedroom cabin on the lot, creating a vacation spot for their family. Realizing the beauty and future value of the location, the Murrs purchased a second lot in 1963, directly adjacent to their first lot. They believed that it would be a valuable long-term investment. For decades, the little cabin along the St. Croix River was a summer getaway for the growing Murr family of children and grandchildren. Though William and Dorothy have both since passed away, they transferred the two lots to their grown children, who continue to use the cabin as the family gathering spot.

Dorothy and William Murr

In 2004, the children decided the time was finally right to sell the adjacent investment property. But because of changes to zoning during the many years that the Murrs had held the lots, the County deemed the investment lot to be "substandard" in size for development. Even though the lot was well over one acre in size, the County subtracted setbacks from the shoreline, from wetlands, and from a steep slope, leaving approximately a half acre of "net project area." While half an acre provides a beautiful building site, County restrictions require a minimum of one acre. The ordinance contains a "grandfather clause" allowing construction on lots that were legally created before the zoning changes. Normally such grandfather clauses for pre-existing lots would provide sufficient relief and allow development. But the clause here has an exception. It does not apply if a landowner owns the adjacent lot. In other words, if anyone else owned the investment parcel, that owner would have been entitled to sell or develop the property. But for the Murrs, the investment parcel could be neither sold nor developed as an independent and discrete lot.

The Murrs brought a takings claim seeking compensation for the taking of the investment parcel. But the Wisconsin appellate court rejected the claim by announcing a rule that under *Penn Central's* "parcel as a whole" concept, two legally distinct, but commonly owned contiguous parcels must be combined for takings analysis purposes.

The Murrs' situation provides the perfect vehicle for the Supreme Court to finally address the issue of what defines the "parcel as a whole" for takings analysis. Several courts, such as the Wisconsin Appellate Court, have treated the "whole parcel" doctrine as allowing—or even requiring—the courts to aggregate legally separate but commonly owned lots into a single parcel when undertaking a regulatory takings analysis. Other courts treat distinct legal lots individually. This question has been left unresolved during the nearly four decades that have passed since *Penn Central* was decided. With *Murr v. Wisconsin*, we may finally get resolution from the Supreme Court.

In *Penn Central*, the Supreme Court rejected the idea that takings law should "divide a single parcel into discrete segments." But the Wisconsin court has gone to the other extreme, deciding that takings law requires the courts to lump multiple lots together. This aggregation dilutes the amount of loss suffered by the property owner, making it less likely that a regulatory taking under the *Penn Central* factors will be found.

The Murrs argue that *Penn Central* compels the opposite result. The analysis of the Grand Central Terminal involved the single legal lot that included the terminal building. Even though Penn Central Transportation Company owned many other properties across New York, the Supreme Court looked only at the reduction of property rights in the Terminal parcel.

Later Supreme Court cases affirm the longstanding tradition of defining property rights as legally defined—and distinct—parcels. In 2002, the Supreme Court decided *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*.[21] That case involved a temporary moratorium on building near Lake Tahoe. The Supreme Court rejected the theory that there was a *Lucas* style taking during a period of several years that development was prohibited. The court refused to divide the parcel into

segments of time. In other words, it did not consider the period of time during which development was prohibited as a separate interest in property. But most significantly, the Court recognized that real property is "defined by the metes and bounds that describe its geographic dimensions." This is the type of definition that the states generally use to identify a parcel of property. The Murrs have two such parcels, independently described and titled. For over 50 years they have paid property taxes on them independently. And for a regulatory takings analysis, they should also be treated independently.

A friend-of-the-court brief filed by the State of Nevada, co-written by Professor Ilya Somin and joined by eight other states, argues that the Wisconsin court rule is at odds with the text and original meaning of the Takings Clause, and that it "creates significant perverse incentives for both landowners and regulators."[22] According to Nevada, the Wisconsin court rule will make it more difficult for states to effectively impose land-use regulations, while also undermining traditional expectations of property rights, creating damaging economic impacts, and encouraging government to heavily regulate both individuals' and states' property. Nevada and its sister states agree with the Murrs that individual, legally defined parcels of land have been a fundamental unit of American property law for centuries. They also note that the Supreme Court has often recognized that these parcels play a "central role" when courts are faced with takings claims.

The State of Wisconsin and County of St. Croix filed separate briefs to defend the Wisconsin court ruling. They will also split the oral argument time for their side. They both correctly note that state law has historically created the legal lots that establish property rights. Under Wisconsin state law, new lots may be created through subdivision of property, and the lines of lots may even be redrawn or adjusted in some instances, by following the required state law procedures. Wisconsin argues that states should have the power, without paying compensation, to force a "merger" of lots that are contiguously owned.[23]

But Wisconsin law does not match up well with the arguments being made to the Supreme Court. The ordinance that Wisconsin and St. Croix County claim has "effectively merged" the lots has actually done no such thing. The County ordinance did not erase the existing legally drawn lot lines and create a new, unified parcel; it is simply a zoning ordinance that prohibits building or selling when certain lots are next to each other. While zoning ordinances limit the potential use and development of land, they cannot alter lot lines. Wisconsin has formal state law procedures that must be followed to alter previously created lots—procedures that were never undertaken as to the Murrs' two lots. If Wisconsin wishes to merge the two parcels, it should be required to follow the state law procedures and redraw the lines, not achieve the same ends through a local zoning ordinance.

The Murrs further respond that government may not redefine the nature of property at will while avoiding compensation. And the fact that the properties came into the hands of the children after the new regulations were enacted does not change the analysis. The Supreme Court has previously held that post-enactment purchasers have all the same rights to challenge burdensome regulations that previous owners had.[23]

PLF and the Murrs urge the Supreme Court to adopt a presumption that the single parcel, legally created under state law, is the proper baseline for measuring the impact of regulatory takings. Whether a court applies the *Lucas* or *Penn Central* tests, the single lot should be used to determine whether the regulation has gone too far, and entitles the owner to compensation. There may be situations where the presumption can be overcome, such as when an owner jointly develops adjoining parcels, but the burden to prove that circumstances warrant combining the parcels should be on the government. And when the separate and independent use of a single parcel is destroyed by government action, as is the case with the Murrs, government should compensate the owner for the loss.

Donna Murr speaks at a 2016 news conference on her family's property. At far left is John Groen, PLF Executive Vice President and Murr lead attorney.

V. Conclusion

At their core, takings analyses are inquiries into long-established principles of fairness and justice, and flow from the idea that one person should not be forced to bear costs that should rightly be paid by the public as a whole. When the same action taken by government affects two people differently because one happens to own a second parcel of land, it offends that sense of fairness. PLF believes that the Fifth Amendment provides protection from this type of arbitrary government redrawing of property rights and trusts that the Supreme Court will agree.

1 *See* Paul J. Larkin, Jr., *The Original Understanding of "Property" in the Constitution*, 100 MARQ. L. REV. 1 (2016) ("Anglo-American traditions, customs, and law held that property was an essential ingredient of liberty that the Colonists had come to enjoy and must be protected against arbitrary governmental interference."); JAMES W. ELY, THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (3d ed. 2007) (detailing the significant role discussions of property rights played in shaping the constitutional era); BERNARD H. SIEGAN, PROPERTY AND FREEDOM: THE CONSTITUTION, THE COURTS, AND LAND-USE REGULATION 14–19 (Transaction Publishers 1997) (discussing the influence of John Locke's theories of property from his Second Treatise on government); DENNIS J. COYLE, PROPERTY RIGHTS AND THE CONSTITUTION: SHAPING SOCIETY THROUGH LAND USE REGULATION 228–30 (State University of New York Press 1993) (same); *and* Harry V. Jaffa, *What Were the "Original Intentions" of the Framers of the Constitution of the United States?*, 10 U. PUGET SOUND L. REV. 351, 378–80 (1987) (same).

2 *See* ROBERT ALLEN RUTLAND, THE BIRTH OF THE BILL OF RIGHTS, 1776-1791, at 186–89 (1950).

3 A third category of takings involves "exactions," where government leverages its power to regulate by demanding that individuals give up money or property to receive some government benefit, such as a development permit. While this is an important area of the law—and one that PLF has extensively litigated—it is beyond the scope of this paper. For more information, see PLF's victories in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013). See also Christina M. Martin, Nollan *and* Dolan *and* Koontz-*Oh My! The Exactions Trilogy Requires Developers to Cover the Full Social Costs of Their Projects, but No More.*, 51 WILLAMETTE L. REV. 39 (2014).

4 545 U.S. 469 (2005).

5 *See, e.g.*, VA. CONST. art. I, § 11 (an amendment was ratified November 6, 2012, that places much stricter limitations on government takings by condemnation than the Fifth Amendment to the U.S. Constitution).

6 *See, e.g.*, C. Jarrett Dieterle, *The Sandbagging Phenomenon: How Governments Lower Eminent Domain Appraisals to Punish Landowners*, 17 THE FED. SOC. REV., no. 3, Oct. 2016, at 38, http://www.fed-soc.org/publications/detail/the-sandbagging-phenomenon-how-governments-lower-eminent-domain-appraisals-to-punish-landowners.

7 *See, e.g.*, Kris W. Kobach, *The Origins of Regulatory Takings: Setting the Record Straight*, 1996 UTAH L. REV. 1211.

8 *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

9 While the Fifth Amendment establishes the baseline constitutional requirements for compensation of takings, Congress or state legislatures are free to go above and beyond those minimums with laws to protect property owners. Despite frequent debates on statutory compensation schemes for takings, however, relatively few have been enacted. *See, e.g.*, ILYA SOMIN, THE GRASPING HAND 204–31 (2015) (discussing various proposals for statutory limits on eminent domain through increased compensation, additional procedural protections, or the narrowing of acceptable public uses).

10 *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) (describing the right to exclude as "one of the most essential sticks in the bundle of rights that are commonly characterized as property").

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

12 *Brown v. Wash. Legal Found.*, 538 U.S. 216 (2003).

13 133 S. Ct. 511 (2012).

14 *See Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002) (holding that a temporary moratorium on all development near Lake Tahoe was not a compensable taking).

15 505 U.S. 1003 (1992).

16 This multi-factor analysis is sometimes referred to as a "partial takings" test, but the "partial taking" term is an imprecise one at best, and a highly misleading concept overall. For example, *Loretto* involved a taking of only part of the property, but the possessory nature of the regulation made it a categorical taking. It is instead correct to distinguish categorical, per se takings from regulations that are analyzed under the multi-factor takings analysis. Moreover, the ultimate question is whether the regulation goes so far that justice requires compensation; using the word "partial" adds nothing to the takings analysis. The regulation either causes a taking that requires compensation or it does not.

17 For criticisms of the *Penn Central* multi-factor test, see Gideon Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective on* Penn Central Transportation Co. v. City of New York, 13 WM. & MARY BILL RTS. J. 679 (2005) and Steven J. Eagle, Penn Central *and Its Reluctant Muftis*, 66 BAYLOR L. REV. 1 (2014).

18 438 U.S. 104 (1978).

19 *See, e.g.*, Steven J. Eagle, *The Four-Factor* Penn Central *Regulatory Takings Test*, 118 PENN STATE L. REV. 601, 622–24 (2013).

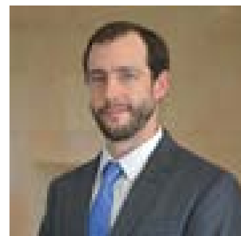
20 This is sometimes called establishing the "denominator" against which the percentage of property rights r estricted by the regulation is calculated. See John E. Fee, Comment, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. CHI. L. REV. 1535 (1994).

21 535 U.S. 302 (2002).

22 Brief of the States of Nevada, Alaska, Arizona, Arkansas, Kansas, Oklahoma, South Carolina, West Virginia, and Wyoming as Amici Curiae in Support of Petitioners at 4–5, Murr v. Wisconsin, No. 15-214 (2016).

23 *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

Authored by



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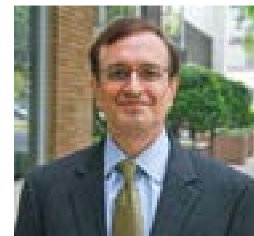

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