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# Recent Developments in Regulatory Takings

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## I. Introduction

THE SUPREME COURT'S 2012 TERM promised to be a banner year in regulatory takings law, with no less than three cases on the Court's docket.<sup>1</sup> In *Arkansas Game and Fish Commission v. United States*,<sup>2</sup> a case involving a takings claim against the federal government for compensation resulting from a flood, the Court held that flooding need not be "permanent" in order to result in liability, and reinforced the principle that categorical takings are not favored, and stated that the default analysis is the multi-factored *Penn Central* test.<sup>3</sup> In *Koontz v. St. Johns River Water Management District*,<sup>4</sup> the Court held that monetary development exactions fall within the reach of the takings clause and "must satisfy the nexus and rough proportionality requirements of *Nollan and Dolan*."<sup>5</sup> In *Horne vs. U.S. Dep't of Agriculture*, the unanimous Court held that raisin farmers' takings claims could be raised as an affirmative defense in an agency enforcement proceeding even where the fine had not previously been paid.<sup>6</sup>

In addition to the Supreme Court, other courts around the country issued consequential rulings of note. This article reviews those major regulatory takings and inverse condemnation decisions of the

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1. *Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511 (2012); *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S.Ct. 2586 (2013); *Horne v. U.S. Dep't of Agric.*, 133 S. Ct. 2053 (2013).

2. 133 S. Ct. at 515.

3. See *Penn Cent. Trans. Co. v. City of New York*, 438 U.S. 104, 130-31 (1978); *Ark. Game*, 133 S. Ct. at 522-23 (detailing a multi-factor test to be applied to the case on remand).

4. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S.Ct. 2586 (2013).

5. *Id.* at 2599 (citations omitted). The *Koontz* case is discussed in detail in an article in the Fall 2013 issue of THE URBAN LAWYER. See Michael C. Kamprath, 45 URB. LAW. \_\_\_\_ (2013).

6. *Horne*, 133 S. Ct. at 2063-64.

past year. Section II details cases about whether particular scenarios result in takings liability. Section III details what sort of property might be considered protected. Section IV details cases analyzing whether application of *Penn Central* results in a taking. Section V focuses on ripeness, the most frequently applied procedural dodge to takings cases. Section VI considers other decisions involving such topics as judicial takings and standing.

## **II. What Qualifies as a Taking?**

### **A. Supreme Court: A Government-Induced Flood Might Be a Taking**

In *Arkansas Game*,<sup>7</sup> the unanimous Supreme Court held that government-induced flooding could be a taking, even if temporary. The Court held that the federal government may be liable under the Takings Clause to pay just compensation because the Corps of Engineers damaged Arkansas' timber by purposely flooding land owned by the state downstream of a federal flood-control project.<sup>8</sup> For more than a century, it has been settled law that when government-induced flooding was *permanent* (such as when lands are inundated as a result of dam building, for example) the government was liable for a taking.<sup>9</sup> But the Supreme Court had never conclusively established whether flooding that was less than permanent would be subject to the same rule.

The Corps argued that it was not liable for the flooding of Arkansas' land and the resulting millions of dollars of loss to the state-owned timber because the floodwaters eventually receded.<sup>10</sup> The Court of Federal Claims concluded otherwise and held the Corps liable, but the Federal Circuit reversed.<sup>11</sup> In that court's view, the flooding must be permanent in order for a property owner to recover compensation.<sup>12</sup> Thus, the flood at most created tort liability. What this meant is that if a property owner can prove the federal government was negligent, it might recover damages. The twist in this conclusion was that the federal government could not be held liable for tort damages resulting from flooding, because it has not consented to be sued under

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7. *Ark. Game*, 133 S. Ct. at 515.

8. *See id.* at 517.

9. *Id.* at 518 (discussing *Pumpelly v. Green Bay Co.*, 80 U.S. 166 (1872)).

10. *Id.* at 517.

11. *Id.*

12. *Id.*

the Federal Tort Claims Act for such claims. Thus, absent a claim for a taking, Arkansas would recover nothing.

The Supreme Court roundly rejected the court of appeals' reasoning and concluded that purposeful water releases from a federally-controlled dam could, in some circumstances, result in a taking.<sup>13</sup> The Court ruled that the government has no "automatic exemption" from the Takings Clause:

We rule today, simply and only, that government-induced flooding temporary in duration gains no automatic exemption from Takings Clause inspection. When regulation or temporary physical invasion by government interferes with private property, our decisions recognize, time is indeed a factor in determining the existence *vel non* of a compensable taking.<sup>14</sup>

The Court remanded the case to the lower courts for an examination of several *Penn Central*-ish factors<sup>15</sup> such as the duration of the flooding, whether it was "temporary and unplanned" and the result of "exigent circumstances," "the degree to which the invasion [by water] is intended or is the foreseeable result of authorized government action," the character of the land at issue and the owner's "reasonable investment-backed expectations" regarding the land's use (such as whether the land had been flooded before), whether the flooding was a one-time occurrence or repeated, and the "severity of the interference."<sup>16</sup> The opinion reminds us that there are few situations in which the Court will conclude there is a taking as a matter of law: the "physical occupation" rule<sup>17</sup> which the Court did not disturb even in flooding cases, and the deprivation of the owner's beneficial use of property under *Lucas*.<sup>18</sup> Everything else is subject to the multi-factor *Penn Central* test. This seems to be the trend in takings cases, and the Court is apparently not keen to take major steps in this area, only to buff up the edges of the rules.<sup>19</sup> Despite the nearly

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13. *Id.* at 522.

14. *Id.* (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 n.12 (1982) (temporary physical invasions should be assessed by case-specific factual inquiry); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 342 (2002) (duration of regulatory restriction is a factor for court to consider); *Nat'l Bd. of YMCA v. United States*, 395 U.S. 85, 93 (1969) ("'temporary, unplanned occupation' of building by troops under exigent circumstances is not a taking").

15. *Penn Cent. Trans. Co.*, 438 U.S. at 123-25.

16. *Ark. Game*, 133 S. Ct. at 514.

17. See *Loretto* 458 U.S. at 435.

18. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (establishing the "total takings" test for evaluating when regulatory takings require compensation).

19. *Arkansas Game* takes an approach similar to the opinion in *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005). Both were unanimous. Both counseled against reading too much into prior opinions. Both rejected *per se* rules—*Lingle* rejecting the "substantially advance" rule of liability, *Arkansas Game* rejecting a rule of no liability. Both opinions fell back to a multi-factor test as the applicable analysis.

universal dislike of the *Penn Central* test, it appears it is here to stay for now.<sup>20</sup>

Thus, *Arkansas Game* is not an entirely satisfying ruling. As noted above, it would have been simpler for the Court to have adopted a brighter-line rule that all physical invasions that directly and substantially interfere with an owner's use are takings,<sup>21</sup> and that the degree of damage inflicted is a question of compensation, not liability. That way, the courts would not need to wade into the metaphysical questions such as the "permanence" of the invasion—for what is truly "permanent?"—but could focus on the key question in takings cases: the degree to which a particular owner is being forced to shoulder more than her proportionate share of the public burden.<sup>22</sup> Moreover, the *Penn Central* test is notoriously amorphous, and consequently provides little guidance to either property owners or government regulators about whether particular actions will be deemed to be takings, which only encourages aggressive regulation, reined in only by the possibility of a future compensation judgment. Which is to say not reined in very much. Those points aside, we can safely say that a goodly portion of government-induced floods that result in litigation should meet the special application of *Penn Central* articulated in *Arkansas Game*, and this decision will not materially alter the present landscape. At least the decision has removed an argument that we've always believed bordered on spurious, and property owners will not have to contend with it from here forward.

Even with this limitation, however, *Arkansas Game* must be considered a decisive victory for property owners and their rights. The Court confirmed that the government does not get a free pass from paying for the damage that flooding causes, just because the flooding may not be "permanent."<sup>23</sup> Moreover, the Court also reaffirmed the principle that good intentions do not insulate the government from liability. The Corps argued that flood control projects are good things—and who can doubt that?—and therefore it should not pay compensation

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20. See John D. Echeverria, *Making Sense of Penn Central*, 23 UCLA J. ENVT L. & POL'Y ENVT'L LAW REPORTER NEWS & ANALYSIS 171, 174-75 (2009) ("To date, the ad hoc *Penn Central* analysis has appeared to mask, if not intellectual bankruptcy, to use Professor Merrill's provocative terminology, at least considerable uncertainty about the fundamental parameters of takings law. If the *Penn Central* test is to serve as more than legal decoration for judicial rulings based on intuition, it is imperative to clarify the meaning of *Penn Central*.").

21. See *Nat'l Bd. of YMCA*, 395 U.S. at 93.

22. See *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

23. *Ark. Game*, 133 S. Ct. at 513.

when it chooses which downstream lands must be flooded in order to preserve others.<sup>24</sup> In that case, the Corps decided that downstream farmers needed a longer growing season, and as a result decided to flood Arkansas' timber lands at a different time of year than was normal. The Court rejected that argument and reaffirmed that in takings cases, the focus is not on the motivation of the government, but on the impact of its decision on property.<sup>25</sup> The Court reminded that “[t]he Takings Clause is ‘designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.’ ”<sup>26</sup> In other words, a single property owner should not have to shoulder the entire financial burden of a public good.<sup>27</sup> This same rationale holds true in other cases, and bears repeating, and *Arkansas Game* is a good reminder that intent doesn’t play a dispositive (or even a significant) role in the takings equation. The Court rejected the argument (pressed by Justice Sotomayor at oral argument) that because the damage to the Commission’s trees was the result of a project designed to minimize the harm from flooding that was going to occur anyway, there’s no taking when the Corps is simply deciding who has to take the hit.<sup>28</sup>

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24. See *id.* at 513-15.

25. “The sky did not fall after *Causby*, and today’s modest decision augurs no deluge of takings liability.” *Ark. Game*, 133 S. Ct. at 521 (citing *United States v. Causby*, 329 U.S. 256 (1946)).

26. *Armstrong*, 364 U.S. at 49.

27. *Ark. Game*, 133 S. Ct. at 521 (citations omitted). The Court held: “The slippery slope argument, we note, is hardly novel or unique to flooding cases. Time and again in Takings Clause cases, the Court has heard the prophecy that recognizing a just compensation claim would unduly impede the government’s ability to act in the public interest. We have rejected this argument when deployed to urge blanket exemptions from the Fifth Amendment’s instruction. While we recognize the importance of the public interests the Government advances in this case, we do not see them as categorically different from the interests at stake in myriad other Takings Clause cases.”

28. For an opinion demonstrating the consequences of forcing a single property owner to take the hit to protect other interests, see *Wolfsen Land & Cattle Co. v. Pac. Coast Fed’n of Fisherman’s Assoc.*, 695 F.3d 1310 (Fed. Cir. 2012), in which the Court of Appeals for the Federal Circuit affirmed the Court of Federal Claims’ denial of a motion to intervene by an environmental organization in a takings case. In an earlier separate case, the organization and others had sued the federal government over the operation of a dam. To settle that case, the government and the organizations entered into an agreement that “obliged the government to release water from the dam for the purpose of restoring and maintaining fish populations downstream[.]” *Id.* at 1313. In the subsequent takings litigation between downstream owners and the federal government, the court held that the environmental organizations did not have standing to intervene, because they “have precisely the same motivation, which is to see [the property owner]’s claims fail.” *Id.* at 1317.

### B. Virginia: Single Instance of Flooding Can Support Inverse Condemnation Claim

Compare the Supreme Court's *Arkansas Game* approach with that of the Virginia Supreme Court in *Livingston v. Virginia Department of Transportation*,<sup>29</sup> which concluded that a one-time flood can result in government liability for inverse condemnation. The plaintiffs claimed that in building the Washington Beltway in the 1960's, the Virginia Department of Transportation (VDOT) straightened and relocated a portion of Cameron Run, a stream feeding into the Potomac River.<sup>30</sup> They also claimed that VDOT's failure to maintain the relocated channel in the intervening years, and that the latter failure resulted in their homes being flooded with sewage after a massive rainfall in 2006.

The homeowner filed an inverse condemnation action in state court to recover just compensation under the Virginia Constitution, which requires compensation when private property is taken or damaged for public use.<sup>31</sup> The defendants demurred, arguing that the plaintiffs lacked standing since they did not own the homes in the 1960's, and because a single instance of flooding could not result in inverse condemnation liability.<sup>32</sup> The Virginia Supreme Court concluded otherwise:

To the extent that the circuit court held that a single occurrence of flooding cannot support an inverse condemnation claim, it erred. We find nothing in Article I, Section 11's text or history that limits a property owner's right to just compensation for a damaging to only multiple occurrences of flooding. Further, our case law holds that a single occurrence of flooding can support an inverse condemnation claim.<sup>33</sup>

The court also rejected the argument that the flood was an "extraordinary event" and thus could not result in inverse condemnation liability.<sup>34</sup> The so-called "act of God" defense is for the defendants to prove—which they can on remand—but is not a *per se* bar to liability.<sup>35</sup> The court also rejected the claim that the plaintiffs lacked standing, holding that they were not seeking compensation for the straightening and relocation of Cameron Run, but for VDOT's failure to maintain

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29. *Livingston v. Va. Dep't of Transp.*, 726 S.E.2d 264, 268 (Va. 2012).

30. *Id.* at 267.

31. VA. CONST. art. I, § 11 ("That the General Assembly shall pass no law whereby private property, the right to which is fundamental, shall be damaged or taken except for public use. No private property shall be damaged or taken for public use without just compensation to the owner thereof. No more private property may be taken than necessary to achieve the stated public use.").

32. *Livingston*, 726 S.E.2d at 269.

33. *Id.* at 271.

34. *Id.*

35. *Id.* at 271-72.

the diverted stream.<sup>36</sup> It was the failure to maintain the concrete channel, not the diversion itself that resulted in the flooding.<sup>37</sup> The court also rejected VDOT's other claims: the taking was not for public use; the flooding did not damage any of plaintiffs' appurtenant rights; the government is only liable for affirmative acts and not omissions.<sup>38</sup>

Two justices dissented, arguing that there can be no liability for inverse condemnation unless property is damaged or taken as the result of VDOT exercising its power of eminent domain:

Today the Court sanctions what can only be deemed a “constitutional tort,” based on a theory of causation, not the principles of condemnation. Noticeably absent from the allegations in this case is a contention, or even facts purporting to show, that VDOT exercised its power of eminent domain in damaging Plaintiffs’ properties. This deficiency is fatal to the Plaintiffs’ claim since there is no cause of action for inverse condemnation without the exercise of such power.<sup>39</sup>

No doubt the single instance of flooding was not “permanent” because the sewage on the plaintiffs’ property was not there forever, and the Virginia court approached the issue differently than the United States Supreme Court. It did not examine the “permanence” of the invasion, but rather the damage. If water receded and later flooded the property again, the Virginia court held that this did not mean that the flooding was not a taking, but that the property owner has multiple causes of action.<sup>40</sup>

### C. Nebraska: Raw Sewage Flooding Property is Inverse Condemnation

Your mission, should you choose to accept it: read *Henderson v. City of Columbus*,<sup>41</sup> without creating bad puns about what a “crappy” or “stinky” case it must have been. Why? Well, in that case, the Nebraska Court of Appeals held that the failure of the city’s sewage “lift station” after a heavy rain storm and the resultant flooding of the Hendersons’ “downstream” property with sewage could result in inverse condemnation.<sup>42</sup> Nasty stuff. The most interesting part of the opinion dis-

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36. *Id.* at 275.

37. *Id.*

38. *See id.* at 267-76.

39. *Id.* at 277 (McClanahan, J., dissenting).

40. *Id.* at 271 (stating also: “In *Hampton Roads Sanitation District v. McDonnell*, we said that a property owner could bring a new inverse condemnation suit against the City of Hampton Roads each time it discharged sewage onto his property. We explained: ‘T]he original discharge of sewage in 1969 did not produce all the damage to the property. The discharges were not continuous; instead, they occurred only at intervals. Thus, each discharge inflicted a new injury for which [the property owner] had a separate cause of action.’”) (citations omitted).

41. 811 N.W.2d 699 (Neb. App. 2012).

42. *Id.* at 713.

cusses inverse condemnation in the context of these types of cases. The court rejected the argument that the property owner must prove that the city was negligent.<sup>43</sup> Instead, the court held that a plaintiff must show only that the city owned the sewer system, and that the city employee's actions caused the sewage backup.<sup>44</sup> The court found that the city was at fault.<sup>45</sup>

#### *D. Federal Circuit on the Difference Between “Temporary” and “Permanent” Physical Takings*

In *Otay Mesa Property, L.P. v. United States*,<sup>46</sup> a case involving the Border Patrol's activities on private land on the border with Mexico, the Federal Circuit held that an agreement by which property owners allowed the federal government to install motion-sensing devices on their land resulted in a permanent physical taking and not a temporary taking. The court also clarified the property “taken” and how just compensation should have been calculated.<sup>47</sup>

You cannot get any closer to the border than San Diego's Otay Mesa neighborhood. The plaintiffs own several parcels abutting the border, and twenty years ago their predecessor-in-title granted the Border Patrol an easement along the border to allow it to, well, patrol the border.<sup>48</sup> The Border Patrol stepped up its activities after 2001 and began operating outside the easement footprint.<sup>49</sup> Otay Mesa Properties and the other landowners sought just compensation in the Court of Federal Claims.<sup>50</sup>

After trial, the court held that most of the owners' claims were barred by the statute of limitations.<sup>51</sup> But on the remaining claim for the underground motion sensors which had been placed on the land pursuant to a stipulation between the parties, the court held the government is liable for \$3 million-plus in just compensation for a

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43. *Id.* at 714.

44. *Id.* at 718-19.

45. *Id.* at 711.

46. 670 F.3d 1358 (Fed. Cir. 2012).

47. *Id.* at 1362-63.

48. *Id.* at 1365.

49. *Id.* at 1360.

50. *Id.* at 1360-61 (“The suit alleged that the Border Patrol's activities of patrolling outside the boundaries of the easement, assuming stationary positions on Otay Mesa's land, creating new roads, constructing a permanent tented structure on Otay Mesa's land, and installing underground motion-detecting sensors constituted a ‘permanent and exclusive occupation’ entitling the plaintiffs to just compensation under the Fifth Amendment's Takings Clause.”).

51. *Id.* at 1361.

temporary physical taking.<sup>52</sup> The court based compensation for the temporary taking on the rental value of the land as a skydiving training area.<sup>53</sup>

Both sides appealed: the federal government asserted that compensation should have been calculated on the basis of a permanent taking, and that the correct measure was the “before and after” method; the property owner asserted on cross-appeal that the court mistakenly limited the scope of the taking to the parcels and the time period specified in the stipulation because the Border Patrol placed more than the agreed-upon number of sensors on the land and placed them there earlier than it acknowledged.<sup>54</sup>

The federal circuit agreed with the government that the stipulation by which the property owners allowed the Border Patrol to install motion sensors was a permanent physical taking because the stipulation did not set forth a specific date by which the sensors must be removed.<sup>55</sup> Under the stipulation, the sensors are subject to removal if one of two conditions occurs, but those conditions might never occur “and most importantly, the easement has not terminated,”<sup>56</sup> and “in this case there is no potential termination of the sensor easement on the horizon.”<sup>57</sup>

Thus, we disagree with the Court of Federal Claims and Otay Mesa that the parties’ respective abilities to terminate the sensor easement in this case renders the taking temporary. Just as the landowner in *Loretto* could have terminated the taking by discontinuing use of the property as a residential rental facility, so Otay Mesa could decide to develop the entirety of its property, thereby terminating the sensor easement. Further, read in its entirety, we agree that the stipulation defines a “perpetual” easement that reserves in the government the right to “redeploy” the sensors in the case of Otay Mesa’s development of the property.<sup>58</sup>

The court, as quoted above, acknowledged the easement could be terminated by the property owner. This holding pretty much turns the notion of “permanent” on its head. It is one thing to conclude that a taking is “permanent” even though the government could decide to walk away (which it always can), and another to hold that a taking in which the landowner retains the right to unilaterally terminate is also “permanent.”

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52. *Id.* at 1362.

53. *Id.* at 1361-62.

54. *Id.* at 1364.

55. *Id.* at 1365.

56. *Id.*

57. *Id.* at 1367.

58. *Id.* at 1368 (citing *Loretto*, 458 U.S. at 419).

Since an inverse condemnation claim seeks compensation for the legal equivalent of an affirmative exercise of eminent domain (which is the forced acquisition of property from an unwilling private owner) it seems odd that the property owner has control of how long the government may occupy the property, something that is plainly lacking in “permanent” exercises of eminent domain.

In the end, however, it did not really matter whether the taking was “permanent” or “temporary” because the court remanded the case to the lower court for a recalculation of damages.<sup>59</sup> However, the court did not endorse the “before and after” method of calculating compensation as the government urged:

[t]he government has argued that, because the sensor easement is permanent, the compensation due Otay Mesa is much less than the compensation that would be due if the easement were temporary. We find this argument difficult to accept. It does not seem to us logical that Otay Mesa should receive less compensation for the taking of a permanent easement than it would for the taking of a temporary easement.<sup>60</sup>

But while the court held that the focus must remain on compensation for what has been taken, it concluded the only thing taken was an easement for the placement of sensors, and the court therefore should not have calculated compensation on the rental value of the land as a skydiving training area:

[t]he sensor easement clearly differs from a lease to use land for those purposes. By exclusively applying a rental value methodology and looking to rents paid for the use of land for skydiving and parachute training, the court, we believe, overlooked exactly what has been taken by the Border Patrol—a minimally invasive permanent easement to use undeveloped land that is unilaterally terminable by Otay Mesa. Under the easement, each sensor must be located so as not to affect the functionality of the property. In addition, should Otay Mesa wish to develop any portion of the property, any affected sensor will be removed or redeployed upon 30 days written notice that a grading permit has been issued by the County of San Diego. Finally, upon removal of a sensor, the portion of the easement relating to that sensor terminates. In short, the court did not squarely address the just compensation appropriate to compensate Otay Mesa for the taking.<sup>61</sup>

The court rejected the property owners’ cross-appeal and concluded that the lower court did not abuse its discretion when it limited the scope of the taking. Finding no clear error, the court affirmed.<sup>62</sup>

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59. *Id.* at 1368.

60. *Id.*

61. *Id.* at 1368-69.

62. *Id.* at 1369-70.

### E. Federal Circuit: Taking As A Result Of Police Power Is Not a Taking

In a case that was probably doomed from the start because of an earlier precedential ruling, the Federal Circuit concluded that the government's temporary seizure of the plaintiff's computer "for review" at a border stop and the subsequent destruction of the computer hard drive and resulting loss of data was not a taking because the seizure was an exercise of the government's power to control the border.<sup>63</sup>

We've been down the road of *Kam-Almaz* before, in *AmeriSource*,<sup>64</sup> for example, where the government seized the plaintiff's property as evidence in order to prosecute a third party, and by the time the government returned the property to its owner, it was worthless. In *Kam-Almaz*, Immigration and Customs Enforcement (ICE) agents took the laptop because Kam-Almaz was a "person of interest," promising to return it shortly.<sup>65</sup> However, during the time ICE had it, the hard drive failed.<sup>66</sup> On the hard drive were Kam-Almaz's business files, which were irretrievably gone. He sued for breach of contract and for a taking.<sup>67</sup>

The court held that a seizure for "law enforcement purposes" implicated only the "character of the government action" prong of the *Penn Central* test, and because ICE has the power to enforce the border, the seizure could not be a taking: "As we have noted, '[a]lthough the precise contours of the principle are difficult to discern, it is clear that the police power encompasses the government's ability to seize and retain property to be used as evidence in a criminal prosecution,'"<sup>68</sup>

This rationale does indeed lack "precise contours" because it makes little analytical sense, even if it might make for the right result. Saying that a seizure is not an inverse condemnation because it was not an exercise of eminent domain power gets you nowhere. Inverse condemnation is, by definition, a taking that results from an exercise of some power other than the power of eminent domain. There are other

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63. *Kam-Almaz v. United States*, 682 F.3d 1364 (Fed. Cir. 2012).

64. *AmeriSource Corp. v. United States*, 525 F.3d 1149 (Fed. Cir. 2008).

65. *Kam-Almaz*, 682 F.3d at 1373.

66. *Id.*

67. *Id.*

68. *Id.* at 1372 (citing *AmeriSource*, 525 F.3d at 1153).

ways to approach this that do not do violence to that basic principle. Here are the takeaways from the opinion:

- Back up your computer files. We all know this and we rarely do it, but this case is an object lesson in mission-critical data: be redundant. If your laptop is the one place that you have this stuff, pain is eventually coming your way, whether it is by government seizure, theft, or just plain bad luck.
- It is tough to make out an implied contract claim with the federal government (the court also rejected Kam-Almaz's claim that a promise by the ICE agent to return his hard drive in seven days was an enforceable implied bailment contract).<sup>69</sup>
- The courts still have not figured out how to reconcile the inverse condemnation theory (a justified exercise of some government power other than the power of eminent domain triggers the Fifth Amendment's requirement to pay compensation) with the idea that some seizures just do not seem like they should be compensable. The Federal Circuit, however, seems bound to the idea that if a seizure is under the police power, it cannot be a taking (the Seventh, as noted above, is also in this camp). We're holding out for another circuit or two to see the light, and then for this issue to go up to the Supreme Court.

#### F. *Takings May Result From Exercise of the Police Power*

Contrast *Kam-Almaz* with the result in the following two cases, both of which rejected the argument that the government could not be liable in inverse condemnation because it was not exercising the eminent domain power.

##### 1. *LORETTA REDUX*: N.Y. COURT OF APPEALS REVISITS AN OLD FRIEND

This tale from New York reminds us of the Supreme Court's decision in *Loretto*<sup>70</sup> and every takings lawyer worth his or her salt knows that *Loretto* stands for the proposition that a regulation allowing a physical invasion of private property—no matter how *de minimis* the invasion might be—is a *per se* regulatory taking.<sup>71</sup> In *Corsello v. Verizon New York*,

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69. *Id.* at 1374-75.

70. See *Loretto* 458 U.S. at 419.

71. *Id.* at 420 (holding that a cable company's attachment of a small box to the building was a taking).

*Inc.*,<sup>72</sup> the New York Court of Appeals held that when the telephone company “attached a box to a building that plaintiffs own, and used the box to transmit telephone communications to and from Verizon’s customers in other buildings,” the property owner could state a valid claim for inverse condemnation.<sup>73</sup> The court agreed with the appellate division, which acknowledged that the plaintiff stated a valid claim.<sup>74</sup>

The telephone company attempted to distinguish *Loretto*, arguing that inverse condemnation was not the correct cause of action, since the physical invasion was not permanent because Verizon offered to remove the equipment—thus trespass, which involves temporary invasions, was the appropriate form of relief.<sup>75</sup> This is reminiscent of the government’s argument in *Arkansas Game* regarding the temporary nature of the invasion, and it was as unsuccessful here as it was in the Supreme Court.<sup>76</sup>

The New York Court of Appeals held that Verizon has the power to take—so it can be a defendant in an inverse condemnation case—and that its argument that attaching the box to the building was merely trespass “rests on an outmoded understanding of the relationship between inverse condemnation and trespass.”<sup>77</sup> The court traced the history of the term “inverse condemnation” in New York law, and concluded that the modern understanding of the term describes cases where a landowner seeks to recover just compensation for a taking of property when condemnation proceedings have not been instituted.<sup>78</sup> In other words, a property owner claiming inverse condemnation asserts that the required remedy for a *de facto* taking is the payment of compensation. The court rejected Verizon’s characterization of its actions as mere trespass:

Verizon’s argument here—that inverse condemnation is normally available only when an entity has chosen to exercise its eminent domain power—in effect invites us to reject the more modern understanding of inverse condemnation, and to return to the time when that term described an option that might be given to a trespasser, either to vacate the property or to condemn it.<sup>79</sup>

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72. 67 N.E.2d 1177 (N.Y. 2012).

73. *Id.* at 1179.

74. *Id.*

75. *Id.* at 1181.

76. *Id.* at 1182.

77. *Id.* at 1181.

78. *Id.* at 1181-82.

79. *Id.* at 1182.

The court held that inverse condemnation is not the exclusive remedy, and that an entity having the power of eminent domain can also be sued in trespass or ejectment if the facts warrant it.<sup>80</sup>

The appellate division, while reaching the same conclusion, held that the three-year statute of limitations had run.<sup>81</sup> The New York Court of Appeals reversed, holding that the claim was “saved” by a statute that eliminates time limits when a telephone company wrongfully attaches equipment to private property.<sup>82</sup> The court held that when the statute was enacted in 1909, the owner’s remedy was trespass or ejectment, and the statute’s language, which eliminates limitations in cases of “presumption of [any] grant of, or [to] justify a prescription of any perpetual right” reveals that the legislature’s purpose was to eliminate all time barriers to the property owner’s claim:

When section 261 was enacted in 1909, an owner would have been expected to seek relief in an action for trespass or ejectment, in which the company might plead adverse possession or prescriptive easement as a defense. Today, as we explained above, the same facts would permit the owner to bring an inverse condemnation action, to which the company may assert a statute of limitations defense—a defense based, like adverse possession and prescriptive easement, on lapse of time. The fact that applicable legal doctrines have changed, and that new claims and defenses, with different names, are now in use should not permit a lapse-of-time defense to succeed where the authors of section 261 clearly intended it to fail.<sup>83</sup>

Finally, the court rejected the appellate division’s conclusion that Verizon was estopped from claiming that the property owner’s unfair and deceptive trade practices claim was barred by the three-year statute of limitations.<sup>84</sup> The appellate division held that it would not be fair to allow Verizon to claim the statute expired, because it had concealed its allegedly wrongful conduct. The New York Court of Appeals rejected this reasoning, however, because Verizon didn’t so much conceal its conduct of placing the box on the building, but rather simply did not tell the property owner it had done so. That being the case, Verizon should not be equitably estopped from asserting the statute of limitations had run.<sup>85</sup>

## 2. WHERE THE SIDEWALK ENDS: THE TAKINGS POWER IS DIFFERENT THAN THE POLICE POWER

Also contrast the decision in *Kam-Almaz* with the holdings from the Arizona Court of Appeals, a court that gets its doctrine right. In *Bonito*

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80. *Id.*

81. *Id.* at 1183.

82. *Id.* (citing N.Y. REAL PROP. LAW § 261 (McKinney 2012)).

83. *Id.* at 1183-84.

84. *Id.* at 1184.

85. *Id.*

*Partners, LLC v. City of Flagstaff*,<sup>86</sup> a property owner challenged a city ordinance that requires a landowner repair adjacent public sidewalks, else the city will do it and send the owner the bill, and if the landowner fails to pay, the city will put a lien on the property.<sup>87</sup> The city told the owner to fix the broken and dangerous sidewalk next to its property; the owner responded “[p]lease proceed with the repairs. Do not wait for Bonito Partners, LLC to do the work.”<sup>88</sup> The city fixed it, charged the owner, and eventually put a lien on the property. The owner sued for both a taking and for due process. The trial court granted the city summary judgment.<sup>89</sup> In addressing the takings argument, the court of appeals first noted that takings and due process are doctrinally distinct:

In its minute entry ruling dismissing the complaint, the trial court agreed with the City’s argument that the ordinance was a valid exercise of that power and therefore was not an unconstitutional taking. As we discuss below, the parties’ arguments, and the court’s ruling, conflate the analytically separate—albeit interrelated—issues regarding whether the ordinance is valid under the Due Process Clause of the Fourteenth Amendment and, if so, whether it nonetheless violates the Takings Clause.<sup>90</sup>

The court correctly concluded that under *Lingle*,<sup>91</sup> a court should not even analyze a takings claim unless it first determines the challenged law is a valid exercise of the police power under the Due Process Clause.<sup>92</sup> The court concluded that broken sidewalks are nuisances, and that under the “rational basis” test, it is a valid exercise of the city’s police power to abate nuisances.<sup>93</sup> But wait a minute, the owner argued, we did not cause the nuisance and it’s not on our property—it’s a public sidewalk, not ours.<sup>94</sup> The court rejected this argument, holding that there is “ample authority” that it is not an unreasonable and arbitrary exercise of municipal power to require a private landowner to maintain and repair public sidewalks on adjacent land.<sup>95</sup>

But that is not the end of the analysis, the court held, because if this valid regulation went “too far” in forcing the property owner to pri-

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86. 270 P.3d 902 (Ariz. Ct. App. 2012).

87. *Id.* at 904.

88. *Id.* at 905.

89. *Id.*

90. *Id.* at 906.

91. 544 U.S. at 528.

92. *Bonito Partners*, 270 P.3d at 906.

93. *Id.*

94. *Id.* at 907.

95. *Id.* While it is beyond the scope of this paper we do find this ruling troublesome. If the city can rule that you must fix public sidewalks even if you did not break them, could they extend that logic to publicly adjacent roads or other structures?

vately bear the cost that the entire public should bear, it might be a taking.<sup>96</sup> Not a *per se* taking (physical invasion or *Lucas* wipeout), but a taking analyzed under the three-factor *Penn Central* test, something that “[n]either party has yet addressed.”<sup>97</sup> The court vacated the summary judgment on the takings claim, and remanded the case to the trial court for application of the *Penn Central* test. Finally, the court of appeals rejected the property owner’s arguments that the ordinance is an unconstitutional tax under state law, that it is an illegal “special law,” and that it was beyond the power of the city to adopt.<sup>98</sup> This opinion is a good reminder that good ideas are not necessarily insulated from takings claims.

### III. What is Protected Property?

#### A. *South Carolina: Lawyer’s Services is “Property”*

In a decision every lawyer should love, in *Brown v. Howard*,<sup>99</sup> the South Carolina Supreme Court held:

We hold today that the Takings Clause of the Fifth Amendment to the United States Constitution is implicated when an attorney is appointed by the court to represent an indigent litigant. In such circumstances, the attorney’s services constitute property entitling the attorney to just compensation.<sup>100</sup>

Brown was appointed as defense counsel in a case in which Howard was charged with serious felonies “including first degree criminal sexual conduct, two counts of kidnapping, two counts of armed robbery, and possession of a weapon during the commission of a crime.”<sup>101</sup> South Carolina law limits attorneys’ fees in indigent criminal defense matters to \$3,500,<sup>102</sup> and Brown asked the court to withdraw, “stating that his obligations to an appointed capital case were taking up substantial amounts of time.”<sup>103</sup> The court declined Brown’s repeated “belligerent” requests.<sup>104</sup> When Brown refused to continue, the court threatened him with contempt, and he ultimately decided to continue with his representation of Howard.<sup>105</sup>

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96. *Id.* at 908.

97. *Id.*

98. *Id.* at 909.

99. 711 S.E.2d 899 (S.C. 2011).

100. *Id.* at 900.

101. *Id.*

102. S.C. CODE ANN. § 17-3-50(A) (2007).

103. *Brown*, 711 S.E.2d at 900.

104. *Id.* at 901.

105. *Id.*

After trial, the court awarded \$17,268 for costs for investigative work and expert fees (in excess of the statutory cap of \$500), but did not exercise its discretion to award Brown attorneys' fees in excess of the statutory \$3,500.<sup>106</sup> Brown appealed:

Appellant presents the issue as one of law: may a trial court properly deny a request to exceed the statutory cap for attorney's fees based on the attorney's unprofessional conduct? We answer that question "yes" under the unique and compelling circumstances presented. Given the egregious level of Appellant's inexcusable conduct and persistent disregard of the trial court's orders, we find the trial court did not abuse its discretion in refusing to award fees in excess of the statutory cap.<sup>107</sup>

The South Carolina Bar Association appeared as amicus and argued that when attorneys' services are conscripted for the public good, the Takings Clause is "implicated," even though the practice of law is a regulated profession.<sup>108</sup> The court agreed, holding that the legislature recognized "the inherent fairness in providing for an award of attorney's fees and costs in appointed cases."<sup>109</sup> The court concluded, however, that this is not simply a matter of legislative benevolence, but is required by the United States Constitution:

What the legislature has recognized for statutorily authorized appointments, we now find is additionally entitled to constitutional protection. We extend the constitutional protection to all court-ordered appointments.<sup>110</sup>

The court did not limit this to criminal appointments, but included appointment in all cases.<sup>111</sup> The court rejected the Bar's call for specific guidelines for attorney compensation, but the court "decline[d] to set bright-line rules" and left it up to the trial courts for determination case-by-case.<sup>112</sup> "The question of a taking is one of law. The question of what constitutes a fair attorney's fee under the circumstances would be one of fact, subject to an abuse of discretion standard of review."<sup>113</sup>

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106. One should probably not expect largess from the court when as an attorney you refuse to stand up when addressing the court, when you deny the court's ruling even after your objections are noted and preserved, and when you "consistently refuse[] at different points throughout the pre-hearing trial and now during the trial of this case to continue." *Id.*

107. *Id.* at 902.

108. *Id.* at 903.

109. *Id.* at 903.

110. *Id.*

111. *Id.* at 904 (noting that courts have the discretion to appoint counsel in "extraordinary" circumstances when "necessary to render justice." (citing *Ex parte Dibble*, 310 S.E.2d 440, 443 (S.C. Ct. App. 1983)).

112. *Id.*

113. *Id.*

Finally, the court concluded that its holding would take effect starting in Fiscal Year 2012.<sup>114</sup>

A single justice dissented and would not have reached the issue raised by the Bar, since Brown did not raise the argument.<sup>115</sup> Generally speaking amici cannot raise issues which the appellant does not, and the issues are considered waived.<sup>116</sup> The dissenting justice also concluded that the trial court abused its discretion by denying fees in excess of the statutory cap, since the only reason stated by the trial court was that Brown acted petulantly and unprofessionally.<sup>117</sup> The statute requires consideration of whether the fee request is “reasonable.”<sup>118</sup>

#### *B. Ninth Circuit: No Vested Rights Taken by Oregon’s Measure 49*

Oregon’s Measure 37 was the initiative measure by which the voters required the state to compensate owners whose private property was devalued by land use regulations.<sup>119</sup> It essentially required the state to either allow development or pay, even if the regulation did not run afoul of the high thresholds of federal regulatory takings doctrine. Measure 49, another statute adopted by the voters, replaced and modified Measure 37, and, as the Oregon Supreme Court held in *Corey v. Department of Land Conservation & Development*, “conveys a clear intent to extinguish and replace the benefits and procedures that Measure 37 granted to landowners.”<sup>120</sup> The courts then faced the question of what do with the landowners who had already begun to assert their Measure 37 rights before they were stripped away. In *Bowers v. Whitman*,<sup>121</sup> the United States Court of Appeals for the Ninth Circuit held that Measure 49:

[E]xempted a property owner from pursuing compensation pursuant to the new provisions in Measure 49 if the property owner had “a common law vested right . . . to complete and continue the use described in the waiver.” . . . Measure 49 does not mandate any particular process for establishing vested rights. Claimants seeking a vested rights determination generally either applied for a local decision or sued for a declaratory judgment.<sup>122</sup>

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114. *Id.* at 905. One might think that if compensation was constitutionally required, it wouldn’t matter that payment had not been budgeted for the current fiscal year.

115. *Id.* (Pleicones, J., dissenting).

116. *Id.*

117. *Id.*

118. *Id.*

119. OR. REV. STAT. § 197.352 (2005).

120. *Corey v. Dep’t of Land Conservation & Dev.*, 184 P.3d 1109, 1113 (Or. 2008).

121. 671 F.3d 905 (9th Cir. 2012).

122. *Id.* at 910-11.

Property owners who had started the Measure 37 process but had not recovered compensation and who were thus halted in their tracks, sued in federal court asserting a taking of their right under Measure 37 to compensation and other vested rights:

First, Bowers Plaintiffs alleged that there had been a “taking” of protected property in violation of the Fifth Amendment due process clause. Bowers Plaintiffs asserted that those property interests were “statutory rights to monetary compensation,” “vested and accrued claim[s] for compensation,” “legal entitlements . . . in lieu” of monetary compensation, or “Measure 37 waivers and the entitlement to monetary compensation.” Second, Bowers Plaintiffs alleged that Measure 49 violates equal protection guarantees under the Fourteenth Amendment. Third, Bowers Plaintiffs alleged that Measure 49 violates substantive due process under the 14th Amendment.<sup>123</sup>

The Ninth Circuit rejected each of these arguments, and the bulk of the opinion is devoted to analysis of whether the plaintiffs possess rights that have “vested” and are thus protected “property” under the Takings Clause.<sup>124</sup> The court professed confusion as to what interest they asserted was the property right that had vested,<sup>125</sup> and rejected three possibilities: (1) “accrued causes of action” under Measure 37 were not vested property rights because they had not been reduced to final judgment, (2) the right to statutory compensation under Measure 37 was not vested because it was not an “express and unequivocal promise” to pay compensation, and (3) Measure 37 did not give the plaintiffs any rights to a particular land use.<sup>126</sup> On the final claim the court analogized the Measure 37 rights to land use permits, and concluded those claims were not ripe under *Williamson County*.<sup>127</sup>

#### **IV. Penn Central Issues**

The three-part *Penn Central* test for an *ad hoc* regulatory taking—reaffirmed by the Supreme Court as the regulatory takings “benchmark” in all but a few cases—tasks courts with evaluating the economic impact of the regulation on the property’s use, the property owner’s distinct investment-backed expectations, and the character

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123. *Id.* at 912.

124. *Id.* at 913 (“Thus, the critical issue is whether Plaintiffs’ Measure 37 property interests have vested such that Oregon could not remove or modify the right without committing a constitutional taking.”).

125. *Id.* (“we emphasize that Plaintiffs failed to articulate any clear characterization of the exact property interest to which they are entitled”).

126. *Id.* at 914-16.

127. *Id.* at 916 (citing *Williamson Cnty. Reg’l Planning Comm’n v. Hamilton Bank of Johnson Cnty.*, 473 U.S. 172 (1985)).

of the government action.<sup>128</sup> Throw all of these “factors” into a pot, stir, and *voila*, the answer of whether the regulation goes “too far” is supposed to emerge, even though none of the factors are supposed to be dispositive.<sup>129</sup> Try as they might, however, many courts do not really have a good idea of how to apply this test, even though in *Lingle*, the Supreme Court affirmed that it remains the “default” analysis to evaluate most takings claims.<sup>130</sup>

#### *A. Federal Circuit and the Denominator: Denial of a Permit to Fill Wetlands Might be a Taking*

The Federal Circuit’s decision in *Lost Tree Village Corp. v. United States*,<sup>131</sup> brought a measure of sanity to the issue of how much of the property owned by the plaintiff is included when determining whether value has been wiped out under *Lucas*, or the extent of the economic impact of the regulation on the claimant under *Penn Central*. These tests require an analysis of the impact of the regulatory action on the “parcel as a whole,” and since *Penn Central* first made the inquiry relevant, the courts and litigants have been trying to figure out the “denominator.” Is it everything the plaintiff owns? Everything nearby? Everything it once owned? The discrete parcel by itself?

The Federal Circuit held that a single parcel owned by the plaintiff was the relevant parcel against which the impact of the Corps of Engineers’ denial of a section 404 wetlands dredge and fill permit is to be measured.<sup>132</sup> The court overturned a Court of Federal Claims decision which concluded the relevant parcel was that single plot plus an additional nearby lot, plus “scattered wetland holdings in the vicinity” also owned by the same owner.<sup>133</sup> The Court of Federal Claims had rejected the Corps’ even broader argument which asserted that the relevant parcel was the entirety of the 1,300-acre gated community which the plaintiff had started to build in 1968, part of its ownership of 2,750 acres on islands near Vero Beach, Florida.<sup>134</sup> The Court of Federal Claims held that the denial of the permit resulted in a 59% loss of value of the “relevant parcel,” which was not enough to support a *Penn Central* takings claim.<sup>135</sup>

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128. *Penn Cent.*, 438 U.S. at 105.

129. *See id.* at 105-06.

130. *Lingle*, 544 U.S. at 535.

131. *Lost Tree Vill. Corp. v. United States*, 707 F.3d 1286 (Fed. Cir. 2013).

132. *Id.* at 1287.

133. *Id.* at 1294.

134. *Id.* at 1291.

135. *Id.*

The Federal Circuit concluded that despite the plaintiff's long-term ownership and development of nearby properties, the single parcel was really a stand-alone piece and that the landowner's "economic expectations" regarding this parcel were not tied to its ownership of the others:

[h]ere, Lost Tree did not treat Plat 57 as part of the same economic unit as other land it developed into the John's Island community. The trial court correctly found that Lost Tree did not include Plat 57 in its formal or informal development plans for the community. The only proposal that ever addressed Plat 57 was the unapproved 1980 Permit Application. While the 1980 application proposed dedicating Plat 57 as a wildlife preserve to mitigate other development, Lost Tree withdrew that application. Thus, when the Corps eventually granted Lost Tree's permit application, Plat 57 had no designated use.<sup>136</sup>

The court concluded with this:

[t]he Court of Federal Claims erred by aggregating Plat 57, Plat 55, and the scattered wetlands as the relevant parcel. The only links between the two plats identified by the trial court are: 1) they are connected by the 323 foot strip of land owned by Lost Tree and therefore "undoubtedly contiguous," and 2) both currently are held with the "usage objective[ ] . . . to sell for profit the lots" on each plat. Similarly, the scattered wetlands are only linked to Plat 57 by their geographic location within the gated community of John's Island. Here, the mere fact that the properties are commonly owned and located in the same vicinity is an insufficient basis on which to find they constitute a single parcel for purposes of the takings analysis.<sup>137</sup>

The court remanded to the Court of Federal Claims with instructions to determine the impact of the permit denial on the single parcel, and then measure whether this amounts to a taking.<sup>138</sup>

#### *B. Florida: Investment-Backed Expectations Measured Parcel-by-Parcel, Not Against All Property Owned*

In *Galleon Bay Corp. v. Board of County Commissioners*,<sup>139</sup> the Florida District Court of Appeals held that the trial court improperly applied the "investment-backed expectations" prong of the *Penn Central* factors by not treating the parcels at issue separately from the plaintiff's other parcel which it had developed "decades earlier." The appeals court reversed the judgment for the County and remanded the case, instructing the trial court to enter judgment in favor of the property owner and hold a trial on compensation.<sup>140</sup> It is a long fact pattern with a relatively short opinion.

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136. *Id.* at 1293 (citation omitted).

137. *Id.* at 1294 (citation omitted).

138. *Id.*

139. 105 So. 3d 555 (Fla. Dist. Ct. App. 2012).

140. *Id.* at 569.

Pay particular attention to a footnote for a flavor of what just might have added to the court of appeals' determination that the law was on the property owner's side. The trial court initially ruled in favor of the property owners, but after that judge retired and was replaced by a different judge, things were "different"—[t]he motion to disqualify included the affidavits of both Galleon's principal, Ms. Vivienne Schleu, and its counsel, attorney James Mattson. Ms. Schleu's affidavit stated in pertinent part:

On January 30, 2006, during a hearing on the governments' motions for summary judgment . . . before Chief Judge Richard Payne, I overheard an Assistant Monroe County Attorney make a statement to his defense colleagues, to the effect that the defendants could expect a different outcome from Judge Audlin . . . that "things would be different" after Judge Payne retired. I believe he made the statements after Judge Payne made his oral rulings.<sup>141</sup>

In his affidavit, Mr. Mattson stated that he had overheard the same statements. Mr. Mattson also asserted that at a case management conference, Judge Audlin "intimated that he was prepared to reconsider all non-final orders rendered by Judge Payne." The State and the County filed motions for reconsideration of Judge Payne's prior order granting summary judgment on liability. Judge Audlin granted the motions for reconsideration and ultimately vacated the order granting summary judgment.

One final note: readers should appreciate the court incorporating three maps in the opinion. They help visualize the issues and we wish more courts would do this.

### *C. Ninth Circuit: No Facial Penn Central Taking In Ordinance Creating Mobile Home Zoning*

A regulatory takings opinion from the Ninth Circuit, *Laurel Park Community, LLC v. City of Tumwater*,<sup>142</sup> is another example of a court applying the *Penn Central* test, in this case to evaluate property owners' claims that the enactment of a new zoning ordinance was a facial taking. Whether it does so correctly, or whether it adds to the growing list of courts that simply do not know what to do with *Penn Central*, we leave to you.

Tumwater, Washington has more than a few mobile home parks, and some of those had plans to close.<sup>143</sup> The residents of the parks, and the park owners had different responses to these plans.

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141. *Id.* at 564 n.9.

142. 698 F.3d 1180 (9th Cir. 2012).

143. *Id.* at 1183.

“[M]obile home owners tended to seek protection from park closures, while park owners tended to emphasize respect for private property and the legal limits on property restrictions.”<sup>144</sup> The residents succeeded in getting the city council to adopt two new ordinances, creating a new zoning category, “Manufactured Home Park.”<sup>145</sup> Six of Tumwater’s ten mobile home parks were subject to this new zoning.<sup>146</sup> Previously, the parks were subject to a variety of zoning restrictions, allowing “a wide range of uses . . . including multi-family residences and other dense types of developments.”<sup>147</sup>

The new MHP zoning severely restricted those uses.<sup>148</sup> First, the ordinances specify certain “permitted uses,” which are allowed as of right: manufactured home parks, one single-family dwelling per lot, parks, trails, open spaces, other recreational uses, family child care homes, and child mini-day care centers. Second, the ordinances specify eleven “conditional uses,” which are allowed via a discretionary conditional use permit: churches, wireless communication facilities, cemeteries, child day care centers, schools, neighborhood community centers, neighborhood-oriented commercial centers, emergency communications towers, group foster homes, agriculture, and bed and breakfast establishments. Third, the ordinances permit still other uses if specified criteria are met: “[t]he City Council may approve the property owner’s request for a use exception if the property owner demonstrates a. they do not have reasonable use of their property under the MHP zoning; or b. the uses authorized by the MHP zoning are not economically viable at the property’s location.”<sup>149</sup>

Several of the owners of the parks subject to the new ordinances asserted they effectively prohibited them from closing and using their properties for other uses, and therefore the new zoning ordinance constituted a Fifth Amendment taking and violated the state constitution.<sup>150</sup> They sued in federal court. (How, we ask, given *Williamson County*? But the court doesn’t tell us.)<sup>151</sup> The District Court granted summary judgment to the city and, applying the *Penn Central* three-part test, the Ninth Circuit affirmed. The court held that the plaintiffs

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144. *Id.* at 1186.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 1188.

151. See *infra*, Part V (discussion of *Williamson* and its effects on federal vs. state forums).

really did not offer much evidence of the economic impact of the ordinances on their properties, noting that diminution in value as a result of the application of a zoning ordinance alone does not mean that there had been a taking, and “[a]t best, Plaintiffs have presented information that reflects an economic loss of less than 15% with respect to one of the three Plaintiff properties and *no effect* on the other two Plaintiff properties or the properties of the remaining affected MHP parks.”<sup>152</sup>

The court next held that the property owners’ expectations that they could make more intensive use of their properties under the old zoning regime were speculative (“that at some indefinite time in the future they could convert their properties to some other specific uses”), and that the new ordinances did not interfere with their “primary expectation concerning the use of the parcel” (a mobile home park).<sup>153</sup>

Finally, the court evaluated the character of the government action. “[A]s a practical matter, Plaintiffs must continue to use their properties as manufactured home parks. Indeed, that was the intended effect of the ordinances.”<sup>154</sup> The court concluded that this factor “slightly favors [the property owners’] taking claims.”<sup>155</sup> The benefit the ordinance confers on the residents (continued ability to be housed in a mobile home park) could be distributed more widely, but “[t]hat analysis goes only so far.”<sup>156</sup> The ordinances do not require that the property owners must keep using their properties as mobile home parks, but allows them, with restrictions, to convert to some other use.

#### D. *New York: No Penn Central Taking With “Only” a 46% Loss In Value*

In *Noghrey v. Town of Brookhaven*,<sup>157</sup> New York’s Appellate Division overturned a jury’s verdict that the town’s zoning regulations worked a *Penn Central* taking because the loss of value determined by the jury was not enough:

[t]he jury was instructed that damages were to be assessed by determining the value of the properties immediately before and immediately after the rezoning. The difference between those two values would be the plaintiff’s damages. Given the expert testimony, the lowest value which could be ascribed to [the property] prior to the rezoning was \$775,500. The damages award of \$360,000 represented only a 46% loss in value from that figure. Such a diminution in value cannot support a

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152. *Laurel Park*, 698 F.3d at 1189 (emphasis in original).

153. *Id.* at 1190.

154. *Id.*

155. *Id.*

156. *Id.*

157. 938 N.Y.S.2d 613 (N.Y. App. Div. 2012).

finding that a regulatory taking occurred. Accordingly, there was no fair interpretation of the evidence by which the jury could have found both that the rezoning effectuated a regulatory taking of Liberty Plaza and that the plaintiff's damages as to that property were only \$360,000.<sup>158</sup>

The opinion is one of those frustratingly cryptic decisions that we have become accustomed to seeing from the Appellate Division, and provides no real analysis of the issues or the existing caselaw. Apparently, the loss of "only 46%" is not enough as a matter of law, regardless of the other two *Penn Central* factors, but the court fails to tell us why it thinks this is so. The opinion also conflates the determination of whether a taking has occurred at all with the determination of the compensation owed, and it seems odd that the court was willing to overturn a jury's verdict on what are "ad hoc factual inquiries," the classic case where appeals courts are usually reluctant to second guess a jury's conclusions.

## V. Ripeness

Most federal takings claims against state and local government do not get heard in federal court except to dismiss them on preclusion grounds under the one-two punch of *Williamson County*<sup>159</sup> and *San Remo Hotel v. County of San Francisco*.<sup>160</sup> *Williamson County* forces property owners into state court because a claim under the Fifth Amendment is not ripe until the state has denied compensation, which includes pursuit of a state law takings claim in state court.<sup>161</sup> *Williamson County*'s rationale was that there is no violation of the Fifth Amendment by a state or local government unless and until the property owner could both show that there was a taking, and that the state had denied compensation.<sup>162</sup> So a property owner must lose his state takings claim to ripen it into a federal takings claim. *San Remo Hotel* penalizes a property owner for pursuing a state law claim in state court by concluding that she will unwillingly litigate her federal takings claim in the course of litigating her state law takings claim.<sup>163</sup> Thus, when her federal claim has been ripened by the

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158. *Id.* at 615-16 (citations omitted).

159. See *Williamson Cnty. Reg'l Planning Comm'n*, 473 U.S. at 172.

160. See *San Remo Hotel, L.P. v. City and Cnty. of San Francisco*, 545 U.S. 323 (2005).

161. 473 U.S. at 176.

162. *Id.*

163. *San Remo Hotel*, 545 U.S. at 352.

visit to state court, the preclusion doctrines kick in to prevent her from raising it in federal court.

This section details the significant cases interpreting and applying the takings ripeness doctrine.

#### *A. Alabama: No Such Thing as a Regulatory Taking*

The *Williamson County* ripeness rule presumes that a property owner has the ability to recover compensation under state law in state courts.<sup>164</sup> In the absence of that ability, a federal court should have no impediment to hearing a takings claim. In light of that, the Alabama Supreme Court's ruling in *Town of Gurley v. M & N Materials, Inc.*<sup>165</sup> takes on added significance because the court held that Alabama law does not recognize a cause of action for a regulatory taking, and that under the Alabama Constitution, the only time a property owner may assert a takings claim is when her property is physically taken:

[w]ithin the plain meaning of its text, § 235 does not make compensable regulatory “takings” by an entity or person vested with the privilege of taking property for public use. As set forth in our long-standing precedent, the taking, injury, or destruction of property must be through a physical invasion or disturbance of the property, specifically “by the construction or enlargement of [a municipal or other corporations’] works, highways, or improvements,” not merely through administrative or regulatory acts.<sup>166</sup>

M & N owned a rock quarry in a previously unincorporated part of the county.<sup>167</sup> A group of town residents didn't appreciate the quarry and formed a group to oppose it, with one member of the group eventually getting himself elected mayor of the Town.<sup>168</sup> The Town had a problem, however. It apparently could not regulate the quarry's operations because the quarry was beyond Town limits.<sup>169</sup> So the Town

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164. All of this presumes that the state law of whatever jurisdiction we're talking about actually recognizes a cause of action for compensation for a regulatory taking. Federal courts have bent over backwards to tell property owners that they need to go to state court, even when the state remedy is not exactly clear. Some state courts, however, have limited the remedy for a regulatory taking in certain circumstances (see Ohio and Pennsylvania, for example), and still others have never expressly recognized a state law claim for a regulatory taking, even though after *First English* it's hard to see how they could.

165. *Town of Gurley v. M & N Materials, Inc.*, Nos. 1110439 & 1110507, 2012 WL 6634447 (Ala. Dec. 21, 2012).

166. *Id.* at \*9.

167. *Id.* at \*1.

168. *Id.*

169. *Id.*

annexed the property in order “to give [it] control over use of the property,” and when the quarry applied for a business license, the application was predictably denied.<sup>170</sup> Two weeks later, the Town imposed an immediate moratorium prohibiting it from accepting any applications for any type of permit related to the property for ninety days while it “studied” what to do with the land.<sup>171</sup> This moratorium was extended for an additional ninety days. After all the studying, the Town eventually zoned the property “agricultural,” which—surprise, surprise—prohibited quarrying.<sup>172</sup> The state court lawsuit followed.

As quoted above, the Alabama Supreme Court eventually rejected the property owner’s claim that section 235 of the Alabama Constitution allowed for the recovery of compensation for a regulatory taking, and limited the claim to only physical takings.<sup>173</sup> The court also rejected the property owner’s call to interpret this provision in line with federal law because the Fifth Amendment is worded differently.<sup>174</sup> The court noted that the property owner could have brought its federal regulatory takings claims in state court, but it did not:

We also note that M & N could have asserted its inverse-condemnation claim, which is based upon the administrative and regulatory actions of the Town, pursuant to the Just Compensation Clause. M & N initially asserted its claim as a federal constitutional claim, but it later voluntarily dismissed that claim in order to keep this case in the state trial court. M & N, as master of its complaint, chose to forgo, for strategical purposes, any relief it may have been entitled to under the federal Constitution.<sup>175</sup>

One justice dissented, reasoning that Alabama should “apply some form” of federal precedents to the interpretation of section 235, and that under the *Penn Central* test as transported to state law, a jury could have concluded that the Town took the quarry’s property.<sup>176</sup> Because the Alabama Supreme Court has made it very clear that there is no such animal as a “regulatory taking” under Alabama law, Alabama property owners may now bring their federal regulatory takings claims directly in federal court without worrying about the *Williamson County/Hotel San Remo* trap.

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170. *Id.* at \*2.

171. *Id.* at n.1.

172. *Id.*

173. *Id.* at \*18.

174. *Id.*

175. *Id.* at \*10 (citations omitted).

176. *Id.* at \*18 (Murdock, J., dissenting).

**B. Fifth Circuit: Williamson County Ripeness Does Not Bar Due Process Claim In Federal Court**

*Williamson County* ripeness gets particularly bizarre when courts extend it beyond the Takings Clause, since what thin justification exists for the rule is grounded in the language of the Fifth Amendment. Yet, the lower federal courts regularly apply it to Equal Protection and Due Process Claims, somehow transforming *Williamson County* from a limited takings requirement to a full-blown bar to the federal courthouse door for any plaintiff alleging a property-related claim.<sup>177</sup>

Well, in *Bowlby v. City of Aberdeen*,<sup>178</sup> the United States Court of Appeals for the Fifth Circuit provided a different view, and injected a modicum of reality into the sometimes strange world of *Williamson County*. In *Bowlby*, the plaintiff had a business permit which the City summarily revoked.<sup>179</sup> She sued in federal court alleging a taking, and procedural due process and equal protection violations. The court promptly dismissed her complaint under *Williamson County*.<sup>180</sup> She did not pursue an appeal of the takings dismissal, but asserted that *Williamson County*'s state litigation requirement of that case did not require dismissal of the due process or equal protection claim.<sup>181</sup>

The Fifth Circuit reversed, concluding that *Williamson County* is applicable only to takings claims, and not due process or equal protection claims:

[i]n *Bowlby*'s case, however, her business permits were definitively taken away. While it is possible that, had she appealed to the mayor or Board of Alderman, she may have regained her permits, the actual taking is "irreversible," unlike the application of a regulation . . . More importantly, under this Court's precedents, a procedural due process claim that is brought concurrently with a takings claim, such as *Bowlby*'s, should be analyzed not under the principles of *Williamson County*, but according to "general ripeness principles."<sup>182</sup>

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177. See *Covington Court Ltd. v. Vill. of Oak Brook*, 77 F.3d 177, 179 (7th Cir. 1996) (due process); *Bateman v. City of West Bountiful*, 89 F.3d 704, 709 (10th Cir. 1996) (due process and equal protection claims subject to *Williamson County*). *River Park, Inc. v. Country Club Estates, Ltd.*, 23 F.3d 164, 167 (7th Cir. 1994) (substantive due process subject to *Williamson County*'s state litigation requirement). For a particularly weird angle, see *Braun v. Ann Arbor Twp.*, 519 F.3d 564 (6th Cir. 2008), which concluded that all of the property owner's federal claims were "takings" claims (even though they sought different relief), and dismissed the plaintiff's equal protection and due process claims along with its takings claim.

178. 681 F.3d 215 (5th Cir. 2012).

179. *Id.* at 218.

180. *Id.*

181. *Id.*

182. *Id.* at 223.

If you read the entire opinion, you will appreciate the Court's analysis.

### C. *Hawaii: Property Owner Need Not Change the Law to Ripen a Takings Claim*

In *Leone v. County of Maui*,<sup>183</sup> the Hawaii Intermediate Court of Appeals held that a plaintiff alleging a regulatory taking is not required to seek an amendment to a Community Plan (CP) in order to ripen her claim. A CP amendment is a legislative act, and property owners are not required to try to change the law before they seek just compensation. The trial court determined the plaintiffs' regulatory takings claims were not ripe because they should have tried to change offending land use regulations which allegedly deprive their property of all economically beneficial uses.<sup>184</sup> The Court of Appeals reversed, concluding:

[b]ecause a Community Plan amendment is not an administrative act, it cannot reasonably be required as a step in reaching a final agency determination for ripeness purposes. Ripeness requires only that landowners take advantage of any available variances or waivers under existing law; it does not require them to undertake changing the law itself.<sup>185</sup>

This case should help put to rest the idea that *Williamson County* is an "exhaustion" requirement that is applicable even in state courts. That case does not mean that property owners must undertake every possible avenue of relief, nor does it adopt a rule of avoidance. Instead, it should only be read to require a plaintiff to take advantage of available procedures which would help a reviewing court determine what has been taken; in other words, a final administrative decision applying existing law to the plaintiff's proposed use.

### D. *Was That So Hard? Third Circuit Lets Landowner Raise Federal Constitutional Claims in Federal Court*

Try explaining that headline to anyone but a land use lawyer, and they would think you are a little bit crazy. What is so odd about a federal court actually exercising its core jurisdiction to consider whether a local government has violated someone's federal constitutional rights?

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183. 284 P.2d 956 (Haw. Ct. App. 2012).

184. *Id.*

185. *Id.* at 969. Disclosure: the author filed an amicus brief in the case in support of the property owner, arguing that *Williamson County* does not require a takings plaintiff to attempt to change the law to ripen her claim.

As we noted earlier, federal takings claims are nearly impossible to raise in federal court unless the stars align just right. In *R & J Holding Co. v. Redevelopment Authority of County of Montgomery*,<sup>186</sup> they apparently did, and the United States Court of Appeals for the Third Circuit concluded that a property owner did not litigate its federal takings claims in an earlier state court case, and thus was able to raise them in federal court.

This case arose from the same fact pattern that gave us *In re Condemnation of 110 Washington Street*,<sup>187</sup> a case in which the state court invalidated the attempted taking because the Redevelopment Authority had delegated its power of eminent domain to a private land developer. In *R & J Holding*, after the Pennsylvania court invalidated the taking and awarded the property owner its attorneys' fees and costs, the land owner filed a civil rights action under 42 U.S.C. § 1983 in federal court seeking just compensation, alleging his rights to improve and to sell the property were taken.<sup>188</sup> The district court dismissed under *Williamson County*, because the owner should have sought compensation from state courts by way of an inverse condemnation claim.<sup>189</sup>

The owner did so, and brought a state law inverse condemnation claim in a Pennsylvania court. It also expressly reserved its federal takings claim under *England*,<sup>190</sup> and split its federal claims from its state claims.<sup>191</sup> The state court agreed that there was a taking under state law, and ordered a calculation of compensation.<sup>192</sup> The Redevelopment Authority appealed, and the court reversed, concluding that Pennsylvania law "does not entitle a prevailing condemnee to compensatory damages," because a condemnee's recovery is limited to "the out-of-pocket expenses available" which the owner had already recovered.<sup>193</sup> "Plaintiffs' brief before the Commonwealth Court repeatedly invoked their rights under the Pennsylvania Constitution, but never directly mentioned their rights under the United States Constitution."<sup>194</sup> The Pennsylvania Supreme Court declined to review the case.<sup>195</sup>

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186. 670 F.3d 420 (3d Cir. 2011).

187. *In re Condemnation of 110 Washington Street*, 767 A.2d 1154 (Pa. Commw. Ct. 2001).

188. *R & J Holding*, 670 F.3d at 423.

189. *Id.* at 425.

190. *England v. La. State Bd. of Med. Exam's*, 375 U.S. 411 (1964).

191. *R & J Holding*, 670 F.3d at 426.

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

The owner then returned to federal court, raising the federal Fifth Amendment claim it had raised in its first federal action, and it had reserved in the subsequent state case. The district court dismissed both the federal claims and the supplemental state claims.<sup>196</sup> The Third Circuit reversed.<sup>197</sup> First, it validated the owner's claim splitting, holding that “[p]laintiffs clearly stated their intention to split their state and federal claims,” and the Redevelopment Authority “raised no objections.”<sup>198</sup> Consequently, Pennsylvania's law of claim preclusion (“*res judicata*” to you old-timers) did not prevent the owner from raising its federal claim:

[p]laintiffs reiterated their intent to reserve their federal claims in their filings before the Pennsylvania Commonwealth Court and the Pennsylvania Supreme Court. Defendants uttered not a word about the reserved federal claims while Plaintiffs prosecuted their state claims all the way to the Pennsylvania Supreme Court. They cannot now benefit from their silence.<sup>199</sup>

The court pointedly based its rationale on Pennsylvania's preclusion law,<sup>200</sup> and not on the validity of the *England* reservation, thus likely insulating that part of the opinion from Supreme Court review. The Third Circuit also rejected the Redevelopment Authority's arguments that issue preclusion (“collateral estoppel”) applied:

[t]he parties agree that the Plaintiffs avoided directly raising their federal claims before the Pennsylvania state courts. And in its opinion holding that the Eminent Domain Code did not provide for “just compensation” under the circumstances of this case, the Pennsylvania Commonwealth Court never directly addressed whether such an interpretation was permitted under the United States Constitution.<sup>201</sup>

The court rejected the argument that in litigating the state issue, the state court naturally determined the federal claim.<sup>202</sup> The court also rejected the Redevelopment Authority's argument that its action was not a taking because it was merely an attempted transfer of title and it did not attempt to take physical possession.<sup>203</sup> The court held that

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196. *Id.*

197. *Id.* at 423.

198. *Id.* at 427.

199. *Id.* at 428.

200. *Id.*

201. *Id.* at 429 (citations omitted).

202. *Id.* at 430 (“The parties never actually litigated the federal constitutionality of the Pennsylvania Eminent Domain Code and the state courts never actually decided it. A past conclusion that the Takings Clause of the Pennsylvania Constitution and the Takings Clause of the United States Constitution are co-extensive does not constitute a present determination that an interpretation of state law accords with the United States Constitution, particularly when the federal constitutionality of that interpretation was never directly presented to the state court.”).

203. *Id.*

“this is a *per se* taking because title to the land actually passed from the Plaintiffs to the Authority when the Authority filed a Declaration of Taking on July 11, 1996.”<sup>204</sup> Finally, the court rejected the Redevelopment Authority’s argument that the lawsuit was barred by the statute of limitations.<sup>205</sup> One judge dissented, arguing that the land-owner engaged in “procedural machinations” and that the federal claims were waived because the Pennsylvania Eminent Domain Code requires all objections to be made, and the owner reserved its federal claims, and “the Code does not authorize parties to make such a choice.”<sup>206</sup>

#### *E. Justice Souter: Dismissal Under Williamson County is So Easy, a Caveman Could Do It*

How difficult is it for the government to obtain a *Williamson County* dismissal that a federal takings claim is not ripe for federal court review? Not too hard, said Justice Souter<sup>207</sup> in *Efron v. Mora Development Corp.*<sup>208</sup> a case from the First Circuit involving a claim for a regulatory taking in Puerto Rico.

The Puerto Rico highway department condemned Efron’s land, and although he objected, the court transferred ownership and possession to the department.<sup>209</sup> Efron then went to federal court on a civil rights claim against the department and Mora Development, alleging that they conspired to take his land.<sup>210</sup> He also brought a state law tort claim for “unlawful deprivation of the use and quiet enjoyment of property.”<sup>211</sup> The district court granted summary judgment to the defendants because Efron had not first brought his federal takings claim to a Puerto Rico court, as required by *Williamson*

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204. *Id.* (citing *Yee v. City of Escondido*, 503 U.S. 519, 522 (1992) (per *se* taking when government physically occupies or takes title)).

205. *Id.* at 432.

206. *Id.* at 433 (Nygaard, J., dissenting).

207. But wait . . . Justice Souter? He retired back in 2009. Recall that Supreme Court justices who retire from the Court don’t really “retire” in the sense that they may continue to sit and hear cases in the federal courts of appeals. Justice O’Connor has done so, and Justice Souter did so in *Efron*. See Robert Barnes, *Retired Supreme Court Justices Still Judge—and Get Judged*, WASH. POST, March 10, 2013, [http://articles.washingtonpost.com/2013-03-10/politics/37605476\\_1\\_high-court-supreme-court-justice-sandra-day-oconnor](http://articles.washingtonpost.com/2013-03-10/politics/37605476_1_high-court-supreme-court-justice-sandra-day-oconnor).

208. 675 F.3d 45 (1st Cir. 2012).

209. *Efron*, 675 F.3d at 46.

210. *Id.*

211. *Id.*

*County*.<sup>212</sup> The court dismissed Efron’s supplemental state law tort claim without prejudice.<sup>213</sup>

The court awarded Mora Development \$92,000 in attorneys’ fees under 42 U.S.C. § 1988, concluding the federal claim was frivolous.<sup>214</sup> The court awarded that amount because it concluded that much of the cost associated with discovery on the state tort claim was “inextricably interrelated” with Efron’s federal claim.<sup>215</sup> The First Circuit, in an opinion by Justice Souter, vacated the decision and sent the case back to the district court.<sup>216</sup> The *Williamson County* dismissal was based only on the fact that Efron had not first sought relief under Puerto Rico law, and:

[T]here is no basis in the record brought to our attention that suggests that these facts are inextricably associated with the tortious conduct alleged in the supplementary action, or that any effort was required to unearth the elementary basis for dismissing the Fifth Amendment claim. The Commonwealth officials must have known of Efron’s failure to resort to local process, and Mora’s principal could presumably have found this out with nothing more than a phone call. A few pages of pleadings and affidavits would have sufficed to place the law and facts before the court. Perhaps there is a more supportive basis for the amount of the fee order than meets the appellate eye, but on the record as cited for our consideration, the need for over \$90,000 in fees for discovery and summary judgment in Mora’s favor . . . is inexplicable.<sup>217</sup>

#### *F. First Circuit: Inverse Condemnation Claim in State Court is an “Adequate Procedural Pathway” to Compensation*

How, as an appellant, do you know you are in trouble? When an opinion starts like this, that’s how:

[a]lthough a residential subdivision proposed for construction in a bucolic Rhode Island town never saw the light of day, its ghost continues to haunt the parties. But apparitions rarely have substance, and this one is no exception. After careful consideration of the plaintiff’s complaint and the district court’s order of dismissal, we lay the ghost to rest.<sup>218</sup>

The remainder of the opinion in *Marek v. Rhode Island* deals with whether a property owner suffered a taking when the state and other parties granted a permit and approved construction by a neighboring owner of a road that allegedly encroached on the plaintiff’s land.<sup>219</sup>

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212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.* at 47.

216. *Id.*

217. *Id.* at 48.

218. 702 F.3d 650, 651 (1st Cir. 2012).

219. *Id.* at 652.

Among other arguments—as far as we can tell—the plaintiff raised a takings claim in federal court after first pursuing an administrative appeal of the permit grant (dismissed for lack of standing), and an appeal to state court that he eventually dismissed (during which time the neighbor sold the property to another developer who allowed the development permit to expire; in the words of the First Circuit, the road project was a “dead letter”).<sup>220</sup> But he never filed an inverse condemnation action in state court to recover compensation. You know what that means.

The federal district court thus dismissed a civil rights lawsuit on *Williamson County* ripeness grounds.<sup>221</sup> The First Circuit agreed, holding that while the plaintiff had secured a final decision applying the regulations to his property, he had not sought and been denied compensation in the courts of Rhode Island, which recognize a cause of action for inverse condemnation.<sup>222</sup> To those versed in ripeness law, you know that this is a fatal defect. The First Circuit rejected the plaintiff’s claims that to do so would be futile because the state remedy is “inadequate,” holding that “[w]e have previously held that this inverse condemnation remedy constitutes an adequate procedural pathway to just compensation.”<sup>223</sup> The opinion ends for the appellant as badly as it began:

[t]he plaintiff’s brief hints at other arguments. These arguments, however, lack both coherence and development. Rather than guessing at what these arguments may or may not portend, we fall back upon the prudential rule that “issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.”<sup>224</sup>

#### *G. Federal Circuit: 22-Year Old Takings Case in Which the Landowner is Already Dead is Not Ripe*

In *Estate of Hage v. United States*,<sup>225</sup> the Federal Circuit applied the “final action” requirement of *Williamson County* to find that a takings claim was not ripe. The property owners filed their case in 1991 in the Court of Federal Claims seeking compensation for the federal government’s taking of water rights in Nevada.<sup>226</sup> In 2008, the Court of

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220. *Id.* at 653.

221. *Id.*

222. *Id.* at 654.

223. *Id.* (citing *Downing/Salt Pond Partners v. R.I.*, 643 F.3d 16, 20 (1st Cir. 2011)).

224. *Id.* at 655 (quoting *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990)).

225. 687 F.3d 1281, 1286 (Fed. Cir. 2012).

226. *Id.* at 1283.

Federal Claims ruled in favor of the property owners, but the Federal Circuit reversed on *Williamson County* grounds because the case was not administratively ripe.<sup>227</sup> The federal agency, you see, had not reached a final decision on what the property owners might do with the land, and just might issue a permit (even if other similar permit applications by the owners had all been denied). Is the property owner disappointed by this ruling? Likely not, since Mr. Hage died in 2006.<sup>228</sup>

So there you have it: a 22-year old lawsuit in which the Court of Federal Claims after hearing evidence concluded was a “drama worthy of tragic opera with heroic characters” and awarded \$4.2 million in just compensation, and in which the agency denied every application for a grazing permit (and in which the property owner has moved on to his final reward) is not yet ripe. Why? Because the agency just might issue a special use permit that might allow the use of the water the property owner’s estate alleges was taken.

## VI. Judicial Takings

### A. *Justice Stevens, Recused in the Stop the Beach Renourishment Case, Weighs in on the Stop the Beach Renourishment Case*

You can take the Justice out of the Court, but you apparently cannot take the Court out of the Justice. Retired Justice John Paul Stevens has added the “ninth vote” (his words, not ours) in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*,<sup>229</sup> the case is which the other eight Justices all agreed that the Florida Supreme Court had not changed the law, so there had been no “judicial taking.” Four Justices, however, opined that if a court declares that what was once an established right of private property no longer exists, it has taken that property in violation of the Takings Clause.<sup>230</sup>

Justice Stevens sat that out, recusing himself because news stories had noted his wife owned a beachfront condo in Ft. Lauderdale.<sup>231</sup>

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227. *Id.* at 1286-87.

228. *See id.*

229. 130 S. Ct. 2592 (2010).

230. *See id.* at 2613-19.

231. Robert H. Thomas, *Justice Stevens, Recused In The “Stop The Beach Renourishment” Case, Weighs In On The “Stop The Beach Renourishment” Case*, INVERSE-CONDEMNATION.COM (Oct. 16, 2012), <http://www.inversecondemnation.com/inverse-condemnation/2012/10/justice-stevens-recused-in-the-stop-the-beach-renourishment-case-weighs-in-on-the-stop-the-beach-ren.html> (citing Justice John Paul Stevens, retired Justice, The Ninth Vote in the “Stop the Beach” Case (Oct. 3, 2012) available

But the lure of adding his reaction to Justice Scalia's opinion has proven too much to resist, and in a recent talk, Justice Stevens told us what he would have done had he not stepped aside. The most curious claim he makes is that the Court should not have addressed the issue at all, since the property owners had not properly raised their federal constitutional claims below, and that if a petitioner only brings up the judicial takings claim in the course of a petition for rehearing in the state supreme court, she has not preserved the issue.<sup>232</sup> This makes no sense whatsoever, because in the typical judicial takings scenario, it would require the property owner to be a mind reader. How is a property owner supposed to predict that a state supreme court is going to make a sudden and unpredictable change in the state's law of property in a judicial decision and preserve the argument for United States Supreme Court review before the state supreme court actually does so? Maybe by arguing to the court "[y]our Honors better not suddenly and unpredictably change our state's law of property because if you do, that would be a judicial taking?"

Take, for example, the course of events in what is perhaps the most paradigmatic judicial taking scenario, the infamous Hawaii water rights case.<sup>233</sup> There, in a dispute between two sugar companies over who had rights to certain surplus water in a Kauai stream under Hawaii law, the Hawaii Supreme Court "sua sponte overruled all territorial cases to the contrary and adopted the English common law doctrine of riparian rights."<sup>234</sup> The court "also held *sua sponte* that there was no such legal category as 'normal daily surplus water' and declared that the state, as sovereign, owned and had the exclusive right to control the flow," and "that because the flow of the Hanapepe [stream] was the sovereign property of the State of Hawaii, McBryde's claim of a prescriptive right to divert water could not be sustained against the state."<sup>235</sup> In other words, in a dispute between "A" and "B" over which of them possessed water rights, the Hawaii Supreme Court simply said "neither of you do, the State owns it all," without briefing or argument. Thus, the federal takings issue could only be raised on a petition for rehearing. The same was true

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at <http://www.scribd.com/doc/110148359/Justice-John-Paul-Stevens-The-Ninth-Vote-in-the-Stop-the-Beach-Case-Oct-2-2012> [hereinafter John Paul Stevens].

232. John Paul Stevens *supra* note 228 at 10-12.

233. *Robinson v. Ariyoshi*, 753 F.2d 1468 (9th Cir. 1985).

234. *Id.* at 1470 (citing *McBryde Sugar Co. v. Robinson*, 504 P.2d 1330 (Haw. 1973)).

235. *Id.*

in the *Stop the Beach Renourishment* case, where the petitioner claimed the Florida Supreme Court changed the state law of accretion and erosion.<sup>236</sup>

Justice Stevens' other argument is that judicial takings, if they exist at all, are Fourteenth Amendment Due Process claims and not Fifth Amendment Takings claims.<sup>237</sup> Here, he makes the argument that the sole remedy for a Fifth Amendment taking is the payment of just compensation, and does not allow a court to invalidate the offending action:

[e]ven if we assume that the scope of the Fifth Amendment's limitation on the scope of a government's power to condemn private property is coextensive with the Fourteenth's, it is noteworthy that neither the text nor the history of the Fifth Amendment's Takings Clause places any limit on the scope of that power; the Clause imposes only a requirement that just compensation be provided for a taking.<sup>238</sup>

Justice Kennedy may agree with Justice Stevens on this one (see, e.g., his concurring opinions in *Kelo v. City of New London*<sup>239</sup> and *Lingle*<sup>240</sup> where he makes the point that challenges to the power to take are really due process in nature), but what Justice Stevens is arguing for is a broader revision in the "incorporation" doctrine, where all challenges under the Bill of Rights to state actions are, in reality, Due Process challenges.

#### B. *California Revisits Pruneyard But Ignores the Takings Problem*

Confirming yet again that the shopping mall seems to be the locus of California culture, the California Supreme Court in *Ralphs Grocery Co. v. United Food & Commercial Workers Union Local 8*,<sup>241</sup> held that a privately-owned walkway fronting a warehouse-type grocery store is a venue for the airing of grievances, even though it is not a "public forum" for speech under the California Constitution's free speech provision. Thus, a labor union's members have no constitutional rights to picket there.<sup>242</sup> However, the court also held that the Moscone Act—a state statute prohibiting courts from issuing injunctions in labor disputes except in limited circumstances<sup>243</sup>—protected union members' (and no one else's) rights to picket on this private

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236. *Stop the Beach*, 130 S. Ct. at 2592.

237. See John Paul Stevens *supra* note 228 at p. 13.

238. *See id.* at p. 15.

239. *See* 545 U.S. 469, 490 (Kennedy, J., concurring).

240. *See Lingle*, 544 U.S. at 548 (Kennedy J. concurring).

241. 290 P.3d 1116 (Cal. 2012).

242. *Id.*

243. CAL. LABOR CODE § 527.3 (West 2011).

property. In other words, the grocery store owner has a right to exclude others from this property, but that right is trumped by the Moscone Act.

If this all sounds like familiar territory, it is. In *PruneYard Shopping Center v. Robins*,<sup>244</sup> the California Supreme Court changed its interpretation of the California Constitution's speech clause, and expressly overruled an earlier decision holding it did not protect speech on shopping center property. The mall owner appealed to the United States Supreme Court, arguing that the change in the law and the resultant opening up of private property to public access was a physical invasion taking. In other words, a "judicial taking," a subject we discussed in this article. The Court ultimately rejected that claim, concluding the mall owner "failed to demonstrate that the 'right to exclude others' is so essential to the use or economic value of their property that the state-authorized limitation of it amounted to a 'taking.'"<sup>245</sup>

Curiously, in *Ralphs Grocery*, neither the majority, concurring, nor dissenting opinions mentioned one word about "takings." Indeed, the only mention of *Pruneyard* is their own opinion, with not even a Shepardized cite to the United States Supreme Court's subsequent opinion. That perhaps tells you what the California Supreme Court thinks of takings arguments. The justices limited their federal constitutional analysis to whether the content discrimination (allowing union members' speech, but not other's) violates the First Amendment. The court's failure to address the Fifth Amendment issue wasn't for lack of not being briefed on the topic because an amicus brief focused on that issue.

So now comes the fun part: how does a grocery store owner (either this one or another) raise the takings claim, now that the California Supreme Court has ruled both that an owner has a right to exclude, but that the statute mandates public access to the store owner's private property? Under *Rooker-Feldman*, it can't go running to the federal district courts to challenge the California Supreme Court directly. Moreover, under *Williamson County* must it ripen its claim in the California state courts (seems it already has)?

Thus, it looks like the only available avenue to directly challenge the ruling is a petition for certiorari to the United States Supreme Court. As Justice Chin noted in dissent, "[t]oday's opinion places California on a collision course with the federal courts."<sup>246</sup> He predicts so based on

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244. 447 U.S. 74 (1980).

245. *Id.* at 84.

246. *Ralphs Grocery*, 290 P.3d at 1122 (Chin, J., dissenting).

free speech issues (discriminating between labor speech and other forms of protest), but his warning is equally applicable to the property issue. The other alternative may be a challenge to the Moscone Act itself as a taking (now that the California court has definitively ruled that it trumps an owner's right to exclude others). If the challenge takes that form, we don't see a reason why such a claim for compensation could not be brought in California state courts even if the U.S. Supreme Court declined to review the case.

The *Ralphs* case has been described as a "hands-down win for organized labor."<sup>247</sup> But the question remains whether the people of California will view it the same way if they end up picking up the tab for a taking.

## VII. Conclusion

This year saw the Supreme Court and the lower courts tackle many of the difficult issues in regulatory takings law, particularly the application of the confounding *Penn Central* test, and the ripeness requirements of *Williamson County*. The Supreme Court put to rest the notion that a physical invasion by water could be held to not be a taking simply because the water eventually receded. Two other cases argued but not decided by the time this article was published may fill out the regulatory takings doctrine further. In the meantime, the lower courts continued to grapple with the doctrine.

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247. Denny Walsh, *California Supreme Court Upholds Picketing at Store Entrance*, THE SACRAMENTO BEE, Dec. 28, 2012, at 1B, available at <http://www.sacbee.com/2012/12/28/5079329/california-supreme-court-upholds.html>.

