An Address to the Distinguished Members of SIRS 51,

given by,

Damien Schiff
Senior Attorney
Pacific Legal Foundation

March 1, 2017
Fremont Hills Country Club
Los Altos, California

In a letter to his friend Nebridius, Saint Augustine described the challenge of balancing a life of administration and business with the universal need for quiet and contemplation. People, he explained, can be divided into three groups based on how they try to resolve that balance. One group consists of persons whom duty impels to be occupied with worldly affairs, but who succeed in keeping their focus on the ultimately important things. Another group comprises those engaged in the same hustle and bustle, but who do so willingly, out of a desire for temporal honors. And a third group covers those individuals who, though currently in private life, ardently desire to become engaged in public life, seeking the same blandishments which attract the members of the second group. According to Augustine, only those individuals within the first group are laudable. People of the other two are foolhardy, in his view, because they could have pursued, but chose not to pursue, a devotion to philosophy in a leisured and cloistered environment. As Augustine put it, they missed the chance to *deificari in otio*, to grow god-like in retirement. Conscious therefore of this opportunity to speak before an organization of persons who wisely have abandoned the workaday world, I hope that my remarks today, about our Constitution's critical protections for private property rights, may in a small way assist in your divinization.

In particular, my aim is to flesh out these constitutional protections in the context of several recent and ongoing cases in which Pacific Legal Foundation has been involved. But first, allow me to provide some background on the Foundation. PLF is the nation's oldest public interest legal foundation fighting in courts throughout the country for the principles of limited government, private property rights, and individual liberty. Our mission is to bring cases that will establish good judicial precedents, which in turn will protect property owners and all citizens. An important part of the Foundation's work is the enforcement of the Constitution's prohibition on the taking of private property for public use without the payment of just compensation. Perhaps in no other part of the nation is this right as attacked

than in California, especially in the guise of rent control, affordable housing mandates, and mobile home park regulation.

How does our Constitution protect against infringements of our property rights? One very important way is through what the courts have called the doctrine of land-use "exactions." This theory got its start in 1987, in *Nollan v. California Coastal Commission*, a case successfully litigated by Pacific Legal Foundation attorneys. The case concerned the attempts of the Nollan family to secure a permit to replace with a newer structure their tumbledown bungalow, located along the beach in Ventura County. The California Coastal Commission was willing to give the Nollans the permit to demolish and rebuild, but only on condition that they deed to the public, in perpetuity, a significant portion of their otherwise private beach. The Commission argued that the Nollans' home-building project would obstruct views to the beach from members of the public walking in front of the Nollans' property, and hence would create a "psychological barrier" to the public's accessing the coast. In the Commission's view, an easement across the Nollans' private beach was needed to make up for the reduction of visual public access to the beach. But the demanded easement would not have provided any relief to the psychologically frustrated members of the public trying to get to the beach. It only would have allowed people *already on the beach* to walk directly in front of the Nollans' home.

The Nollans sued the Commission, arguing that the easement condition on their permit threatened to take their property without just compensation. The California court of appeal ruled against the Nollans, but the United States Supreme Court took their case and held in their favor. In a decision by Justice Scalia, the Court ruled that the Commission's easement condition was nothing less than an "out and out plan of extortion." The Commission had violated the Nollans' rights, the Court explained, by conditioning their land-use permit on their forfeiting a valuable property interest, one that was entirely unrelated to any impact of their proposed home-building project. To be sure, a land-use agency, the Court conceded, may impose reasonable conditions that mitigate the harm of a proposed project. But what an agency may not do, and yet what the Commission was proposing to do, is demand from a permit applicant a valuable property interest that lacks "an essential nexus" to any impact of the proposed development. Requiring such unrelated mitigation would amount to an unconstitutional condition on the permit applicant's use of his property.

Thus, the exactions doctrine was born. Since the *Nollan* decision, the Supreme Court has provided two important elaborations of the exactions doctrine. First, in *Dolan v. City of Tigard*, the High Court held that not only must a permit condition bear an "essential nexus" to a proposed project's impacts, it also must be "roughly proportional" in nature and amount. Second, in *Koontz v. St. Johns River Water Management District*, another case successfully litigated by Pacific Legal Foundation

attorneys, the Supreme Court held that the exactions doctrine applies not just to permit conditions demanding the forfeiture of real property, but also to conditions demanding the payment of money.

With these principles in mind, I would like to address how they have played out in recent decisions, beginning with several cases here in Northern California that concern the state's housing crisis.

Few would deny that California has had an affordable housing crisis for decades. The principal cause of that crisis is the familiar operation of supply and demand. Many people wish to live in California—thus, the demand for housing is high. But the supply of housing cannot meet the demand, mainly because the Legislature and local governments have enacted a number of land-use, environmental, and other laws that make home-building difficult and expensive.

Thus, the housing crisis problem. How is it to be addressed? In the estimation of many local governments, the problem can be remedied by requiring landlords, mobile home park owners, and developers to bear the burden of providing affordable housing. This approach has resulted in the enactment of so-called "inclusionary zoning" ordinances. The theory behind these ordinances is that the production of market-rate housing negatively affects the need for affordable housing. Accordingly, so the argument goes, it is appropriate to require developers of market-rate housing to provide affordable housing, or an in-lieu monetary equivalent, as a condition to building market-rate housing.

The California Supreme Court recently addressed the constitutionality of affordable housing ordinances in *California Building Industry Association v. City of San Jose*, in which Pacific Legal Foundation attorneys represented the building industry association. The case concerned a challenge to San Jose's inclusionary housing ordinance, which requires that for all new residential development projects of 20 or more units, at least 15% of the units must be sold at so-called "affordable prices" to qualified buyers. (The obligation increases if the units or their equivalent are provided off-site). The building industry association challenged the law, arguing, consistent with the exactions doctrine I discussed earlier, that the demand to produce affordable housing bears no relationship to the production of market-rate units. After all, housing prices are a result of supply and demand. Assuming that demand does not increase faster than supply, then it follows as a matter of basic economics that an increase in supply will lower the price of the commodity. Yet San Jose's ordinance proceeds on the assumption that *adding* to the home supply makes housing *more* rather than *less* expensive. San Jose has the cause-and-effect relationship precisely backward, a failing that should render the ordinance unconstitutional.

The trial court accepted the Association's argument, but sadly not the court of appeal or, ultimately, the California Supreme Court. Our state's High Court upheld

San Jose's ordinance, although it did so without addressing the law's inverted economic reasoning, and without attempting to locate any essential nexus between the production of market-rate housing and an increased need for affordable housing. Rather, the Court ruled that the quest for a nexus was irrelevant, because San Jose wasn't demanding an "exaction." It was merely imposing a form of price control: under the ordinance, the City "exacts" nothing; a developer can build and sell units; he simply cannot sell them for what the market will bear.

But surely, one might ask, are there not constitutional limits to price controls? Yes there are, the California Supreme Court admitted. But a price control is unconstitutional only if the owner or landlord is denied a fair return; in a word, only if the price control is "confiscatory." And that, ladies and gentlemen, is a very high bar to meet. Not surprisingly, the California Supreme Court concluded that San Jose's inclusionary housing ordinance was not confiscatory, especially given the purported "bonuses" available to developers who satisfy their affordable housing obligation by building the units on-site.

So, from a loss, let's move to a happier subject. To a win. I have in mind Pacific Legal Foundation's recent victory in federal court in San Francisco, resulting in the invalidation of the City's Rent Differential Ordinance. Everyone knows of the severe housing crisis in San Francisco. To address that crisis, the City in 2014 enacted a law that required landlords of rent-controlled apartments who wished to stop being landlords to pay their soon-to-be-former tenants a "rent differential." Notably, the ordinance did *not* require a landlord to pay for a tenant's moving expenses. Rather, the ordinance required landlords to pay their tenants the difference between the rent-controlled price the tenant had been paying and the market-rate price of a comparable unit, *over the course of two years*. That is correct. *Two years' worth* of rent differential payments. With no strings attached on how the tenant could spend the money. For PLF's clients Daniel and Maria Levin, that would have meant over *one hundred thousand dollars* simply to reclaim the first floor of their home which had been rented out.

PLF therefore brought suit on behalf of the Levins and other property owners who wished to withdraw units from the rental market. We argued that the City's scheme violated the exactions doctrine, because there was no connection between, on the one hand, a landlord deciding to stop renting, and, on the other hand, a former tenant's exposure to the City's tough rental market. Simply put, a landlord does not create or meaningfully contribute to San Francisco's housing crisis merely by ceasing to rent a unit. Instead, the crisis is caused by the City's own land-use policies, in conjunction with natural market forces of supply and demand. The federal district court agreed with this critique, and enjoined the City's enforcement of the ordinance. Then, as a result of our lawsuit, the City substantially amended the ordinance, capping the rent differential payment at $50,000, requiring that at least some of the

money be used for standard relocation expenses, and mandating that former tenants provide documentation showing the proper use of the funds.

Unfortunately, not all local governments have followed San Francisco's course. For example, Palo Alto has had on the books for some time a Mobile Home Park Conversion and Rent Control ordinance. The ordinance caps what a mobile home park owner may charge in rents, and it also imposes a number of restrictions on the ability of a mobile home park owner to close his park. Perhaps the most onerous is the requirement that, as a condition to closing the mobile home park, the owner pay each of his former mobile home park residents (i) the full purchase price of their mobile homes, (ii) full relocation expenses, and (iii) twelve months' worth of rent differential payments, *i.e.*, the difference between what the tenants were paying at a rent-controlled rate, and what the market rate would be. These so-called "enhanced relocation assistance benefits" can be shockingly high.

A good example can be found in the story of PLF's clients, Tim and Eva Jisser. In 1986, the Jissers purchased Palo Alto's lone mobile home park. With the help of their son, they have operated it ever since. But on account of health issues and the anticipated expenses of park updates, along with the natural desire to retire, the Jissers decided that now would be an appropriate time to close the park. They were astounded, however, to learn that under Palo Alto's ordinance, they would be required to pay their former tenants *over eight million dollars* in relocation benefits.

PLF filed suit in federal court on their behalf. We argued that the Palo Alto ordinance is unconstitutional in the same way as the San Francisco ordinance: although Palo Alto has a housing crisis, it is a problem caused by the City's own development choices, coupled with market forces; it has nothing to do with the Jissers' desire to stop being mobile home park owners. Consequently, the City could not constitutionally condition the Jissers' right to exit the mobile home park business on the purchase of their tenants' mobile homes and the payment of their future rents. Unfortunately, the trial court ruled against us on the procedural ground that the Jissers had to litigate their case in state court first. That decision is currently on appeal to the Ninth Circuit.

Perhaps some of you are asking yourselves whether the intended take-away from my recitation of the San Jose case, or the Levins' case, or the Jissers' case, is that affordable housing is not an important issue in California, or that mobile home park tenants don't deserve some special consideration. By no means. But these cases certainly do underscore the correctness of a principle, enunciated by the U.S. Supreme Court over a half-century ago, about how to interpret the Constitution's requirement that private property be taken for public use only on the payment of just compensation. That principle is: no individual should be required to shoulder disproportionately the cost of providing a benefit that, in fairness, should be paid for

by all. Yet that it precisely what happens too often in land-use permitting. Local governments do not like to ask their residents to authorize new taxes to pay for affordable housing or many other public benefits. Yet politicians naturally want to satisfy their constituents by providing such goods. So they attempt to solve the quandary through the permitting process. "Let's have the Levins, or the Jissers, pay for affordable housing," they say. "We'll call it an 'off-budget expense': a win-win for us and our constituents!" Well, not quite—a win for the politicians, to be sure, but a loss for property owners, a loss for property rights, and a loss for democracy. Ladies and gentlemen, there is no such thing as a free lunch. It's paid for by somebody, and too often that somebody is the targeted landowner who needs a permit but who can only get it by acceding to outrageous conditions. That is not just unconstitutional, it is unjust and unfair.

Unfortunately though not surprisingly, the government's efforts to avoid paying for the costs of regulation extend beyond the permitting process. A good example can be found in the story of the Murr family. In 1960, William Murr and his wife purchased a lot along the shores of the St. Croix River. For about 125 miles, the St. Croix forms the border between Wisconsin and Minnesota. In its lower reaches, the river has for some time been a favored vacation spot, known for its scenic charm and recreational opportunities. Shortly after purchase, the Murrs—like many of their neighbors—built a family vacation cabin on their lot. And a few years later, the Murrs acquired, for investment purposes, an immediately adjoining parcel, title to which the Murrs put in the name Mr. Murr's plumbing business.

But concerns about the environmental impacts of development along the St. Croix led Congress, in 1968, to designate the waterbody as a wild and scenic river. Not long after, Congress directed Wisconsin and Minnesota to produce a comprehensive master plan to govern development in the area. Wisconsin followed by enacting legislation that ultimately resulted in administrative rules establishing restrictive land-use policies to govern new development along the river. In 1976, St. Croix County implemented these policies locally by enacting a zoning ordinance. Among other things, the ordinance imposes minimum lot size requirements. In particular, the ordinance requires that a standard lot have at least one acre of "net project area." Owing to the ordinance's substantial setback and other requirements (for example, requiring buffers around wetlands), a lot that is well over one acre might nevertheless be deemed substandard, because its "net project area" could end up being well less than one acre.

Such was the fate of the Murrs' lots. Their investment parcel, although 1.25 acres in size, has a net project area of only 0.5 acres. Hence, the County ordinance deems it substandard. Now, the County ordinance, like many such ordinances, has a grandfather provision which allows development to proceed on an otherwise substandard lot if the lot was buildable prior to the ordinance's enactment. But the

Murrs received no relief from this provision. The County's grandfather provision does not apply if the substandard lot is adjacent to another substandard lot, and if both lots are owned by the same person. In that instance, the ordinance treats the two lots as one lot, and forbids their sale or development as separate lots. Although the Murrs originally purchased the lots under different ownership, in the mid-1990s they deeded both lots to their children in common ownership. In 2004, when the Murr children approached County officials about possibly selling the investment lot, they were informed that, owing to the grandfather clause's carve-out, they were forbidden to do anything with the parcel. After unsuccessful attempts to obtain a variance, the Murrs brought a claim for just compensation.

The central issue in the Murrs' case is what has been called "the relevant parcel" problem. Identifying the "relevant parcel" is an inquiry compelled logically by the seminal takings decision of the United States Supreme Court, *Pennsylvania Coal Co. v. Mahon*. Under the holding of that case, the government can reduce the value of private property, to some extent, without having to compensate the property owner for that reduction. But if the government "goes too far"—if it reduces the value too much—then the government will be required to compensate the landowner. The Supreme Court's takings jurisprudence therefore necessarily requires a comparison between the value of the property without the challenged regulation, and the value of the property with the challenged regulation. Such a comparison naturally is expressed in terms of a percentage. Yet every percentage analysis requires a denominator. Hence, identifying the denominator—or, in the terms of a later takings case, identifying the "parcel as a whole"—is critical to all regulatory takings claims. It measures the economic impact of the regulation and thus helps to determine whether the regulation has indeed "gone too far."

Since *Pennsylvania Coal*, the Supreme Court has provided limited guidance in how to identify the relevant parcel. In *Penn Central Transportation Co. v. City of New York*, the Court rejected what may be termed "vertical" segmentation. There the Court cabined the ancient maxim that property is owned *ab inferis usque ad caelos*, and denied the efforts of Penn Central Station's owners to obtain compensation for the inability to build up in to the air, because they could still use their property closer to the ground. And in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, the Court rejected a segmentation based on time. Thus, a claimant for just compensation cannot assert, as the landowners in *Tahoe-Sierra* attempted to, that a temporary development moratorium is necessarily a taking simply because nothing can be done with the property during the moratorium. But the Court has never addressed what might be called "horizontal" segmentation, *i.e.*, whether and to what extent the relevant parcel may include other adjacent or nearby lots.

Returning to the Murrs' case, the Wisconsin trial court denied relief, and the Wisconsin Court of Appeals affirmed. Central to that court's rejection of the Murrs' claim was its "relevant parcel" analysis. In the court's view, the relevant parcel is not the investment lot, but rather the investment lot combined with the adjacent, built-out lot. The court explained that "contiguousness is the key fact," and therefore applied the purportedly "well-established rule that contiguous property under common ownership is considered as a whole regardless of the number of parcels contained therein."

I should now like to show you a video on the *Murr* case.

The *Murr* case highlights that protecting private property is not just about the wealthy. It is about vindicating the key rights for all citizens, about protecting an institution that like none other has assured the just and orderly distribution of the limited goods of this world. And it is even more. As Frederic Bastiat noted in his *The Law*: "Each of us has a natural right—from God—to defend his person, his liberty, and his property. These are the three basic requirements of life, and the preservation of any one of them is completely dependent upon the preservation of the other two. For what are our faculties but the extension of our individuality? And what is property but an extension of our faculties?" Bastiat's point, which I believe to be well taken, is that property is not just the means to securing the satisfaction of materials wants; it also is the tool through which we realize the full potential of our individual human personalities.

But particularly relevant to my remarks today, protecting private property is not just a philosophical concern. It was key to our Founders and to those who influenced them. For example, James Madison, the principal drafter of the Bill of Rights and the Just Compensation Clause, stated in an essay on Property, "Government is instituted to protect private property of every sort; . . . This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*." And John Locke, the English philosopher who profoundly affected the Founders' views of government, wrote that "the Supreme power cannot take from any Man any part of his Property without his own consent. For the preservation of Property being the end of Government, and that for which Men enter into Society, it necessarily supposes and requires, that the People should have Property."

In summary, the protection of private property rights concerns all of us. A threat to property anywhere is a threat to liberty everywhere. In this country, most of the fights between government and landowners occur in our courts. That is why PLF has been dedicated to protecting property owners in those courts from overreaching government, by invoking the foundational constitutional principles that have helped to preserve freedom for so many for so long.