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BACK TO THE FUTURE OF LAND USE REGULATION

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I. INTRODUCTION

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

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

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

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

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

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

[5] *Id*. at 544.

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

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

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

II. J.C. HADACHECK GETS PLAYED

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[17] *Hadacheck*, 239 U.S. at 413-14.

[18] Kelo v. City of New London, 545 US. 469 (2005).

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

III . REASON AND LAND USE REGULATION

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

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

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

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

[21] *Id.* at 1938.

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

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

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[23] *Id.* at 1947.

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

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

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

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

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

IV. THE FUTURE OF "PROPERTY"

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[36] HAW. CONST. art XI, § 9.

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

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

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

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

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

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

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

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

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

[40] *Id.* at ___.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

V. CONCLUSION

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

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

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

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

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