

NOVEL TAKINGS THEORIES: TESTING THE BOUNDARIES OF PROPERTY RIGHTS CLAIMS

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INTRODUCTION

In the past seventy-five years, property rights litigation has transformed from a constitutional afterthought to a major force in the defense of a fundamental right. It did not happen overnight, and it did not happen without some very heavy lifting, fortuitous circumstances, and an intellectual revival in the Academy. For the first third of the past seventy-five years, arguments suggesting limits on government action based on property were routinely unsuccessful despite vague suggestions from the Supreme Court in the 1920s. For the middle twenty-five years, the courts were largely silent, with property rights litigation barely registering on the Supreme Court's radar. But for the past quarter century or so, arguments that would once have been considered novel and concomitantly futile have gained substantial traction in the courts, especially the Supreme Court.

So, what accounts for the transformation of novelty into doctrine? And how does one avoid appearing too novel, such that courts will avoid a favorable ruling at all costs? This article will explore the elusive boundary between novelty and viability in property rights cases. The thesis is simple: some novelty is good, but too much is doomed to failure. And it is only when a novel idea is accompanied by compelling facts and intellectual heft that the law is likely to be advanced.

The underlying premise of this essay is that the protection of property rights is overall a benefit to both societal needs and individual liberty. Property rights are a fundamental attribute of the liberty that the Federal Constitution is designed to protect. In arguing for cases that advance the cause of property rights, one must never forget that neither the Constitution nor the courts will care about property

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for its own sake; rather the defense of property must be consistent with the defense of larger societal concerns. As the Supreme Court put it over a decade before the dawn of the property rights revolution:

[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a “personal” right, whether the “property” in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other.¹

This sentiment was not new. It was an essential ingredient of intellectual thought from John Locke’s *Second Treatise on Government*² to James Madison’s *A Property in Our Rights*.³ But the Court’s recitation of this principle after a long dormancy during the heyday of progressivism signaled a new respect and new opportunities for a long-ignored principle—a principle that was not novel in the larger sweep of history, but somewhat novel in recent history: that property rights deserved vigorous protection by the courts from infringements by government agencies.

1. *Lynch v. Household Fin.*, 405 U.S. 538, 552 (1972).

2. JOHN LOCKE, *TWO TREATISES ON GOVERNMENT* §§ 124, 201, 222 (“Whenever the legislators endeavor to take away, and destroy the Property of the People . . . they put themselves into a state of War with the People, who are there upon absolved from any further obedience.”). Locke is cited in *Lynch* for support of the Court’s thesis.

3. James Madison, *A Property in our Rights*, *THE NATIONAL GAZETTE*, Mar. 27, 1792, reprinted in 1 PHILIP B. KURLAND & RALPH LERNER, *THE FOUNDERS’ CONSTITUTION* Ch. 16, Doc. 23 (Univ. of Chicago Press 1987), Madison wrote:

Government is instituted to protect property of every sort; as well that which lies in various rights of individuals, as that which the term particularly expresses.

This being the end of government, that alone is a just government, which impartially secures to every man, whatever is his. According to this standard of merit, the praise of affording a just security to property, should be sparingly bestowed on a government which, however scrupulously guarding the possessions of individuals, does not protect them in the enjoyment and communication of their opinions, in which they have an equal, and in the estimation of some, a more valuable property.

Id. For more on the role of property thought during the founding of the republic, see JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* (2d ed. 1998).

I. THE ORIGINS OF MODERN PROPERTY RIGHTS
JURISPRUDENCE—*PENNSYLVANIA COAL V. MAHON* TO THE
MODERN ERA⁴

The first Supreme Court recognition of the potential of regulatory takings, the foundation of modern property rights jurisprudence, came in 1922 with *Pennsylvania Coal v. Mahon*.⁵ In that case, the landowners had sold their mineral rights to various coal mining companies. Included in those sales were the “support estate.” In other words, the coal companies bought not only the coal but the right to allow the surface to collapse after mining withdrew the coal. Being that there were far more surface landowners than coal companies, the Pennsylvania legislature adopted a statute forbidding companies from removing coal that might cause a surface collapse. The coal companies objected. Justice Holmes, the great progressive, *Lochner* dissenter, and not a great friend to business, ruled in favor of the coal companies, saying, “[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.”⁶ That’s it. There was no in-depth analysis

4. For a more complete summary of modern takings law, see James S. Burling, *Private Property Rights and the Environment After Palazzolo*, 30 B.C. ENVTL. AFF. L. REV. 1 (2002). For a complete treatment of regulatory takings law, see STEVEN J. EAGLE, *REGULATORY TAKINGS* (25th ed., 2012).

5. 260 U.S. 393 (1922). Despite the common assertion that the doctrine of regulatory takings began with *Pennsylvania Coal*, it is much more accurate to say that the doctrine was revived with that case, and that it was developed a century earlier in state courts and then forgotten. See, e.g., Kris W. Kobach, *The Origins of Regulatory Takings: Setting the Record Straight*, 1996 UTAH L. REV. 1211 (1996). As a dissenting Montana Supreme Court justice recently explained:

Contrary to the Court’s assertion in ¶ 67, the notion of a regulatory taking—where the government regulates private property rights, as opposed to condemning or directly appropriating private property—was recognized in this country long before 1922. Indeed, recognition of this sort of taking may be found in the 19th century decisions of numerous state courts and even the Supreme Court. See generally Kris W. Kobach, *The Origins of Regulatory Takings: Setting the Record Straight*, 1996 UTAH L. REV. 1211; Andrew S. Gold, *Regulatory Takings and Original Intent: The Direct, Physical Takings Thesis “Goes Too Far,”* 49 AM. U. L. REV. 181, 228–38 (1999); Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549 (2003); David A. Thomas, *Finding More Pieces for the Takings Puzzle: How Correcting History Can Clarify Doctrine*, 75 U. COLO. L. REV. 497, 519–33 (2004).

Kafka v. Montana Dep’t of Fish, Wildlife & Parks, 201 P.3d 8, 43 (2008) (Nelson, J., dissenting).

6. *Pennsylvania Coal*, 260 U.S. at 415.

of the Takings Clause, or the Due Process Clause for that matter.⁷ Nor was there much in the way of guidance beyond the test of “too far.” But this sentence stands out from the other rhetorical flourishes of the opinion and has come to stand for the beginning of modern era of takings jurisprudence. Justice Brandeis dissented from the holding, saying that “the defendant has failed to adduce any evidence from which it appears that to restrict its mining operations was an unreasonable exercise of the police power.”⁸ This was a reflection of the belief that any valid exercise of the police power could absolve any takings liability.⁹ In addition, Brandeis surmised that there might be “an average reciprocity of advantage,”¹⁰ negating any liability for an uncompensated taking. For a dissent, this formulation has been given great weight and is often trotted out to deny takings liability for land use regulations—in other words, “reciprocity of advantage” has been a thorn in the side of regulatory takings cases and has coexisted uneasily with the evolution of regulatory takings doctrine.

In looking at the Pennsylvania Supreme Court’s opinion in *Mahon v. Pennsylvania Coal Co.*,¹¹ there is no indication that the parties actually raised a “regulatory taking” or even a Takings Clause violation. So this is not a case in which it is apparent that the parties brought a “novel” takings claim or any sort of regulatory takings claim at all. But it does illustrate the two key elements that any novel takings claim must have to succeed: it must have compelling facts, and it must be a fairly logical extension of existing doctrine. On the former point, the facts might not seem terribly compelling today—with coal companies causing the collapse of the surface under buildings. But the early part of the last century, environmental consciousness was not at the forefront of priorities—economic survival was.¹² Moreover, the Court would have been reminded that the companies actually bought and paid for the right to do this and that the surface owners had essentially convinced the legislature to renege on the deal. On the

7. Which is significant because a number of the property rights cases from this era do not separate out these two constitutional clauses.

8. 260 U.S. at 419–20 (Brandeis, J., dissenting).

9. Most famously articulated in *Mugler v. Kansas*, 123 U.S. 623 (1887) (no government takings liability from the prohibition of the manufacture of alcohol).

10. *Pennsylvania Coal*, 260 U.S. at 422 (Brandeis, J., dissenting).

11. *Mahon v. Pennsylvania Coal Co.* 118 A. 491 (Pa. 1922).

12. By the time of *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470 (1987), however, the public consciousness had changed enough for the Court to reach a different result in a case of almost identical facts.

doctrinal front, the Court had already ruled that state judicial action can result in a taking or due process violation (the two concepts were used interchangeably during this period).¹³ So it was not a huge stretch to say that an action of a state legislature could result in a takings claim as well.

From *Pennsylvania Coal* to the 1980s, the idea that a regulation could result in takings liability was more of an academic curiosity than a useable doctrine in the hands of landowners and their attorneys. It was not for want of trying.

In 1926, the Court in *Village of Euclid v. Ambler Realty* upheld a scheme of land use zoning against a claim that it violated the Fourteenth Amendment.¹⁴ The Court held that zoning plan lawful because it was not “clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.”¹⁵ As to the facts, the Court was not convinced that the unproven financial impact to the landowners outweighed the negative effects of not zoning. The Court was particularly concerned about the blight of parasitic apartment buildings on residential districts and felt no compulsion to extend property protections in this circumstance.¹⁶ A couple of years later, the Court did strike down a zoning regulation—this time because on the facts there was no “practical use” for the property and not an “adequate return on the amount of any investment for the development of the property.”¹⁷ However, this seems to have been a one-off decision not to be repeated by the Court (outside the context of non-property rights and related civil rights violations).¹⁸

A few years after *Pennsylvania Coal*, in 1928, the Court found no problem when the owner of cedar trees was forced to destroy his trees, without compensation, to prevent the spread of blight from the cedar trees to the more valuable apple trees.¹⁹ Again, the facts in favor of

13. See, e.g., *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 235 (1897) (“If compensation for private property taken for public use is an essential element of due process of law as ordained by the Fourteenth Amendment, then the final judgment of a state court, under the authority of which the property is in fact taken, is to be deemed the act of the State within the meaning of that amendment.”).

14. 272 U.S. 365 (1926).

15. *Id.* at 395.

16. *Id.* at 394.

17. *Nectow v. City of Cambridge*, 277 U.S. 183, 187 (1928).

18. See, e.g., *Vill. of Belle Terre v. Boras*, 416 U.S. 1 (1974); *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494 (1977).

19. *Miller v. Schoene*, 276 U.S. 272 (1928).

the landowners were not compelling to the Court: either the cedar trees would have to be removed (and the timber sold), or the more valuable apple trees would die. The Court found no need to apply or extend a Takings or Due Process theory to these circumstances.²⁰

Following this relative flurry of activity, nothing much of any significance happened in regulatory takings for the next half century.²¹ What happened next, beginning in the late 1970s to mid-1980s, has been written about extensively elsewhere.²² In short, through a series of cases, the Court managed to evade finding the existence of a regulatory taking, although it established a number of tests, some of which have withstood the test of time, others of which have not.²³ With the exception of *Loretto*, each one of these attempts to establish a regulatory taking failed.²⁴ But they certainly represented what had to be considered *novel* or at least bold attempts to claim a taking in light of over fifty years of silence from the Supreme Court.

II. THE 1987 TRIFECTA

What happened next in 1987 was the culmination of good facts, good theories, and a change in the intellectual currents. With the cases

20. For more on the background of the dispute between the competing owners of these two types of trees and why the claim may have failed, see William A. Fischel, *The Law and Economics of Cedar-Apple Rust: State Action and Just Compensation in Miller v. Schoene*, 3 REV. L. & ECON. 133 (2007).

21. One possible exception could be *United States v. Causby*, 328 U.S. 256 (1946), a case in which airplane overflights made property unusable and lead to government takings liability. But that case was more akin to a physical invasion, like flooding or commandeering the use of the property, rather than a taking caused only by the regulation of the property.

22. See Eagle, *supra* note 4.

23. See, e.g., *Penn. Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978) (the beginning of the amorphous regulatory takings tests of “economic impact,” “investment backed expectations” and “character of the regulation”); *Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979) (physical invasion taking of private waterway); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (establishing the “substantially advances a legitimate state interest” and “economically viable use” tests for regulatory takings, the former of which was rejected later in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005) (explaining that the “substantially advances” test of *Agins* is a Due Process test)); *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621 (1981); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (physical invasions are always takings); *Williamson Cnty. Reg’l Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) (setting in motion a jurisdictional bar to bringing federal constitutional takings claims in federal courts unless there is final agency action and state compensation remedies have been utilized); *MacDonald, Sommer & Frates v. Cnty. of Yolo*, 477 U.S. 340 (1986) (takings claim not ripe because alternatives not pursued).

24. Of course, to be precise, *Loretto* was not actually a *regulatory* takings case but rather a *physical* invasion taking more along the lines of *Causby* than *Pennsylvania Coal*’s “too far” test.

through the late 1970s and 1980s that got close to finding a regulatory taking—but not close enough for property owners—the Academy had begun to stir. There were law review articles across the ideological spectrum with most giving some degree of credence to the idea of a regulatory taking, albeit often in limited terms.²⁵

Most significantly, in 1985 Richard Epstein's *The Takings: Private Property Rights and the Power of Eminent Domain* was published, and Epstein's libertarian view of regulatory takings reached a more general audience. Thus, by 1987, the academic foundations had been built that made it possible for the Court to recognize and articulate the doctrine of regulatory takings.

The first case of 1987, *Keystone Bituminous*,²⁶ was an inauspicious beginning to the 1987 takings cases. There, Pennsylvania passed a regulation requiring that coal miners leave some coal in the ground in order to prevent the collapse of the surface. This was, of course, quite similar to the facts that animated Justice Holmes's decision in *Pennsylvania Coal*. Nevertheless, the Court distinguished *Pennsylvania Coal* and rejected a facial regulatory taking claim. The coal operators making the takings argument thought they had some controlling authority in *Pennsylvania Coal*, yet their claim could hardly be called "novel" in such circumstances. If anything, the government's argument could be considered "novel" in light of that precedent. Nevertheless, the passage of time and the public's embrace of environmental values led the Court to reach a different conclusion. When it came to the argument that the regulation would require twenty-seven million tons of coal to be left in the ground, the Court essentially reasoned that the overall economic impact was not that great.²⁷

But, with *First English Evangelical Church v. Cnty. of Los Angeles*,²⁸ the Justices changed course. With Justice Scalia writing the opinion,²⁹

25. See, e.g., Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971); William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553 (1972); F. BOSSELMAN, D. CALLIES & J. BANTA, *THE TAKING ISSUE: AN ANALYSIS OF THE CONSTITUTIONAL LIMITS ON LAND USE CONTROL* (Council on Env'tl. Quality) (1973).

26. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987). The opinion was written by Justice Stevens, joined by Justices Brennan, White, Marshall, and Blackmun. Justice Rehnquist wrote the dissent, joined by Justices Powell, O'Connor, and Scalia.

27. *Id.* at 499.

28. 482 U.S. 304 (1987).

29. He was joined by Justices Rehnquist, Brennan, White, Marshall, Powell, and Scalia. Justice Stevens wrote the dissent, joined by Justices Blackmun and O'Connor. The point of

the Court held that *if* a regulation takes property, even for a short period of time, compensation is due for the period of the taking.³⁰ This was a shot in the arm for property owners who had been enduring an endless sue-and-start-over scenario for decades in California and elsewhere.³¹ In other words, after *First English*, landowners could seek compensation, rather than just invalidation, as a remedy for a regulatory taking, giving landowners and their attorneys an incentive to sue and governments an incentive not to take.³²

The most telling victory for property owners in 1987 came with *Nollan v. California Coastal Commission*.³³ With that case, the Court required that government permitting agencies must show a nexus or relationship between impacts caused by a development project and the mitigating demands imposed on the developer. This too was not much of a novelty in the law; most states required such a relationship. Indeed, so too did California in a number of published decisions. But what had happened in California was that this relationship test was

listing out the names of the justices is simply to note that there was no change in personnel that explains the shift towards more favorable property rights opinions; it was more the combined weight of the various justices' reactions to the particular facts and doctrines being advocated in each case.

30. *Id.* Ultimately, on remand to the lower courts, no taking was found. But the principal of compensation for a temporary taking remains intact.

31. *See, e.g., San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621, 655–57 n.28 (1980). Justice Brennan seemed particularly peeved with the following advice given by a California city attorney to his fellow city attorneys at a 1974 annual conference of the National Institute of Municipal Law Officers in California:

IF ALL ELSE FAILS, MERELY AMEND THE REGULATION AND START OVER AGAIN.

If legal preventative maintenance does not work, and you still receive a claim attacking the land use regulation, or if you try the case and lose, don't worry about it. All is not lost. One of the extra goodies contained in the recent [California] Supreme Court case of *Selby v. City of San Buenaventura* appears to allow the City to change the regulation in question, even after trial and judgment, make it more reasonable, more restrictive, or whatever, and everybody starts over again. . . .

See how easy it is to be a City Attorney. Sometimes you can lose the battle and still win the war. Good luck.

Id. (citing Longtin, *Avoiding and Defending Constitutional Attacks on Land Use Regulations*, 38B NIMLO MUN. L. REV. 192–93 (1975) (emphasis in original)).

32. Of course, California, being California, devised a rule wherein invalidation of a regulation might only be part of the normal permitting process, during which no compensation is due. *See, e.g., Landgate v. California Coastal Comm'n*, 936 P.2d 472 (1997), *cert. denied*, 575 U.S. 876 (1998).

33. 483 U.S. 825 (1987). This time Justice Scalia wrote the opinion, joined by Justices Rehnquist, White, Powell, and O'Connor. The dissenters included Justices Brennan, Marshall, Blackmun, and Stevens.

being justified by increasingly tenuous or imaginative relationships at the behest of increasingly aggressive agencies, such as the California Coastal Commission. In *Nollan* for example, the state argued that its demand of some thirty percent of the Nollans' property in exchange for a permit to replace one home with a somewhat larger home was justified because of general policies in favor of public access and because building the home would create a "psychological barrier" between people and their coastline. Even taking these arguments as true, however, the Court found that there was no relationship between these harms and the particular land that the Nollans had to surrender.

While none of the successful takings arguments before the Supreme Court could be characterized as particularly novel, they did wake up lawyers across the country to the possibility that (1) money could be made in regulatory takings cases, (2) there was another cause of action in the lawyer's quiver, and (3) the arrow could be pulled out when nothing else would seem to work. These factors, combined with the adage that a little knowledge is a dangerous thing, have led to a plethora of "interesting" takings arguments since 1987. While many regulatory takings claims filed since 1987 have had a solid basis in the law and fact, and while some have even been successful, the remainder of this article will focus on some novel claims—claims that could be characterized as ranging from creative to bizarre. Much has been written on the more normal run of the mill regulatory takings claims, but not as much on those that are truly novel and idiosyncratic.

To a property rights advocate, there is a problem with claims that seek not to push the boundaries of the law, but rather to shatter those boundaries. Claims with bad facts or bad law lead to bad decisions that affect cases with good facts or good law behind them. Advocates for government authority and judges sympathetic to government arguments will use these cases to develop precedents that make it easier for the government to win future cases.

III. COMPENDIUM OF SELECTED NOVEL TAKINGS CLAIMS

This section is written from the perspective of an attorney who seeks to advance the cause of property rights by carefully litigating the best facts available in cases that may push the boundaries of the law but never push the boundaries beyond the realm of reasonableness. From the perspective of a property rights advocate, the best cases are

those that highlight the adverse consequences of bad government behavior—cases that will make the judiciary take notice that there is something wrong that must be fixed. Cases with unsympathetic clients or clients with bizarre grievances do not advance the cause of property rights.

A. *Satellites and Takings*

One pervasive theme that lawyers should take away from the study of regulatory takings is that the first step in any property rights analysis, whether the asserted claim being considered sounds in regulatory takings or due process, is to understand and define the property right at issue. Most importantly, there has to be a property right at issue. In *United States v. Willow River Power Co.*,³⁴ the government raised the water level downstream from a hydroelectric plant and thereby reduced the distance the water could fall through the turbines and, therefore, the efficiency and profits from the plant. The Court held this was not a taking because “not all economic interests are ‘property rights’; only those economic advantages are ‘rights’ which have the law *back of them*,”³⁵ and they must be “legally protected interests.”³⁶ Because there was no property right in any particular downstream water level, there was nothing to be taken and no due process to be denied. The lesson here is that a property owner contemplating a constitutional claim over the regulation of property must first understand what property interest is actually implicated before proceeding to court.

This same theme was repeated nearly a half century later in *Lucas v. South Carolina Coastal Council*³⁷ in which the Court reiterated this point from the opposite perspective. It found that when government asserts a “nuisance defense” to a takings claim, the government must demonstrate the existence of the common law nuisance limitation: “Any limitation [on the use of property] 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.”³⁸

34. 324 U.S. 499 (1945).

35. *Id.* at 502.

36. *Id.* at 503.

37. 505 U.S. 1003 (1992).

38. *Id.* at 1029.

With these principles in mind, we turn to *Howard v. United States*.³⁹ In that case the plaintiff alleged that satellite surveillance of Howard's property as well as the government's failure to accept a late contract bid were takings. Think about it—if the government were to find some kind of property right not to have a satellite go whizzing by a few hundred miles overhead every couple of hours, and then to find that the violation of that right implicated a takings claim, the results would portend astronomical levels of government liability. While it is true that property rights were once defined to extend from the center of the earth skyward to the heavens, that doctrine existed before air flight. Thus, while *Causby* found that aircraft overflights at eighty-three feet could cause a physical invasion-style taking, the Court there did so on the basis of the impact of the flights on the ground, not on an anachronistic reliance on property definitions originating in the middle ages.⁴⁰ Now, to be fair, in addition to more traditional *Causby*-like claims,⁴¹ Howard wasn't only claiming a strict physical invasion or a claim based on an anachronistic definition of property, but rather a taking of the "plaintiff's privacy, peace of mind, and ability to secure gainful employment."⁴² Clearly, a new age claim for a cadet of the space age. However, the court suggested that if these allegations were true, they might implicate criminal acts or torts—claims that were not cognizable in the court.⁴³ As for the contract-based claims, the claimant failed to assert a valid offer, so there was no contract claim or taking of any such contract.⁴⁴

39. 21 Cl. Ct. 475 (1990).

40. *United States v. Causby*, 328 U.S. 256 (1946).

41. Well, sort of. "Plaintiff also claims a taking of his personal 'property' by agents of NASA 'who flagrantly, maliciously and loudly fly commercial and smaller aircraft at low altitudes constituting a nuisance, and cause aircraft contrails that resemble rocket launches.'" 21 Cl. Ct. at 477.

42. *Id.* at 479. Moreover, "NASA harassed him, watched his person, and listened to his private conversations continuously over the past seventeen years and, by unexplained actions, was to blame for his lack of gainful employment." *Id.* I suppose I should point out that this claim was brought *pro se*, and that no attorney was responsible for its contents. Surprisingly, Howard did not live in California where such claims might be considered more credible: "All of this activity allegedly occurred from 1973 to present in Washington, D.C.; Cambridge, Massachusetts; Chicago, Illinois; and Gary, Indiana." *Id.*

43. The intersection between torts and takings, it should be noted, can be somewhat murky. See, e.g., ALI-ABA COURSE OF STUDY, TAKINGS AND TORTS: THE ROLE OF INTENTION AND FORESEEABILITY IN ASSESSING TAKINGS DAMAGES SS036 ALI-ABA 437 (Feb. 17–19, 2011).

44. 21 Cl. Ct. at 478.

B. Dancing and Takings I: Lap Dancing the Takings Claim Away

Attorneys are always hoping the next big damages case will put them into the lap of luxury. Connoisseurs of dance may wish to be up close and personal to the dancers, especially dancers engaged in the constitutionally protected art of lap dancing.⁴⁵ And the dancers of this aesthetic understand that proximity breeds tips. So when a municipality imposes proximity restrictions on the exercise of this art form, separating dancers from their customers, the dancers' income, among other things, may shrink. But does this rise to a taking of the foregone tips?

After all, we know that money is property, the taking of which can give rise to a valid takings claim.⁴⁶ But what if it is not money itself that is taken but the hope to earn more in the future from satisfied customers? In *Gammoh v. City of La Habra*,⁴⁷ the Ninth Circuit found that the dancers had not shown they had any sort of "property interest" in that alleged loss of income. Thus the takings claim was properly dismissed.⁴⁸ This claim was clearly an act of desperation—a quick Westlaw perusal of the fate of proximity restrictions on lap dancing makes it plain that while the Supreme Court, in all of its wisdom, has deemed that the Constitution protects certain sexually oriented artistic endeavors, that protection is not absolute, and various proximity regulations are permissible.

C. Dancing and Takings II: Raisins Back in the High Court

One of the truly great contributions to late twentieth-century American culture was the mash-up between pop music, claymation, and commercial television. We are talking, of course, about the triumphant dancing raisin commercials brought to us by the California Raisin Commission that featured *Heard It Through the Grapevine*.⁴⁹

Raisins may be cute when they dance, but government control of the raisin market is not, and it has engendered much litigation.

45. According to plaintiffs in one case, "so-called 'lap dancing,' [is] arguably another unique form of expressive conduct." *Colacurcio v. City of Kent*, 163 F.3d 545, 556 (9th Cir. 1998).

46. See, e.g., *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 164 (1980).

47. 395 F.3d 1114 (9th Cir. 2005).

48. *Id.* at 1122.

49. See Video, *Heard It Through the Grapevine*, https://www.youtube.com/watch?v=pM2OK_JaJ9I (last visited June 10, 2015) (original version); <https://www.youtube.com/watch?v=sDkA1pCQFOo> (last visited June 10, 2015) (Michael Jackson version); <https://www.youtube.com/watch?v=nhIvBZmQUWY> (June 10, 2015) (Ray Charles version).

First, there was a First Amendment challenge to the fee assessed raisin growers to finance marketing programs, such as the *Grapevine* commercials.⁵⁰ It lost. Then there was an unsuccessful antitrust challenge.⁵¹ Neither of these challenges made it to the Supreme Court. But now a takings claim has made it there twice.

The underlying question is whether a requirement to give a portion of a farmer's raisin crop in exchange for permission to sell the remainder is a taking of those raisins. In the case's first trip to the Supreme Court, the government and the raisin growers argued whether the takings case should have been brought in the Court of Federal Claims or federal district court.⁵² The Ninth Circuit had tried to get rid of the case, but the Supreme Court said the district court was just fine. But along the way, members of the Court had some scathing characterizations of the statute. Notably, Justice Kagan remarked at oral argument that perhaps the best course would be for "the Ninth Circuit . . . [to] try to figure out whether this marketing order is a taking or it's just the world's most outdated law."⁵³

But a return to the district court, and eventually the Ninth Circuit, was no guarantee of relief. After dealing with some preliminary standing issues, the Ninth Circuit proceeded to find that a *Penn Central* claim was not before the Court and that there was no physical invasion of the raisins.⁵⁴ The court reasoned that physical invasion cases like *Loretto* involved only real property, and since the Court in *Lucas* suggested that Takings Clause protections for personal property were less robust than for real property, there was no physical invasion

50. See, e.g., *Delano Farms v. Cal. Table Grape Comm'n*, 586 F.3d 1219 (9th Cir. 2009), *cert. denied*, 131 S. Ct. 159 (2010) (holding that mandatory assessments under state law do not violate the First Amendment), as discussed in Jeremiah Paul, *Is a Grape Just a Grape? California Table Grape Commission's Mandatory Assessment Funded Generic Advertising Scheme vs. Grower's First Amendment Rights*, 21 SAN JOAQUIN AGRIC. L. REV. 207, 212 (2012). Such schemes had been previously upheld in *Glickman v. Wileman Brothers & Elliott*, 521 U.S. 457 (1997) (nut tree assessments), but later were called into question in *United Foods v. United Foods*, 533 U.S. 405 (2001) (mushroom marketing orders violated First Amendment because the advertising was the principal object of the regulatory scheme).

51. *Delano Farms v. California Table Grape Comm'n*, 655 F.3d 1337 (Fed. Cir. 2011), *cert. denied*, 133 S. Ct. 644 (2012).

52. See *Horne v. United States Dep't of Agric.*, 133 S. Ct. 2053 (2013).

53. Oral Arg. in *Horne v. Dep't of Agric.*, 2013 WL 3132218, at *49 (2013).

54. "The Hornes, however, have intentionally declined to pursue a *Penn Central* claim. Instead, they argue the Marketing Order, though a regulation, works a categorical taking." *Horne v. U.S. Dep't of Agric.*, 750 F.3d 1128, 1138 (9th Cir. 2014), *cert. granted*, *Horne v. Dep't of Agric.*, No. 14-275, 2015 WL 213643 (U.S. Jan. 16, 2015).

taking of the portion of raisin crop (or cash in lieu) confiscated by the government.⁵⁵

Quite disingenuously, the Ninth Circuit also suggested that the Supreme Court itself had eschewed finding a physical invasion could apply to personal property when it justified its holding with this citation:

See also Wash. Legal Found. v. Legal Found. of Wash., 271 F.3d 835, 854 (9th Cir.2001) (en banc), *aff'd sub nom., Brown v. Legal Found. of Wash.*, 538 U.S. 216, 123 S. Ct. 1406, 155 L. Ed.2d 376 (2003) (“The per se analysis has not typically been employed outside the context of real property. It is a particularly inapt analysis when the property in question is money.”).⁵⁶

What makes this disingenuous was that the parenthetical following the citation to *Brown* above was not from the Supreme Court’s opinion but from the Ninth Circuit’s and that the Supreme Court had *expressly rejected* the Ninth Circuit’s assertion:

We agree that a per se approach is more consistent with the reasoning in our *Phillips* opinion than *Penn Central*’s ad hoc analysis. As was made clear in *Phillips*, the interest earned in the IOLTA accounts “is the ‘private property’ of the owner of the principal.” If this is so, the transfer of the interest to the Foundation here seems more akin to the occupation of a small amount of rooftop space in *Loretto*.⁵⁷

Having dispensed with the physical invasion claim, the Ninth Circuit turned to considering whether the expropriation of raisins was an exaction proscribed by the Supreme Court’s unconstitutional conditions doctrine. Here, the Ninth Circuit also found no taking, finding that the tests of *Nollan* and *Dolan* were both met.

While *Nollan* itself asked whether the exactions served the public interest of alleviating a harm caused by the home building project, the Ninth Circuit here asked simply whether the exaction served the government end of stabilizing the market. But *Nollan* held that

55. 750 F.3d at 1139–40 (“[W]e see no reason to extend *Loretto* to govern controversies involving personal property.”).

56. *Id.* at 1140.

57. *Brown v. Legal Found. of Washington*, 538 U.S. 216, 235 (2003) (citation omitted.).

the condition must do more than advance a government's purpose; it must advance a government regulation designed to ameliorate a harm caused by the project itself. Thus in *Nollan*, the Court wrote, "here, the lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation."⁵⁸ In contrast, the Ninth Circuit concluded in *Horne* that "the Marketing Order program furthers the end advanced: obtaining orderly market conditions."⁵⁹ One could add that "obtaining orderly market conditions" without tying them to any *disorderly* market conditions caused by Horne's raisin crop is akin to merely "some valid government purpose." Therefore it is no surprise that the raisin seizure passed the Ninth Circuit's bowdlerized *Nollan* test.

Turning to *Dolan*'s rough proportionality requirement, the Ninth Circuit surmised that because all raisin producers are treated equally⁶⁰ and because the percentage of raisins expropriated is adjusted annually, the *Dolan* standard had been met. But the "equal treatment" and "annual adjustment" rationales are non sequiturs: neither has anything to do with finding proportionality between the adverse impacts caused by selling raisins and the demand to fork raisins over to the federal government. The Supreme Court is expected to issue its ruling by the end of its 2014 term in June of 2015.

Most importantly, all this botched analysis of *Nollan* and *Dolan* begs the question: What does the demand for a portion of a raisin crop really have to do with context of *Nollan* and *Dolan*? Is it the regulation via conditions of the use of real property? This is the sort of confusion that the Supreme Court will need to sort out.

D. Takings by Lawyers in Black Robes

We know it is possible for the Executive and Legislative Branches of government to take property. It happens all the time. A Department of Transportation may condemn property for a road, or a local municipality may zone a parcel into inutility, giving rise to liability

58. *Nollan*, 483 U.S. at 837.

59. *Horne*, 750 F.3d at 1143.

60. *Id.* at 1144 ("[T]he use restriction is imposed evenly across the industry.").

under an inverse condemnation claim. But what about the Judicial Branch? Can it take property?⁶¹

The idea that a court can be responsible for a taking is not new or novel. It has been kicking around at least since 1897 in *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*.⁶² In that case, the Court obliquely referred to a state court being involved in the taking of private property:

[A] judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the fourteenth amendment of the constitution of the United States, and the affirmance of such judgment by the highest court of the state is a denial by that state of a right secured to the owner by that instrument.⁶³

But since then, the doctrine of judicial takings has not had much traction—until perhaps now. It did get a major boost seventy years later in *Hughes v. State of Washington*,⁶⁴ in which Justice Stewart, in a concurring opinion wrote that “a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all.”⁶⁵

Hughes dealt with questions about how the State of Washington viewed accretions of riparian property. Justice Stewart continued that

to the extent that the decision of the Supreme Court of Washington on that issue arguably conforms to reasonable expectations, we must of course accept it as conclusive. But to the extent that it constitutes a sudden change in state law, unpredictable in

61. For a more extended discussion on the arguments leading up to *Stop the Beach Renourishment v. Florida*, see James Burling, *Bacchanalian Beach Parties, Property Rights, and Judicial Takings: Argument in Stop the Beach Renourishment v. Florida Department of Environmental Protection*, ALI-CLE PROGRAM: EMINENT DOMAIN AND LAND VALUATION LITIGATION (2010), available at http://www.ali-cle.org/index.cfm?fuseaction=online.chapter_detail&paperid=266347&source=2.

62. 166 U.S. 226 (1897).

63. *Id.* at 241.

64. 389 U.S. 290 (1967).

65. *Id.*

terms of the relevant precedents, no such deference would be appropriate.⁶⁶

Although the State in this case made no attempt to take the accreted lands by eminent domain, it achieved the same result by effecting a retroactive transformation of private into public property—without paying for the privilege of doing so. Because the Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its legislature, and no less when a taking is unintended than when it is deliberate, I join in reversing the judgment.⁶⁷

Finally, in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*,⁶⁸ the Court actually took up a case premised solely on a judicial takings theory. In this case landowners claimed that the state's assertion of title over beachfront property—created in part by the addition of sand to the beach—was a taking. But the unique and novel twist here was that the landowners asserted that the Florida Supreme Court's rejection of the takings claim, and its assertion that the property belonged to the state, effected a judicial taking. The United States Supreme Court ultimately rejected this claim based on its reading of Florida land use law. But in doing so, a plurality of the justices opined that in the right set of circumstances, there could be a judicial taking:

In sum, the Takings Clause bars the State from taking private property without paying for it, no matter which branch is the instrument of the taking. To be sure, the manner of state action may matter: Condemnation by eminent domain, for example, is always a taking, while a legislative, executive, or judicial restriction of property use may or may not be, depending on its nature and extent. But the particular state actor is irrelevant. If a legislature or a court declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation. [A] State, by ipse dixit, may not transform private property into public property without compensation.⁶⁹

66. *Id.* at 296.

67. *Id.* at 298.

68. 560 U.S. 702 (2010).

69. *Id.* at 715.

This formulation doesn't exactly give a practitioner a whole lot of guidance. Moreover, the possibility of a judicial taking gives rise to a host of questions such as: What court gets to decide that another court took property? Who pays the compensation? From what budget? Indeed, because no judicial takings claim has actually succeeded, any attempt to bring one could be considered novel, if not daring. So, to the extent that the Court had referred to the possibility of a judicial taking, is that something a practitioner should actually bring? Only hindsight can answer that question.

E. Gambling on Government Contracts and Licenses

As noted above, having a definable property right is essential to a viable claim that property has been taken. While it is easy to understand that real property is covered, other less tangible assets can be problematic. Government contracts and licenses are a case in point. While one may take a broad Madisonian view of property—that a person has a property right in many things⁷⁰—one must be cautious in equating the same degree of “right” to a government contract or a government-issued license, because the rights in that contract or license can be limited by the very terms of the instrument itself. Thus, if the terms of the contract or license allow for future interference or restriction by the government, then there may be no “property right” to complain about when that interference or restriction occurs.⁷¹ Moreover, the contract or license may be limited not only by its express terms but also by the implicit understanding that the terms may be altered by future legislative or administrative acts.⁷²

For these reasons, disputes based on the regulation of licenses do not make for the best vehicle for developing new precedents supporting property rights. Because of the inherent malleability in license rights, judicial decisions on license cases might yield negative

70. *See supra* note 3.

71. It is also important to note that if one has a viable contract remedy for an alleged government breach, that remedy must be pursued before any takings claim. *See, e.g.,* *Allegre Villa v. United States*, 60 Fed. Cl. 11 (2004).

72. *See, e.g.,* *Transohio Sav. Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598, 621 (D.C. Cir. 1992) (noting that the “unmistakeability” doctrine means that a contract may be implicitly altered by later legislative acts—unless the contract in unmistakable terms says otherwise and that the contracting parties had the authority to so limit the government’s ability to make future alterations).

understandings in other cases—that is, broad and imprecise language in license cases may well bleed over into the realm of more traditional property rights, making the latter more vulnerable to government manipulation.

In *Hawkeye Commodity Promotions, Inc. v. Vilsack*,⁷³ the owners of video lottery machines brought claims sounding in contract, takings, equal protection, and due process when the Iowa legislature ended the lottery games. With respect to the contract claim, it was undisputed that the owners had invested heavily in the video machines in anticipation of carrying out their contracts with the state. But that was not enough. Assuming that there was a contract here, the regulated nature of the gaming industry was enough for the court to conclude that the parties should have anticipated that the legislature could step in and impose new regulations in the future.⁷⁴

As for the takings claim, this too was a novel claim. There is no precedent holding that regulation of the gaming industry, or even its outright prohibition, can lead to takings liability.⁷⁵ Here, the court found that the machines and the business of operating them were interests in property.⁷⁶ The state never took possession of the machines; it just disallowed their use. And the business operation, although a property interest, was limited by the requirement to obtain a license to operate. And because “[t]he possession of . . . [a] license . . . is a privilege personal to that person or entity and is not a legal right” and “because Hawkeye’s . . . license cannot be sold, assigned, or transferred, it ‘lacks the indicia of a property interest.’”⁷⁷ Along the way to finding no taking violation, the court also, and unnecessarily, found that *Lucas* applies only to real property, and that in a *Penn Central* analysis one factor can be dispositive: that is, despite the near total destruction of the business, the lack of reasonable expectations in not having the legislature shut the business down, combined with the an amorphous third-prong analysis, was enough to obviate any *Penn Central* takings.

73. 486 F.3d 430 (8th Cir. 2007).

74. *Id.* at 438 (finding “diminished contract expectations” based on this understanding and in the language of the contract itself).

75. The same company lost a similar argument in South Carolina in an opinion that did not provide much of a rationale for rejecting a takings claim. *See* *Armstrong v. Collins*, 621 S.E.2d 368 (S.C. Ct. App. 2005).

76. *Hawkeye Commodity Promotions, Inc. v. Vilsack*, 486 F.3d 430, 43 (8th Cir. 2007).

77. *Id.* at 440.

F. Takings and the Aryan Brotherhood

It is not often that one gets to discuss the Aryan Brotherhood in an article on regulatory takings. But takings lawyers had that opportunity in *Schneider v. California Dep't of Corrections*.⁷⁸ For those not familiar with the lead plaintiff in this takings case, Paul “Cornfed” Schneider, here is a brief excerpt from the San Francisco Chronicle:

Paul “Cornfed” Schneider, a high-ranking member of the Aryan Brotherhood prison gang who came to prominence as the owner of two dogs that killed a San Francisco woman, was sentenced to a third life term in prison Monday during a hearing that was secretly rescheduled to protect him from an assassination plot by fellow gang members.⁷⁹

In other words, he is not the sort of person one would want for a neighbor, especially considering the locale of his present neighborhood. But he is a property owner, of sorts, and has been willing to bring a novel takings claim to protect his property—which happens to be the interest he insists that he earned on his prison trust account. Under California Penal Code, that interest was to be deposited in the “Inmate Welfare Fund,” the moneys of which would be applied to certain amenities for the prisoners.⁸⁰ The court, however, did not find that this penal code provision answered the question of whether a property

78. 151 F.3d 1194 (9th Cir. 1998).

79. The article continues:

Schneider, who is already serving two life sentences in the California prison system for a variety of crimes, was sentenced in U.S. District Court in San Francisco for his part in a drug smuggling operation he ran from Pelican Bay State Prison and the 1995 murder of Sonoma County Sheriff's Deputy Frank Trejo.

He told The Chronicle during an interview at the Santa Rita Jail in Dublin on Saturday that he hopes his federal prison sentence will keep him safe from the gang he belonged to for 15 years. He said when he arrived at Santa Rita, guards told him the gang knew he was coming and had repeatedly asked if he had arrived yet.

State and federal authorities confirmed last week that the man called “the most dangerous man in California” in the wake of Diane Whipple's brutal death in January 2001 has been marked for assassination—or “placed in the hat,” in the parlance of the white supremacist gang.

Charlie Goodyear, *'Cornfed' Draws 3rd Life Term . . .*, S.F. CHRON., Oct. 28, 2003, <http://www.sfgate.com/bayarea/article/Cornfed-draws-3rd-life-term-Inmate-in-2580493.php>.

80. *Schneider v. California Dep't of Corrections*, 151 F.3d 1194, 1196 (9th Cir. 1998).

right had been created, noting that many property interests exist “wholly independent of statutes.”⁸¹ Ultimately, the court found that Schneider and his fellow travelers did have a property interest in whatever interest their accounts earned, despite the lack of statutory recognition. In response to the state’s argument that because property is defined by state law, and a state can define away a property interest, the court noted,

Rather, there is, we think, a “core” notion of constitutionally protected property into which state regulation simply may not intrude without prompting Takings Clause scrutiny. The States’ power vis-a-vis property thus operates as a one-way ratchet of sorts: States may, under certain circumstances, confer “new property” status on interests located outside the core of constitutionally protected property, but they may not encroach upon traditional “old property” interests found within the core.⁸²

This is clearly a case of bad facts—because who really cares about petty amounts of interest accruing in the accounts of a collection of bad and very bad people? But what this case did have going for it was the application of some very well defined law holding that government cannot withhold interest on accounts of money held by the government.⁸³ But, in the end the bad facts led to a dissatisfying result for the prisoners: on remand, the court found that whatever interest had been earned was subsumed on average by the costs of administering the funds and that the compensation owed amounted to nothing.⁸⁴ On further appeal, the Ninth Circuit held that each fund had to be looked at individually, but also noted that the state stopped putting any of the funds into interest-bearing accounts in order to avoid the problem altogether.⁸⁵

81. *Id.* at 1199.

82. *Id.* at 1200–01.

83. *See, e.g.*, *Webb’s Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980); *Brown v. Legal Found. of Wash.*, 538 U.S. 216 (2003) (interest on lawyer’s trust accounts subject to takings analysis).

84. *Schneider v. Cal. Dep’t of Corrections*, 91 F. Supp. 1316 (N.D. Cal. 2000). On appeal of this decision, the Ninth Circuit reversed, holding that each individual account had to be considered separately for purposes of comparing costs to expenses. 345 F.3d 716 (9th Cir. 2003).

85. *Id.* at 722 n.3. There are no further reported decisions explaining what, if anything, Schneider got out of this litigation.

G. Up in Smoke I—Weeding Out Takings Claims

If the sheriff takes your pot plants, is there a taking? In *Young v. Larimer County*⁸⁶ the local police raided Kaleb Young’s leased property and seized forty-two marijuana plants, cutting them down and killing the plants. Young claimed the plants were for medicinal purposes under that state’s medical marijuana law, and he was acquitted. The dead plants were returned to Young, but they had been taken before they were ready to be harvested. Young sued for damages to his plants based on a 1983 claim for just compensation under federal law and a state takings claim. On his federal takings claim, the court found he had no property right in what is contraband under federal law.⁸⁷ On his state takings claim, the court held that no right of action accrued when property is temporarily seized for evidence—and that there was no “public use” of his plants when they were seized as evidence. One suspects that this is the result the court wanted to reach—otherwise the judicial process itself would be upended if compensation were to be required for damages caused to seized evidence or damage to anything belonging to a defendant who is eventually acquitted. So after dragging someone through an unsuccessful prosecution, the government isn’t going to be held responsible for its attempt at making the world a safer place, even if it is not actually doing that.

H. Up in Smoke II—Smoking Bans and Takings

With the advent of indoor smoking bans across the country, a number of somewhat desperate bar owners—along with their tobacco industry allies—have tried some unconventional approaches to fighting smoking bans—including bringing takings challenges. In the most recent of these, *Big John’s Billiards, Inc. v. Nebraska*,⁸⁸ the court began where it should have begun, by analyzing the nature of the property right alleged to be taken. Here, Big John’s Billiard Parlor alleged that it had a vested property right in “its ability to operate

86. Colo. Ct. Apps., Case No. 13CA1339, 2014 WL 449513 (2014).

87. Along similar lines is *Bennis v. Michigan*, 516 U.S. 448 (1996), in which Mr. Bennis used his wife’s car for purposes inconsistent with his marriage vows, and the car was seized under the law of asset forfeiture.

88. 852 N.W.2d 727 (Neb. 2014).

a premises that allowed smoking.”⁸⁹ Unfortunately for Big John’s, the court was not convinced that this was a vested right—finding that “[t]he only ‘right’ Big John’s had to allow its customers to smoke was created by statute—the prior version of the act.”⁹⁰ Now I suppose that one could make an academic argument that under ancient common law principles an innkeeper or establishment owner had the right to regulate conduct itself within the establishment, but it appears that no such arguments were made here. Nor would it have done much good. Bringing a taking claim here was simply a matter of desperation combined with an ignorance of the realities of takings and property law. Put another way, this one was never going to fly.

The same argument arose in *D.A.B.E. Inc. v. City of Toledo*,⁹¹ in which a group of restaurant owners alleged a smoking ban effected a regulatory taking. Here the court didn’t focus on the nature of the property interest, if any. Instead it moved right to a *Penn Central* partial takings analysis and focused on the “character of the government regulation” prong of that test, finding that there were serious adverse impacts on employees working in establishments where smoking is permitted. The court then mentioned, but was not particularly moved by, what was “unquestionably . . . an adverse economic impact on plaintiffs’ businesses, two of which closed their doors.” Lastly, it found the owners should have anticipated the increasing regulation of smoking, thus negating the existence of any reasonable investment-backed expectations in maintaining the status quo.⁹² On appeal, the Sixth Circuit found that the restaurant owner plaintiffs failed to show that the law denied them economically viable use of their property.⁹³

I. Up in Smoke III—and Shrapnel

In *National Amusements Inc. v. Borough of Palmyra*,⁹⁴ the owner of a flea market was distressed to find unexploded ordnance on his

89. *Id.* at 954.

90. *Id.* at 955. The prior act had an exemption for billiard parlors regulating, but not banning, smoking.

91. 292 F. Supp. 2d 968 (N.D. Ohio 2003), *aff’d*, 393 F.3d 692 (6th Cir. 2005).

92. *Id.* at 973. Of some historical interest, at around this time the Second Circuit held that there were takings implications when a tobacco company was told to divulge its trade secrets in *Philip Morris, Inc. v. Reilly*, 312 F.3d 24 (1st Cir. 2002).

93. 393 F.3d at 695.

94. 716 F.3d 57 (3d Cir. 2013).

property—property that had been at one time used as a firing range. After the borough closed the flea market to the public so that clean-up operations could be conducted, the owner sued for due process and takings violations. The court did not buy it. On the due process claim, the court found the owner was not entitled to a predeprivation hearing because of the public health and safety necessity of moving rapidly to clean up the danger. As for the takings claim, the court found that the five months of cleanup did not constitute a temporary taking, because this was a reasonable exercise of the police power and not a taking.⁹⁵ Unfortunately, the court's analysis was rather cursory and misleading. There is no dichotomy between exercises of the police power and takings. Indeed, most compensable regulatory takings do involve legitimate exercises of the police power.

What the court *should have* focused on was whether the so-called “public necessity doctrine” created an “emergency exception” to the Takings Clause. Thus, when a fire threatens to consume a city, and the city destroys private buildings in order to create a firebreak, no compensation is due. But there certainly is no “police power” exception to the duty to pay just compensation. As the Supreme Court explained in *Lucas*, at least since *Pennsylvania Coal*, the courts have recognized that if “the uses of private property were subject to unbridled, uncompensated qualification under the police power, ‘the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed].’”⁹⁶ There are, however, discrete instances at common law in which extraordinary circumstances render the taking of damaging of property non-compensable. Government's prerogative to destroy, take, or damage private property without paying compensation is limited by the doctrine of “public necessity.” In extraordinary situations, not only the government but “everyone ha[s] the right to destroy real and personal property” without incurring liability to the owner.⁹⁷ Thus “in times of imminent peril—such as when a fire threatened a whole community—the sovereign could, with impunity, destroy the property of a few

95. “It is difficult to imagine an act closer to the heartland of a state's traditional police power than abating the danger posed by unexploded artillery shells. Palmyra's emergency action to temporarily close the Market therefore constituted an exercise of its police power that did not require just compensation.” 716 F.3d at 63.

96. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014 (1992) (citing *Pennsylvania Coal*, 260 U.S. at 415).

97. *Bowditch v. Boston*, 101 U.S. 16, 18 (1879).

so that the property of many and the lives of many more could be saved.”⁹⁸ “[I]n virtually all of the decided cases, the property destroyed had temporarily become dangerous itself and was likely to have been destroyed anyway.”⁹⁹ In the case of setting aside private property for five months in order to clean up unexploded ordnance, it is debatable whether the necessity doctrine could apply—but the court surely failed by not considering the matter.

National Amusements is not unique. In *Warren Trust v. United States*,¹⁰⁰ two family trusts acquired roughly 18,000 acres of property near the city of Hammond, Louisiana. Of this, approximately 11,200 acres were inside a World War II bombing range. The trusts had used the property for timber harvesting and had plans to develop some or most of it. But with adoption of CERCLA in 1980 and amendments in 1986, the Department of Defense inspected the property and found a possibility of contact by “human receptors” to unexploded ordnance. This put a kibosh on development plans. The trusts sued for a taking and lost. At least the court here engaged in a meaningful takings analysis. Holdings include:

- 1) The fact that the trusts sued first in the court of federal claims and later in another suit involving same underlying facts allowed the claim to move forward under 28 U.S.C. § 1500.¹⁰¹
- 2) The trusts did not allege allegations of tort such as slander of title.¹⁰²
- 3) There is no taking because trusts did not establish interference with property interest—prohibitory regulations did not apply to non-government property.¹⁰³
- 4) No categorical taking because:
 - a) Parcel as a whole is the larger 18,000 acres.¹⁰⁴
 - b) Some use and value left.¹⁰⁵

98. *United States v. Caltex*, 344 U.S. 149, 154 (1952) (World War II destruction of property before falling into enemy hands).

99. W. PAGE KEETON, ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 24 at 146 (5th ed. 1984).

100. 107 Fed. Cl. 533 (2012).

101. *Id.* at 552.

102. *Id.* at 555.

103. *Id.* at 562.

104. *Id.* at 563–66.

105. *Id.* at 566–67.

5) No *Penn Central* taking because:

- a) Diminution in value is only between 62% and 82%.¹⁰⁶
- b) Owners knew property had been used for bombing range when they acquired it.¹⁰⁷
- c) Government acted properly in inspecting property and warning public.¹⁰⁸

The fact that both of these cases lost—one with a meaningful inquiry and the other without—indicates that courts are going to have difficulty finding novel takings in cases where the property had been heavily damaged and constitutes an inherent public danger.

J. Home Sweet Homeless—Takings of the Possessions of the Homeless

In *Lavan v. City of Los Angeles*,¹⁰⁹ the Ninth Circuit held that there was a taking in the removal and destruction of the property of a class of homeless persons who were “momentarily away” from their possessions on Skid Row in Los Angeles. This certainly qualifies as a novel takings claim. But it was a successful one. The City’s petition for writ of certiorari was denied, but it did ask some provocative questions:

In a divided opinion, the Ninth Circuit held that even in the face of a posted law expressly prohibiting such conduct, personal effects left unattended on the public sidewalk are constitutionally protected. Thus, the majority concluded when city employees dispose of these unattended items during a scheduled cleaning operation, the city commits both an unreasonable seizure in violation of the Fourth Amendment and a deprivation of procedural due process in violation the Fourteenth Amendment. The profound effect of this opinion is that a city can no longer fulfill its obligation to protect the public health. The interest in safe, clean, passable sidewalks has been supplanted. In its place, as the photographs in Appendix E illustrate, are public sidewalks that become home to mounds of tarp-covered items, often tagged with a sign reading “not abandoned.” If a city wants to protect the public’s health by removing this accumulation of stuff piling up on the sidewalk, yet

106. *Id.* at 568–69.

107. *Id.* at 569–70.

108. *Id.* at 570–71.

109. 693 F.3d 1022 (9th Cir. 2012).

not violate the Constitution, a city must dedicate resources to sort through these items for contamination, fend off lawsuits alleging illegal search, and then bag, tag, and provide the facilities to store the remainder for retrieval by their owner. Do the protections of the Fourth Amendment and the due process clause of the Fourteenth Amendment extend to these personal effects intentionally left unattended by the owner on the public sidewalk in violation of an express law, such that city workers cannot dispose of these items during routine street cleaning without violating the Constitution?¹¹⁰

It is telling that in the Ninth Circuit novel Takings Clause-based claims fare better when brought by prisoners and the homeless than more traditional claims brought by owners of farm commodities and real property.

K. Relaxing of Rules on Mandatory Union Membership

After Indiana passed its controversial right-to-work statute, wherein no individual can be required to join or remain a union member or pay any sort of dues or assessments to the union or other third party, the labor unions sued. In *Sweeney v. Pence*¹¹¹ the question arose whether the combination of a federal statute requiring a union to provide fair representation to all employees and the state law prohibiting the union from collecting dues from nonmembers somehow “took” the union’s property. It argued nonpaying nonmembers were free-riders, enjoying the benefits of the union’s collective bargaining efforts without compensating the union. The court held that to the extent the union was tasked with the duty of fair representation, it was “justly compensated by federal law’s grant to the union the right to bargain exclusively with the employer.”¹¹²

It seems disingenuous not to recognize that the Union’s position as a sole representative comes with a set of powers and benefits as well as responsibilities and duties. And no information before us persuades us that the Union is not fully and adequately compensated by its rights as the sole and exclusive member at the negotiating table.¹¹³

110. *City of Los Angeles v. Lavan*, 2013 WL 796022, *cert. denied*, 133 S. Ct. 2855 (2012).

111. 767 F.3d 654 (7th Cir. 2014).

112. *Id.* at 666.

113. *Id.* at 666.

The dissent suggested was that forcing the union to provide services without compensation was a taking.¹¹⁴ But in a convoluted taking doctrine, the dissent continued that “[h]ere, no public purpose was even alleged,”¹¹⁵ forgetting those cases in which compensable takings were not found despite lack of a public purpose.¹¹⁶ And the dissent continued that this would be like gasoline retailers being required to give away gasoline to customers who did not want to pay.¹¹⁷

With all due respect to the court, missing in the discussion by either the majority or the dissent is anything resembling a cogent discussion of takings law based on established principles or precedent. First of all, there is very little attempt to identify the property right that was taken. Is there a property right to represent nonmembers? Is there a property right in the incidental benefits received by the nonmembers? Perhaps there is. Perhaps there isn’t. But some meaningful discussion could help explain why there is, or isn’t, a property interest that can be taken in the first place. Next, the dissent’s confusion over the impact of a lack of public purpose reflects a lack of understanding of whether this case is actually a claim for an uncompensated taking or something else perhaps more akin to a substantive due process challenge. Finally, the dissent ever so closely skimmed the edge of a *Nollan* and *Dolan* unconstitutional conditions argument but never quite connected the dots. In other words, this court is about as confused about takings law as every other court generally is.

L. Animal Law I: Lions and Tigers and Bears, Oh My Takings Claws

After an Ohio man released over fifty exotic animals before committing suicide,¹¹⁸ the State of Ohio passed the Ohio Dangerous and

114. *Id.* at 683.

115. *Id.*

116. *See, e.g.*, text accompanying footnote 86 (discussion of *Young v. Larimer*).

117. *Id.* This brings to mind Justice White’s dissenting hypothetical of requiring a grocery store to give away groceries to the poor in *Christy v. Lujan*, 490 U.S. 1114 (1989). There the Court denied certiorari to a rancher who was denied the right to terminate a marauding bear.

118. Wikipedia described the incident this way:

Muskingum County Animal Farm was a private zoo located in Zanesville, Ohio, United States.

The zoo received world-wide attention on October 19, 2011, when dozens of exotic animals were released from their enclosures. Bears, lions, tigers, and wolves were among those who escaped, and were hunted by local law enforcement out

Wild Animals and Restricted Snakes Act. Among the provisions was one requiring that certain exotic animals be microchipped. This in turn led exotic animal owners such as the plaintiff-appellants in *Daniels v. Wilkins*¹¹⁹ to allege a host of constitutional infirmities, including a physical invasion Takings Clause claim.

The Sixth Circuit addressed first whether it had jurisdiction to hear the claim in light of *Williamson County* and the fact that the plaintiffs-appellants did not seek compensation in state court. Noting that *Williamson County* is a prudential ripeness doctrine, it found that there would be no point in sending the case to state court if it were clear that there had been no taking.¹²⁰ Turning to the Takings Clause claim, the court was not convinced that the implantation of microchips effected any kind of physical invasion. It is, after all, one thing to force someone to allow cable wires and boxes onto one's building, but a microchip implanted in an animal is distinguishable both in degree and kind:

But even after appellants implant the microchips, they retain the ability to use and possess their animals and the implanted microchips. Indeed, the Act is close kin to the general welfare regulations that the Supreme Court ensured were not constitutionally suspect. There is little difference between a law requiring a microchip in an animal and a law requiring handrails in apartment buildings. Both are regulations of individuals' property properly challenged as regulatory takings, *Loretto*, 458 U.S. at 440, 102 S. Ct. 3164, and neither law effects a government occupation of property or a government-authorized occupation of property by a third party. As appellees point out, were the Act's micro chipping

of fear for public safety. The animals were killed or captured and taken to the Columbus Zoo and Aquarium. Owner Terry Thompson set free fifty-six of his exotic animals before shooting himself in the head. Forty-eight were killed by the local police. The animals freed included lions, leopards, wolves, primates, bears, and eighteen tigers. The animals confirmed to be dead were the eighteen tigers, six black bears, two grizzlies, two wolves, one macaque monkey, one baboon, three mountain lions, nine male lions, and eight lionesses. Three leopards, one grizzly bear, and two monkeys were left caged inside Thompson's home. These animals were tranquilized and sent to the Columbus Zoo. One of the surviving leopards was subsequently injured in an accident at the zoo and was euthanized. One monkey was eaten by a tiger, and a wolf was killed after being hit by a car.

Wikipedia entry for Muskingum County Animal Farm, http://en.wikipedia.org/wiki/Muskingum_County_Animal_Farm (last visited June 10, 2015) (footnotes omitted).

119. 744 F.3d 409 (6th Cir. 2009).

120. *Id.* at 418.

requirement to be ruled a taking, “laws requiring license plates on cars, warning labels on packaging, lighting on boats, handrails in apartment buildings, and ramps leading to restaurants” would be suspect.¹²¹

This was surely the correct result. As much as one may or may not chafe against government regulations of various sorts, not every regulation effects a taking, no less a physical invasion-style taking.¹²² While it may be an “invasion” of some kind, to conclude “unassailably” that this invasion rises to a constitutional dimension is a stretch. *Loretto* involved the use of a measurable amount of Mrs. Loretto’s apartment building for the benefit of and continuing use by a third-party utility company. If the animal owners here had asked first what the nature of the property interest alleged to be taken was, then they might have saved some time and effort in litigation.¹²³

M. Animal Law II: Big Game and Takings

In Montana, owners of ranches supplemented their income by promoting hunts of captive big game. Sometimes referred to pejoratively as “canned hunts,” these operations have engendered significant controversy. They are supported by some hunters and free-market advocates who claim that exotic animal wildlife ranching can help conserve threatened species. On the other hand, animal rights advocates and other conservationists doubt the utility of using exotic wildlife ranches as a means to conserving species. In *Kafka v. Montana Dep’t of Fish, Wildlife & Parks*,¹²⁴ the owners and operators of livestock

121. *Id.* at 419.

122. Opinions do vary. See, e.g., Stephen D. Lott, *Getting Under Fido’s Skin: Analyzing the Objections to Mandatory Pet Microchipping Laws*, 7 OKLA. J. L. & TECH. 52 (2011), available at <https://www.law.ou.edu/sites/default/files/files/FACULTY/2011okjoltrev52.pdf>. The article concludes, “[t]o be sure, mandatory microchipping constitutes a permanent physical invasion of the pet owner’s property. Thus, it seems fairly clear that, based upon the Court’s finding in *Lucas*, pet owners must be compensated.” *Id.*

123. There have been similar, and so far unsuccessful, challenges brought to the Department of Agriculture’s requirement for farm animal microchip identification (for the purpose of tracking disease), although most claims seem to be First Amendment religion challenges alleging that the microchipping is related to the “mark of the beast” as described in the Book of Revelations 13:16–18. For more on one lawsuit, see Tom Leonard, *Amish Sue U.S. Government for “Mark of the Beast” on Livestock*, U.K. TELEGRAPH (Nov. 17, 2008), <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/3473461/Amish-sue-US-government-for-mark-of-the-Beast-on-livestock.html>.

124. 201 P.3d 8 (Mont. 2008).

game farms sued for a taking of property interests as result of an initiative that prohibited the charging of a fee to shoot ranched big game wildlife. They lost. The game owners had licenses to operate the hunts and the revocation of the licenses after the initiative did not effect a taking because the licenses were not compensable property rights—they were government benefits. Nor, the court held, could the ranchers demonstrate that the value of their ranches had substantially been diminished. Likewise, continuing with a *Penn Central* analysis, the court found the other factors did not militate finding a take.

The dissent was displeased:

At bottom, the Court holds that any individual in this State who, with the State's encouragement, invests capital and resources to create a going concern, but who does so in a field that this Court considers "highly controversial," simply has no compensable interest in that business. Therefore, when the State up and decides to legislate the business out of existence—through the unique expedient of depriving the business of any income—the State need not provide any compensation for the owner's loss of property.

The injustice in treating Montana business people and property owners in this manner is manifest, not to mention legally indefensible. I strenuously disagree with the Court's determination that the Ranchers, and others similarly situated, are without a remedy for a taking of their property. I also cannot subscribe to the Court's faulty rationales in reaching this result. I therefore respectfully dissent from the Court's decision.¹²⁵

The dissent makes for an interesting read for its detailed Due Process and Takings analyses, in which it ultimately concludes that there should be no exception for the compensation requirement just because game ranches are unpopular businesses in some circles and that the harm to the ranchers is so substantial.

In *Simpson v. Dep't of Fish and Wildlife*¹²⁶ an elk rancher sued after Oregon prohibited hunting elk on private ranches. At issue was whether the elk were private property. The court said "no." First, it found that elk are wildlife; second, all wildlife belongs to the state; and third, all elk belong to the state.¹²⁷ Therefore, there could no taking.

125. 201 P.3d at 33–34 (Nelson, J., dissenting).

126. 255 P.3d 565 (Or. App. 2011).

127. *Id.* at 569.

Thus in Montana there was no property interest in operating a trophy-hunting ranch, and in Oregon there was no property in the wildlife. In neither instance could a taking claim succeed.

N. Taxi Medallions and Takings

In what could be one of the final battles of the last war, taxi companies in New York have complained that increasing the number of legal taxis will diminish the monopoly power that existing medallion owners have. Some have gone on to argue that plans to allow more lawful taxis, especially in the outer boroughs and neighborhoods that are traditionally underserved by medallion cabs, is a potential taking. Recently, the established taxi companies brought suit, arguing a taking.¹²⁸ But what kind of property is a government monopoly license to drive a car for hire? This has been the subject of some rather intense debate and speculation. Professor Wyman has suggested that while the medallions may not have *started* out as property in the traditional sense, they have evolved that way.¹²⁹ Because of the manner in which medallions are infused with indicia of property, she concludes, somewhat pessimistically, that “[p]roblematic property rights should not only be regarded as burdensome in the present but also potentially burdensome in the future.”¹³⁰ Whether that burden will consume Uber or be transcended by Uber remains to be seen.

As noted by Steven Oxenhandler, there is precedent out of Chicago for treating taxi licenses as compensable property:

In other words, despite the lack of an explicit recognition that a taxicab license constituted a compensable property interest, the court reasoned that because the City treated the taxicab license

128. *Taxicab Serv. Ass’n v. New York*, No. 102553, at 30 (N.Y. Sup. Ct. Aug. 17, 2012) (“Plaintiffs claim . . . that medallions are ‘more than mere licenses. Because they create consistent streams of income, have lasting residual value, and are freely transferable, they have long been understood to be valuable property.’ Let us assume that this is so. They are still ‘intangible’ property. Plaintiffs intangible rights are not being ‘taken,’ they are being shared.”) (cited in Katrina Miriam Wyman, *Problematic Private Property: The Case of New York Taxicab Medallions*, 30 *YALE J. ON REG.* 125, 187 n.84 (2013)).

129. See, e.g., Wyman, *supra* note 128, at 140 (“The evolution of medallions underscores the potential for items to come to be regarded and treated as property absent the benefit of a clear constitutional guarantee against governmental expropriation without just compensation.”).

130. *Id.* at 187.

as a traditional form of property, the City implicitly created a compensable property right in a taxicab license.¹³¹

But Oxenhandler also notes precedent from California treating taxi licenses as a mere privilege.¹³²

Of course, much of this discussion predates what has now become the elephant in the room: Uber. Wherever Uber goes, it is disrupting the traditional model of taxi license monopolies. And wherever Uber goes, Uber gets sued. Whether “allowing” or at least not banning Uber will have takings implications for existing taxi licenses will depend on what those licenses are: protected property interests, mere privileges, or something else. Central to the academic discussions of whether taxi licenses should be treated as compensable property interests are extensive discussions of what constitutes property in the first place.¹³³

CONCLUSION

Suffice it to say for the limited discussion in this short article, any litigant seeking to extend the protections of the Takings Clause to a property interest not heretofore protected had better understand and apply one or more of the various theories on the meaning of property before embarking on a novel takings claim. This caution applies across the board: from taxi licenses to smoke-filled billiard halls to microchipped animals. Short of delving into a comprehensive exegesis of theories on the origins of property law, there is also the laugh test: the louder the laugh in reaction to a suggestion that something is a protected property right, the less likely it is to succeed in court.

131. Steve Oxenhandler, *Taxicab Licenses: In Search of A Fifth Amendment, Compensable Property Interest*, 27 *TRANSP. L.J.* 113, 131 (2000) (comparing *Boonstra v. City of Chicago*, 574 N.E.2d 689, 692 (Ill. App. Ct. 1991) (finding a property right associated with a taxi license), with *O'Connor v. City of San Francisco*, 153 Cal. Rptr. 306, 310 (Cal. Ct. App. 1979) (finding no property interest in the privilege of a taxi license.)).

132. *Id.*

133. *See, e.g.*, Wyman, *supra* note 128; Oxenhandler, *supra* note 131.

