

EMERGING ISSUES IN PROPERTY LAW

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INTRODUCTION

I am a property lawyer, which means I am a civil rights lawyer and a human rights lawyer. I say this because, as we all know, private property is a civil right—and most importantly for today’s discussion—a *federal* constitutional right. This is the context that frames the subject of my portion of the panel at the Fifteenth Annual Brigham-Kanner Property Rights Conference about emerging issues in property law.

I’ll be focusing on recent trends in the courts, fitting these trends into my internal matrix for property rights. That matrix places property rights along a continuum ranging from the baseline property rights—otherwise known as “common law,” “natural law,” “fundamental principles,” Lockean, “normative” (and what would an academic conference be without at least one use of the term “normative?”), “re-statement,” or whatever-you-want-to-call-them property rights—to state-recognized and state-created property rights.

I. FUNDAMENTAL FEDERAL PROPERTY RIGHTS

The first and most fascinating of the emerging issues in property law is whether certain property rights are immune from being re-defined by state law, either by a state legislature or even a state court.¹ The Ninth Circuit recently addressed this question, concluding that the interest on state retirement accounts is not subject to

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1. This is an issue left unresolved by the U.S. Supreme Court in *Stop the Beach Renourishment v. Florida Department of Environmental Protection*, 560 U.S. 702 (2010). There, only four Justices acknowledged the fact that certain aspects of how property is defined can only be altered with the payment of compensation.

a state court's redefining it out of existence, because interest is a "core" and "traditional" property right that the state cannot disavow or define away.² This was a very Blackstonian approach, one recognized by Justice Marshall in his concurring opinion in *PruneYard Shopping Center v. Robins*, where he wrote:

I do not understand the Court to suggest that rights of property are to be defined solely by state law, or that there is no federal constitutional barrier to the abrogation of common-law rights by Congress or a state government. The constitutional terms "life, liberty, and property" do not derive their meaning solely from the provisions of positive law. They have a normative dimension as well, establishing a sphere of private autonomy which government is bound to respect.³

We have also seen this more recently—although less expressly—in *Murr v. Wisconsin*, where eight Justices rejected Wisconsin's argument that the State could define and redefine what counts as "property" with a free hand.⁴ The majority in that case instead adopted a multifactor test for the takings "denominator," which in reality defined the property claimed to have been taken as a matter of federal common law, an interest traditionally defined by reference to state law.⁵ The dissenters rejected Wisconsin's argument that state law alone defined the property, concluding that even though a state's metes and bounds is the starting point in the parcel analysis, it isn't the only thing to look at.⁶ In short, one must ask if there are "background principles of federal law" in the concept of "property." Like Justice Marshall, I think so.

That is the first new emerging issue in property law, and the most important in my view.

2. *Fowler v. Guerin*, 899 F.3d 1112, 1118 (9th Cir. 2018) ("We then held that there is 'a core' notion of constitutionally protected property into which state regulation simply may not intrude without prompting Takings Clause scrutiny.' This 'core' is 'defined by reference to traditional "background principles" of property law.'") (citations omitted) (quoting *Schneider v. California Department of Corrections*, 151 F.3d 1194 (9th Cir. 1998)).

3. *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 93–94 (1980) (Marshall, J., concurring).

4. *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017).

5. *Id.* at 1948.

6. *Id.* at 1953 (Roberts, C.J., dissenting).

II. STATE-CREATED OR STATE-RECOGNIZED PROPERTY RIGHTS

If there is a federal baseline, the second emerging issue is to question what happens when a state recognizes more rights, not less, as “property.” Before we address this, I want to ask whether anything is to be made of the fact that the Fifth Amendment is the only provision in the Constitution that refers to “*private* property?”⁷ The other provisions that mention property, such as the Due Process Clauses of the Fifth and the Fourteenth Amendments, only refer to “property” without the “private” modifier.⁸ The following is one recent example where this distinction may make a difference.

In *In re Maui Electric Company*,⁹ the Hawaii Supreme Court held that the Hawaii Constitution’s provision guaranteeing a right to a “clean and healthful environment” is “property.”¹⁰ But the District of Columbia Circuit held the opposite in a case involving the Federal Energy Regulatory Commission. The court interpreted Pennsylvania’s similar “clean air and pure water” constitutional provision, concluding that although the provision recognized the right to clean air and water as “property,” that’s not really a “property” right.¹¹ You can’t sell it, you can’t exclude others from it, nor is there any value you can place on it. As the court noted, “Even for entitlements, ‘[t]he hallmark of a protected property interest is the right to exclude others,’ which is ‘one of the most essential sticks in the bundle of rights that are commonly characterized as property.’”¹² To the court, it was not truly property, because it did not fall within the “traditional” concept of property, and thus was not protected by the Due Process Clause. Are there any federal baselines?

The provisions in the Hawaii and Pennsylvania Constitutions guaranteeing a clean environment are state-created entitlements like state employment in *Board of Regents v. Roth*,¹³ that gives someone

7. U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

8. *See id.* amends. V, XIV.

9. *In re Application of Maui Elec. Co.*, 408 P.3d 1, 12–13 (Haw. 2017).

10. *Id.* at 23. For more on the Hawaii case, see Robert H. Thomas, *Back to the Future of Land Use Regulation*, 7 BRIGHAM-KANNER PROP. RTS. CONF. J. 109, 117–22 (2018).

11. *Delaware Riverkeeper Network v. FERC*, 895 F.3d 102, 109–10 (D.C. Cir. 2018).

12. *Id.* at 109 (quoting *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 673 (1999)).

13. *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972).

a “legitimate claim of entitlement.”¹⁴ This also includes entitlements such as Kaiser Aetna’s Rivers and Harbors Act Permit,¹⁵ the alleged cultural rights that were asserted by the objectors in the Hawaii telescope case referred to by Professor David Callies in his panel at the Fifteenth Annual Brigham-Kanner Property Rights Conference,¹⁶ and the procedural rights recently recognized by the Tenth Circuit when it concluded that a city must inform an affected property owner when the city declares her property to be blighted.¹⁷ In the latter case, the court concluded that the city’s blight designation did not have a direct impact on a property in the land (the blight designation was merely a designation).¹⁸ But the lack of notice of the blight designation did have a direct impact on the property owner’s property right to timely appeal the blight designation. Thus, the “property” for purposes of due process was the state’s procedures.¹⁹

III. IS THERE A RIGHT TO HAVE THE GOVERNMENT PROTECT PROPERTY?

The next emerging issue in property law is whether there is either a fundamental or federal property right—or a state-created property

14. *Id.* at 577.

15. *Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979) (“While the consent of individual officials representing the United States cannot ‘estop’ the United States, it can lead to the fruition of a number of expectancies embodied in the concept of ‘property’ . . . expectancies . . .” (citation omitted)).

16. *In re Contested Case Hearing re Conservation Dist. Use Application (CDUA) HA-3568 for the Thirty Meter Telescope at the Mauna Kea Sci. Reserve*, 431 P.3d 752 (Haw. 2018). Professor Callies spoke on this case during his panel presentation. David L. Callies, Presentation on “Government Ownership of Land and the Limits upon Transfers or Sale: The Public Trust Doctrine,” at the Fifteenth Annual Brigham-Kanner Property Rights Conference (Oct. 5, 2018). For further discussion from Professor Callies on this topic, see David L. Callies, *The Public Trust Doctrine*, 8 BRIGHAM-KANNER PROPERTY RIGHTS J. 71 (2019).

17. *M.A.K. Inv. Grp., LLC v. City of Glendale*, 889 F.3d 1173 (10th Cir. 2018).

18. *Id.* at 1189.

19. *Id.* at 1182 (“Applying this intuitive rule, we conclude due process required Glendale to provide M.A.K. with direct notice of the adverse blight determination. In contemporary terms this means notice had to be mailed, emailed, or personally served. Without the minimal step of actual notice, M.A.K. was left unaware of the potentially looming condemnation action, and so had little reason to even investigate whether it could challenge the blight determination that authorizes that action. As a consequence, M.A.K. lost its statutory right to review within thirty days. In other words, M.A.K.’s ability to preserve its *property right* in the *statutory right of review* depended on its knowledge of the simple fact the blight finding *existed*.”) (emphasis in original).

right—to have the government act to protect your property. Professor Timothy Mulvaney has explored this in his recent work on “non-enforcement” takings,²⁰ and in the courts we see this played out in several recent, interesting cases.

The Federal Circuit’s decision in the Mississippi River-Gulf Outlet case addressed this question of government’s role to protect property.²¹ Prior to reaching the Federal Circuit, the Court of Federal Claims (“CFC”) held that the United States had taken property belonging to Saint Bernard Parish because the Corps of Engineers constructed—and then failed to maintain—the Mississippi River-Gulf Outlet Canal. Built decades ago, the channel amplified the effect of Hurricane Katrina by serving as a bowling alley for the hurricane’s force—with Saint Bernard Parish and New Orleans’s Ninth Ward as the pins.²² The CFC awarded a very large compensation verdict, and the government appealed to the Federal Circuit.²³ That court, in an opinion by Judge Timothy Dyk, reversed the CFC and concluded that, as a matter of law, the federal government could never be liable for a taking caused by its *inaction*²⁴—thus adopting a categorical rule in a flood case even though the Supreme Court in *Arkansas Game*²⁵ told the lower courts it wasn’t fond of categorical rules.

We see a state court version of this ruling going the other way in Maryland, where the court held that a local government’s failure to enforce its septic tank regulations was the cause of sewage flooding in a nearby campground.²⁶ The loss due to flooding was held to be a

20. Timothy M. Mulvaney, *Non-Enforcement Takings*, 59 B.C.L.REV. 145 (2018) (arguing that takings law should police the government’s decision to not enforce regulations on the same grounds that it treats affirmative enforcement).

21. *St. Bernard Parish Gov’t v. United States*, 121 Fed. Cl. 687 (2015), *rev’d*, 887 F.3d 1354 (Fed. Cir. 2018), *cert. denied*, 139 S. Ct. 796 (2019).

22. *St. Bernard Parish Gov’t v. United States*, 121 Fed. Cl. 687 (2015), *rev’d*, 887 F.3d 1354 (Fed. Cir. 2018).

23. *St. Bernard Parish Gov’t v. United States*, 121 Fed. Cl. 687 (2015).

24. *St. Bernard Parish Gov’t v. United States*, 887 F.3d 1354, 1357 (Fed. Cir. 2018) (“We conclude that the government cannot be liable on a takings theory for inaction and that the government action in constructing and operating [the Mississippi River-Gulf Outlet] was not shown to have been the cause of the flooding.”).

25. *Arkansas Game & Fish Comm’n v. United States*, 568 U.S. 23 (2012) (holding that government-induced flooding may give rise to a takings claim, even if the flooding is not permanent).

26. *Litz v. Md. Dep’t of Env’t*, 131 A.3d 923, 931 (Md. 2016) (“Upon this review, it seems appropriate (and, in this case, fair and equitable, at least at the pleading stage of litigation) to recognize an inverse condemnation claim based on alleged ‘inaction’ when one or more of

taking even though it was based on government inaction. We've also seen this same issue playing out in the California litigations and the resulting inverse condemnation claims resulting from the recent devastating wildfires in Northern and Southern California.²⁷ Finally, this question of government responsibility has also arisen in lawsuits where taxicab medallion owners have sued local governments for not enforcing the same medallion regulations against ride-sharing companies.²⁸

To me, these are the most critical issues of “what is property?” and “what does it mean?” that we should be following.

IV. TWO OTHER ISSUES: JUST COMPENSATION AND COVERING ALL LOSSES

Two other burgeoning issues are ripe for clarification. The first concerns just compensation. It has been more than thirty years since the Supreme Court has given us a just compensation case, and it is not because the law of just compensation is remarkably clear.²⁹ Two competing threads in compensation law still have yet to be resolved. First, is the purpose of the Just Compensation Clause to make an owner whole—to award the “the full and perfect equivalent for the property taken”³⁰—or is it simply to pay the owner the *fair market value* of the land alone?³¹ We know what the answer should be (the former), but the courts just don't seem to want to address it. The second burgeoning issue is business losses associated with a taking. This issue also covers the fees and costs an owner might incur in defense of her property rights, especially when the government has lowballed the valuation.

the defendants has an affirmative duty to act under the circumstances. Therefore, we hold, as a matter of Maryland law, that an inverse condemnation claim is pleaded adequately where a plaintiff alleges a taking caused by a governmental entity's or entities' failure to act, in the face of an affirmative duty to act.”)

27. *See, e.g.*, *San Diego Gas & Elec. v. Pub. Utilities Comm'n*, No. D074417 (Cal. Ct. App. Nov. 13, 2018).

28. *See, e.g.*, *Glyka Trans, LLC v. City of New York*, 76 N.Y.S.3d 585 (N.Y. App. Div. 2018).

29. *See United States v. 50 Acres of Land*, 469 U.S. 24 (1984).

30. *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893).

31. *United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668 (1896).

V. ONE LAST THING: WHAT IS A “TAKING?”

I cannot leave the discussion without asking the most fundamental question the Supreme Court has left unresolved: what is a regulatory taking? It’s been nearly one hundred years since the Court told us that an exercise of a power other than eminent domain can result in a taking, but the Court is still not sure what this power looks like. This was most recently evidenced in the oral arguments in *Knick v. Township of Scott*,³² where it appeared that only two or three of the Justices even understand what an inverse condemnation or regulatory takings lawsuit means, and what the property owners who raise those claims really want. Most of the questions to counsel during the oral argument on October 3, 2018, were scary because they reflected the Justices’ wrong—and in some cases, bizarre—assumptions.³³

I don’t see the Justices comparing apples to oranges but rather think that they believe they are eating oranges when, in fact, they have tangerines. Thus, the biggest issue I see is that the majority of the Supreme Court does not understand eminent domain—law fundamentals. Lacking that analytical foundation, they end up operating under a set of often-wrong assumptions. They assume, for example, that the inverse condemnation and regulatory takings tangerines are just like the eminent domain oranges they are used to biting into. I do not have a lot of confidence in the Court’s ability to lead us out of this doctrinal wilderness—or, at least, to not make it worse—after October’s *Knick* arguments.

CONCLUSION

But enough of doom and gloom—please allow me to end on a more positive note: hearty congratulations to Professor Stewart Sterk for a well-earned Brigham-Kanner Property Rights Prize. Welcome to the pantheon of the greats, Professor Sterk.

32. See Transcript of Oral Argument, *Knick v. Twp. of Scott*, 138 S. Ct. 1262 ((Jan. 16, 2019) (No. 17-647), 2019 WL 260998.

33. See, e.g., Transcript of Oral Argument at 25, *Knick v. Township of Scott*, 138 S. Ct. 1262 (Oct. 3, 2018) (No. 17-647), 2018 WL 44776176 (“JUSTICE BREYER: Or we could go into 1331. But Williamson was decided 32 years ago. This is a very complicated area of law. Why not let sleeping dogs lie? It’s called stare decisis.”).