

# Superfluous Judicial Activism: The Takings Gloss

*Michael Allan Wolf\**

## ABSTRACT

*In the summer of 2021, the Supreme Court released opinions in three Takings Clause cases. The Justices did not focus primarily on the dozen words that compose that Clause. Instead, the Court considered the expansive judicial gloss on those words, the extratextual aspects established by takings opinions over the last 100 years, since the “too far” test introduced by Justice Holmes in Pennsylvania Coal. The “Takings Gloss” is the product of holdings expanding the meaning and reach of the Takings Clause, a tangled web of opinions that have troubled lawyers, judges, and commentators for several decades. With the latest contributions, the Takings Gloss (original Clause in bold) now reads:*

*[N]or shall private or public property, including rights in property such as the right to exclude, **be taken for public use, purpose, or benefit** (even if the property taken by eminent domain is transferred to a new private owner), or subjected to regulation that goes too far, or be physically occupied even temporarily, or exacted as an unreasonable development condition, by the government or by private parties delegated by the government, **without just compensation**, unless the property owner is seeking only injunctive relief.*

*This Article highlights the three newest takings cases (Cedar Point Nursery, PennEast, and Pakdel); introduces a broad range of alternative, non-takings avenues of relief for aggrieved property owners (in constitutional, statutory, and common law); and demonstrates the real dangers of the Takings Gloss in three critical contexts: (1) climate change mitigation and adaptation, (2) COVID-19 restrictions and regulations on landlords and business owners, and (3) land use regulations designed to increase the crucial supply of affordable housing and create more diverse, equitable, and inclusive communities. The Court can abandon the Takings Clause expansion project, secure in the knowledge that landowners and other property owners are adequately protected from government harms.*

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\* Richard E. Nelson Eminent Scholar Chair in Local Government, University of Florida Levin College of Law. Thank you, Andrew Hammond, Blake Hudson, Daniel Mandelker, Dwight Merriam, Christopher Serkin, and Danaya Wright, for your insights and suggestions. The author also benefited from comments by participants at the American Association of Law Schools’ 2022 Annual Meeting Property Section and the 2022 Arizona State University Sustainability Conference of American Legal Educators. Audrey Carver provided invaluable research assistance.

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## INTRODUCTION

The text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings. Its plain language requires the payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation. But the Constitution contains no comparable reference to regulations that prohibit a property owner from making certain uses of her private property.<sup>1</sup>

Justice John Paul Stevens

The Court . . . has never purported to ground those [regulatory takings] precedents in the Constitution as it was originally understood. . . . In my view, it would be desirable for us to take a fresh look at our regulatory takings jurisprudence, to see whether it can be grounded in the original public meaning of the Takings Clause of the Fifth Amendment or the Privileges or Immunities Clause of the Fourteenth Amendment.<sup>2</sup>

Justice Clarence Thomas

<sup>1</sup> *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 321–22 (2002).

<sup>2</sup> *Murr v. Wisconsin*, 137 S. Ct. 1933, 1957 (2017) (Thomas, J., dissenting) (citations omitted).

Living up to the representations he made prior to defeating James Monroe for a seat in the First Congress,<sup>3</sup> Representative James Madison presided over the drafting of the initial set of amendments for the new Constitution,<sup>4</sup> the controversial creature of compromise that Madison had already played an oversized role in inspiring, drafting, memorializing, promoting, and ratifying.<sup>5</sup> All but one of the clauses found in what we now call the Bill of Rights were suggested by others (many in the various state ratifying conventions) who sought to make the new national blueprint more protective of individual liberty against a potentially oppressive national government.<sup>6</sup>

The one glaring exception was this passage that Madison added apparently on his own without any groundswell of support from critics of the original Constitution: “No person shall be . . . obliged to relinquish his property, where it may be necessary for public use, without a just compensation.”<sup>7</sup> For reasons that remain unclear even to the most

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<sup>3</sup> NOAH FELDMAN, *THE THREE LIVES OF JAMES MADISON: GENIUS, PARTISAN, PRESIDENT* 264 (2017) (“Madison knew that he had to propose a bill of rights, both in order to fulfill his campaign pledge and to head off the possibility of a constitutional convention.”); MICHAEL J. KLARMAN, *THE FRAMERS’ COUP: THE MAKING OF THE UNITED STATES CONSTITUTION* 563 (2016) (“During his congressional contest against Monroe in early 1789, Madison publicly advocated a bill of rights for the first time.”).

<sup>4</sup> See FELDMAN, *supra* note 3, at 264–77; KLARMAN, *supra* note 3, at 566–87.

<sup>5</sup> See generally FELDMAN, *supra* note 3. But see AKHIL REED AMAR, *THE WORDS THAT MADE US: AMERICA’S CONSTITUTIONAL CONVERSATION, 1760–1840*, at 737 n.14 (“Alas, Feldman wildly overstates the case for Madison as the Constitution’s creator and guardian and routinely fails to present contrary evidence or analysis.”).

<sup>6</sup> See William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 791 (1995) (“Despite this precedent for a constitutional compensation requirement, states did not demand a similar limitation on the federal government in the Bill of Rights. State ratifying conventions sought as amendments to the Constitution every provision in the Bill of Rights except the Takings Clause.”).

<sup>7</sup> JAMES MADISON, *Amendments to the Constitution (June 8, 1789)*, in 12 *THE PAPERS OF JAMES MADISON* 196, 201 (Charles F. Hobson et al. eds., 1979); see also Treanor, *supra* note 6, at 837.

Most pre-1787 state constitutions failed to include a just compensation requirement for government takings of property. Pennsylvania’s constitution, for example, adopted on September 28, 1776, featured two relevant provisions. Number VIII of the “Declaration of Rights” provided that “no part of a man’s property can be justly taken from him, or applied to public uses, without his own consent, or that of his legal representatives,” and Section 36 of the “Plan or Frame of Government” declared that “if any man is called into public service to the prejudice of his private affairs, he has a right to a reasonable compensation.” PA. CONST. of 1776, ch. I, art. VIII; ch. II, § 36. Notice that the just compensation requirement only applies in the public service (not property) context.

Vermont and Massachusetts were the only two states that included in their early constitutions a just compensation requirement for government takings. See William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 701 (1985). The Vermont Constitution of July 8, 1777, provided: “That

careful historians,<sup>8</sup> Madison (or someone else) modified the language of the first version that was submitted to his congressional colleagues, and the version of the seventh of twelve amendments passed by Congress and circulated to the states for ratification included this twelve-word clause at the end: “nor shall private property be taken for public use, without just compensation.”<sup>9</sup> Three subtle but ultimately substantive changes appeared in the official Takings Clause. First, the drafter(s) clarified that the requirement for just compensation was triggered by a government that actively “takes” property, not by the owner’s being “obliged to relinquish” property. Second, the mandate would apply to “private” property (not all property). Third, public use no longer had to be “necessary.”<sup>10</sup>

During a ten-day period from June 23 to July 2, 2021,<sup>11</sup> the Takings Clause was high on the Supreme Court’s agenda. The Court re-

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private property ought to be subservient to public uses, when necessity requires it; nevertheless, whenever any particular man’s property is taken for the use of the public, the owner ought to receive an equivalent in money.” VT. CONST. of 1777, ch. I, § II. The Massachusetts Constitution of 1780, whose chief drafter was John Adams, combined a Pennsylvania-style prohibition (“[N]o part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent or that of the representative body of the people.”) with a Vermont-style compensation requirement (“And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.”) MASS. CONST. of 1780, part I, art. X; PA. CONST. of 1776, ch. I, art. VIII; VT. CONST. of 1777, ch. I § II.

Several years later, on July 13, 1787, as Madison and the other Framers crafted, debated, and revised drafts of the Constitution in the sweltering Philadelphia heat, the Confederation Congress, meeting in New York City, adopted “An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio,” known as the Northwest Ordinance of 1787. See Denis P. Duffey, *The Northwest Ordinance as a Constitutional Document*, 95 COLUM. L. REV. 929, 929–930, 930 n.7 (1995). Article 2 of the Ordinance included the following clause: “[S]hould the public exigencies make it necessary, for the common preservation, to take any person’s property, or to demand his particular services, full compensation shall be made for the same.” Northwest Ordinance of 1787 art. II, AVALON PROJECT, [https://avalon.law.yale.edu/18th\\_century/nworder.asp](https://avalon.law.yale.edu/18th_century/nworder.asp) [<https://perma.cc/AR8Y-EKA9>]. Neither of the earlier Northwest Ordinances—the 1784 version attributed to Thomas Jefferson nor the 1785 version—contained similar language.

<sup>8</sup> See, e.g., Treanor, *supra* note 7, at 711 n.95 (“The accounts of the congressional debate over the Bill of Rights provide no evidence as to why the change in language was made.”). For photographs of Senate changes to the House version of the first set of amendments, see *Bill of Rights*, NAT’L ARCHIVES, <https://www.archives.gov/legislative/features/bor> [<https://perma.cc/9V7P-C87E>].

<sup>9</sup> U.S. CONST. amend. V.

<sup>10</sup> Compare *id.*, with MADISON, *supra* note 7, at 201.

<sup>11</sup> The Supreme Court has often waited until the final weeks of the Term to release opinions in property rights cases in which the Justices have been asked to interpret the Takings Clause. Since 1978, the Supreme Court has released opinions in more than twenty takings cases as late in the Term as the month of June. See *Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019) (decided June 21, 2019); *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017) (decided June 23, 2017);

leased divided opinions in *Cedar Point Nursery v. Hassid*,<sup>12</sup> which involved a labor relations statute that arguably effected a physical taking,<sup>13</sup> and *PennEast Pipeline Co. v. New Jersey*,<sup>14</sup> which involved a privately owned utility's use of eminent domain to acquire state-owned property.<sup>15</sup> In *Pakdel v. City and County of San Francisco*,<sup>16</sup> the Court issued a per curiam opinion in response to allegations that local government officials had effected a taking by making a condominium unit's owners live up to their promise to offer a lifetime lease to their existing tenant.<sup>17</sup>

In each instance, the Court did not focus on the dozen words that compose the Takings Clause. Instead, it focused on the extratextual aspects that have deeply troubled jurists such as Justices Stevens and Thomas, as seen in the quotations that begin this Article. Consider the following assertions made by the Justices in these 2021 cases:

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Horne v. Dep't of Agric., 576 U.S. 351 (2015) (decided June 22, 2015); Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595 (2013) (decided June 25, 2013); Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot., 560 U.S. 702 (2010) (plurality opinion) (decided June 17, 2010); Kelo v. City of New London, 545 U.S. 469 (2005) (decided June 23, 2005); San Remo Hotel, L.P. v. City of San Francisco, 545 U.S. 323 (2005) (decided June 20, 2005); Palazzolo v. Rhode Island, 533 U.S. 606 (2001) (decided June 28, 2001); E. Enter. v. Apfel, 524 U.S. 498 (1998) (decided June 25, 1998); Phillips v. Wash. Legal Found., 524 U.S. 156 (1998) (decided June 15, 1998); Dolan v. City of Tigard, 512 U.S. 374 (1994) (decided June 24, 1994); Concrete Pipe & Prods. of Cal. v. Constr. Laborers Pension Tr. for S. Cal., 508 U.S. 602 (1993) (decided June 14, 1993); Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992) (decided June 29, 1992); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987) (decided June 26, 1987); First Eng. Evangelical Lutheran Church v. Cnty. of Los Angeles, 482 U.S. 304 (1987) (decided June 9, 1987); MacDonald v. Cnty. of Yolo, 477 U.S. 340 (1986) (decided June 25, 1986); Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) (decided June 28, 1985); Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) (decided June 26, 1984); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (decided June 30, 1982); Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981) (decided June 15, 1981); Agins v. City of Tiburon, 447 U.S. 255 (1980) (decided June 10, 1980); PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980) (decided June 9, 1980); Pa. Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978) (decided June 26, 1978). The October 2020 Term fits that pattern.

<sup>12</sup> 141 S. Ct. 2063 (2021).

<sup>13</sup> *Id.*

<sup>14</sup> 141 S. Ct. 2244 (2021).

<sup>15</sup> *Id.*

<sup>16</sup> 141 S. Ct. 2226 (2021) (per curiam).

<sup>17</sup> *Id.* Although the Court denied the petition for a writ of certiorari in *Eychaner v. City of Chicago*, 141 S. Ct. 2422 (2021), a case involving the use of eminent domain allegedly to transfer ownership from one private owner to another private owner, Justice Thomas (joined by Justice Gorsuch) took the opportunity to express the hope that the Justices would soon revisit the Court's broad interpretation of the phrase "public use" in *Kelo v. City of New London*, 545 U.S. 469, 479–80 (2005). *Eychaner*, 141 S. Ct. at 2423 (Thomas, J., dissenting).

- Physical occupations by or with the permission of the government are the equivalent of eminent domain and are thus per se takings.<sup>18</sup>
- A physical occupation taking can be effected by a government requirement that allows nonowners on private property even temporarily.<sup>19</sup>
- An essential quality of private property is the right to exclude.<sup>20</sup>
- Government regulation that goes “too far” is subject to the Takings Clause’s mandate.<sup>21</sup>
- Public property is a form of private property.<sup>22</sup>
- Government officials can authorize private entities to take private property owned by others.<sup>23</sup>

What we learn from the newest takings opinions—and from many others that the Court has released over the past 100 years<sup>24</sup> in exercising the profound power of judicial review to strike down a wide range of federal, state, and local regulation of land and other forms of property—is that, by adding new, more complex, extratextual nuances, the words of the actual Takings Clause are outnumbered and overwhelmed by the Court’s “Takings Gloss.”<sup>25</sup> The current version of

<sup>18</sup> See *Cedar Point*, 141 S. Ct. at 2071–72.

<sup>19</sup> See *id.* at 2074, 2079–80; cf. *Pakdel*, 141 S. Ct. at 2230 (“Petitioners must ‘execute the lifetime lease’ or face an ‘enforcement action.’ And there is no question that the government’s . . . ‘position on the issue [has] inflict[ed] an . . . injury’ of requiring petitioners to choose between surrendering possession of their property or facing the wrath of the government.”) (quoting *Williamson Cnty. Reg’l Plan. Comm’n v. Hamilton Bank*, 473 U.S. 172, 193 (1985)).

<sup>20</sup> *Cedar Point*, 141 S. Ct. at 2072.

<sup>21</sup> *Id.* at 2071–72 (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)); *Pakdel*, 141 S. Ct. at 2230.

<sup>22</sup> See *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244, 2257–58, 2263 (2021).

<sup>23</sup> *Id.* at 2257.

<sup>24</sup> Justice Holmes is traditionally credited with first recognizing the concept of regulatory takings in the Supreme Court in *Pennsylvania Coal*, 260 U.S. at 393. See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005) (“Beginning with [*Pennsylvania Coal*], . . . the Court recognized that government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster—and that such ‘regulatory takings’ may be compensable under the Fifth Amendment.”). Half a century before *Pennsylvania Coal*, the Court had recognized that physical occupation by the government (flooding) could effect a taking as well. *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166, 181 (1871). The Court in *Pumpelly* did not strike down any laws, however.

<sup>25</sup> Of course, the Court over more than two centuries has significantly rewritten other constitutional texts. Perhaps the most dramatic example can be found in *Hans v. Louisiana*, 134 U.S. 1 (1890), in which the Justices, in effect, added a phrase to the Eleventh Amendment such that it is now *understood* to read: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or of the same state, or by Citizens or Subjects of any Foreign State.” See *id.* at 10–11 (emphasis added); U.S. CONST. amend. XI. For a provocatively critical

the Takings Gloss, which broadens the reach of the Clause (to the detriment and benefit of landowners, depending on the context), in effect reads:

[N]or shall private or public property, including rights in property such as the right to exclude, be taken for public use, purpose, or benefit (even if the property taken by eminent domain is transferred to a new private owner), or subjected to regulation that goes too far, or be physically occupied even temporarily, or exacted as an unreasonable development condition, by the government or by private parties delegated by the government, without just compensation, unless the property owner is seeking only injunctive relief.

A version of the Takings Gloss with illustrative case citations from the Supreme Court's latest opinions appears in the figure below.

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view of the Court's emendation in *Hans*, see Edward A. Purcell Jr., *The Particularly Dubious Case of Hans v. Louisiana: An Essay on Law, Race, History, and "Federal Courts,"* 81 N.C. L. REV. 1927, 1934 (2003) (asserting "that *Hans* should carry no generative authority in American constitutional law because it was the product of unprincipled expedience, a vicious and long-since repudiated racism, and a refusal to accept the constitutional principles embodied in the Fourteenth Amendment").

## FIGURE.

[N]or shall private or public<sup>i</sup> property, including rights in property such as the right to exclude<sup>ii</sup> be taken for public use, purpose, or benefit (even if the property taken by eminent domain is transferred to a new private owner<sup>iii</sup>), or subjected to regulation that goes too far,<sup>iv</sup> or be physically occupied<sup>v</sup> even temporarily,<sup>vi</sup> or exacted as an unreasonable development condition,<sup>vii</sup> by the government or by private parties delegated by the government,<sup>viii</sup> without just compensation, unless the property owner is seeking only injunctive relief.<sup>ix</sup>

<sup>i</sup> See *PennEast Pipeline Co.*, 141 S. Ct. at 2257 (“The eminent domain power may be exercised—whether by the Government or its delegates—within state boundaries, including against state property.”).

<sup>ii</sup> See *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2077 (2021) (“We cannot agree that the right to exclude is an empty formality, subject to modification at the government’s pleasure.”).

<sup>iii</sup> See *Eychaner v. City of Chicago*, 141 S. Ct. 2422, 2423 (2021) (Thomas, J., dissenting) (“That decision [*Kelo v. New London*, 545 U.S. 469 (2005)] was wrong the day it was decided. And it remains wrong today. ‘Public use’ means something more than any conceivable ‘public purpose.’”) (citing *Kelo*, 545 U.S. at 508–11) (Thomas, J., dissenting)).

<sup>iv</sup> See *Cedar Point*, 141 S. Ct. at 2071–72 (“Before the 20th century, the Takings Clause was understood to be limited to physical appropriations of property. In *Pennsylvania Coal Co. v. Mahon*, however, the Court established the proposition that ‘while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.’”) (citations omitted) (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

<sup>v</sup> See *id.* at 2073 (“In *Loretto v. Teleprompter Manhattan CATV Corp.*, we made clear that a permanent physical occupation constitutes a *per se* taking regardless whether it results in only a trivial economic loss.”) (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 423 (1982)).

<sup>vi</sup> See *id.* at 2074 (“[W]e have held that a physical appropriation is a taking whether it is permanent or temporary.”).

<sup>vii</sup> See *id.* at 2079 (“The inquiry . . . is whether the permit condition bears an ‘essential nexus’ and ‘rough proportionality’ to the impact of the proposed use of the property.”) (quoting *Dolan v. City of Tigard*, 512 U.S. 374, 386, 391 (1994)).

<sup>viii</sup> See *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244, 2251 (2021) (“Eminent domain . . . can be exercised either by public officials or by private parties to whom the power has been delegated.”).

<sup>ix</sup> See *Cedar Point*, 141 S. Ct. at 2070 (“The growers argued that the access regulation effected an unconstitutional *per se* physical taking under the Fifth and Fourteenth Amendments by appropriating without compensation an easement for union organizers to enter their property. They requested declaratory and injunctive relief prohibiting the Board from enforcing the regulation against them.”).

In the 2021 cases, as in the overwhelming majority of takings cases announced since the late 1970s, the Justices, like their counterparts on state and federal trial and appellate tribunals, spent much less time scrutinizing the *actual* words of the Takings Clause than they did agonizing over, massaging, and distinguishing judicial interpretations of the sometimes concrete, often abstract, idea of a government “taking.” Notwithstanding many Justices’ repeated claims of fidelity to the



language and original understanding of the words of the Constitution,<sup>26</sup> when it comes to takings law, judicial gloss rules.<sup>27</sup>

Ever since John Marshall cajoled or convinced his Federalist colleagues to speak with one voice—his own—and thereby angered the Jeffersonians by implying that the right federal court could order the nation’s executive branch to perform a ministerial act,<sup>28</sup> judicial review has been an effective mechanism for achieving political successes. Marshall’s successor, the *bête noire* Roger Taney, naively thought that his assertion that African Americans, free or enslaved, could never be citizens, along with the idea of undercutting the Missouri Compromise, would resolve the savage political battles over slavery in the territories that threatened to dismantle the Union.<sup>29</sup> A half century later, the pro-business conservatives who dominated the Court put their thumbs on the scales in favor of management over labor (while claiming that both sides benefited from the “liberty of

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<sup>26</sup> Statements by the Justices about the “original understanding” of constitutional texts are legion. A sampling from the Court’s October 2020 Term alone includes the following: *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1998 (2021) (Thomas, J., dissenting) (“Neither our precedent nor the original understanding of the Appointments Clause requires Senate confirmation of officers inferior to not one, but *two* officers below the President.”); *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1912 (2021) (Alito, J., concurring in the judgment) (“[B]ased on the text of the Free Exercise Clause and evidence about the original understanding of the free-exercise right, the case for *Smith* fails to overcome the more natural reading of the text.”) (citing *Emp. Div., Dep’t of Hum. Res. v. Smith*, 485 U.S. 660 (1988)); *United States v. Briggs*, 141 S. Ct. 467, 473 (2020) (“Some Justices have eschewed aspects of those approaches and have looked instead to the original understanding of the Eighth Amendment.”).

As for the Takings Clause specifically, Robert Natelson, the highly respected, conservative, originalist scholar has written, “[I]t is clear that the Clause is a qualification of the federal government’s condemnation or eminent domain power—that is, the sovereign’s prerogative of taking private property for public use.” ROBERT G. NATELSON, *THE ORIGINAL CONSTITUTION: WHAT IT ACTUALLY SAID AND MEANT* 194 (3d ed. 2014). The judicial gloss of regulatory takings is a much different matter:

The . . . question is whether the Takings Clause required compensation only when government actually seized possession or whether compensation was also required when government merely regulated in a way that reduced the property’s value. The plain meaning of the word “take” suggests only the former, and history supports the plan meaning: Founding-era governments did not customarily compensate for the impact of regulations on market value.

*Id.* at 296.

<sup>27</sup> This is not a phenomenon limited to the Takings Clause, of course. Professors Christopher Serkin and Nelson Tebbe have noted, for example: “Constitutional interpretation often strays so far from the text that readers can be confident of only one thing when reading a constitutional provision: it is almost certain *not* to mean precisely what it says.” Christopher Serkin & Nelson Tebbe, *Is the Constitution Special?*, 101 *CORNELL L. REV.* 701, 714–15 (2016).

<sup>28</sup> See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

<sup>29</sup> See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 404, 406 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend XIV.

contract” they read into the Fourteenth Amendment’s Due Process Clause<sup>30</sup>). Their successors three decades later wielded judicial review to strike down key New Deal programs until FDR’s appointees steered the judicial ship hard a port.<sup>31</sup>

These controversial decisions (and many more) convey the impression that the Justices often act more like opinionated legislators than objective umpires. Indeed, perhaps the best way to convey the essence of judicial activism is to envision the Supreme Court as a super-legislature whose five- (and on occasion four-) member majority can outvote even a unanimous state or federal legislature and the President or governor who signed its handiwork.

Today we are in the middle of another wave of judicial activism, and the Takings Clause has become one of the Roberts Court’s means by which to exercise its will over ostensibly fickle and wrong-headed elected officials at the local, state, and federal levels. Indeed, some state and federal judges will find—and, as this Article demonstrates, have found—the ever-expanding Takings Clause a useful instrument to redress pro-union labor laws; allegedly irrational and confiscatory environmental, land use, and landlord-tenant regulations; and even supposedly overzealous pandemic responses.

No ideological wing of the Court has taken the lead in creating the Takings Gloss that imperils a wide and growing range of government regulatory programs, leaving their opposites silently to wring their hands or stridently dissent. For each emendation (and resulting expansion) of the “official” Takings Clause written by conservative exemplars such as former Chief Justice Rehnquist,<sup>32</sup> Justice Scalia<sup>33</sup> and Chief Justice Roberts,<sup>34</sup> we can find a similar modification penned by liberal icons such as Justices Brennan,<sup>35</sup> Marshall,<sup>36</sup> and Ginsburg.<sup>37</sup> The Takings Gloss has many authors with different agendas, which

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<sup>30</sup> See *Lochner v. New York*, 198 U.S. 45, 56–57 (1905).

<sup>31</sup> See, e.g., ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* 600 (6th ed. 2020) (noting that in 1937, “the Court signaled the end of the laissez-faire jurisprudence that had dominated constitutional law for several decades”).

<sup>32</sup> See *First Eng. Evangelical Lutheran Church v. Cnty. of Los Angeles*, 482 U.S. 304, 305 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 375 (1994).

<sup>33</sup> See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1004 (1992); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 826 (1987).

<sup>34</sup> See *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2064 (2021).

<sup>35</sup> See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 107 (1978); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 636 (1981) (Brennan, J., dissenting).

<sup>36</sup> See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 420 (1982).

<sup>37</sup> See *Ark. Game & Fish Comm’n v. United States*, 568 U.S. 23, 25 (2012).

may explain in part the notoriously muddled state of takings jurisprudence.<sup>38</sup>

When each takings case is viewed in the context of its unique physical and temporal setting, it is easy to understand why Justices of all ideological strains added on to the existing Takings Clause to rescue overburdened property owners from confiscatory or otherwise offensive government acts, regulatory and otherwise. This Article demonstrates for the first time how the judicial activism embedded in the Takings Gloss is now superfluous in the light of widespread and often dramatic changes effected by modern legislation and evolving constitutional and common-law jurisprudence. In other words, the Court can abandon the Takings Clause expansion project, secure in the knowledge that landowners and other property owners are adequately protected from government harms.

Part I of this Article highlights the three takings cases from the end of the Supreme Court's October 2020 Term, featuring several opinions that illustrate the inordinate amount of attention the Court places on the Takings Gloss. Part II introduces alternative, non-takings avenues of relief for aggrieved property owners like those in two of the three most recent Supreme Court takings cases<sup>39</sup> and in many others decided by the Court over the past century<sup>40</sup>—due process and equal protection claims brought under the U.S. Constitution and its state counterparts; vested rights protections under zoning and other common forms of land use regulation; state common law claims (chiefly trespass); and claims brought under the Fair Housing Act, state counterparts, and other federal and state antidiscrimination laws.

Part II's suggestion that several federal and state statutory and common law developments have rendered the Takings Gloss superfluous has much in common with Professor Thomas Merrill's provocative "amendability canon."<sup>41</sup> This Article does not dispute Professor Mer-

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<sup>38</sup> For the classic work discussing the quandary of takings, see Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984). As this Article demonstrates, things have only gotten worse since Rose's landmark article was published; see also Nicole Stelle Garnett, *From a Muddle to a Mudslide: Murr v. Wisconsin*, 2016–2017 CATO SUP. CT. REV. 131, 132–33 (2017).

<sup>39</sup> See *Cedar Point*, 141 S. Ct.; *Pakdel v. City & Cnty. of San Francisco*, 141 S. Ct. 2226 (2021) (per curiam).

<sup>40</sup> See *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922); *Loretto*, 458 U.S. In addition, the Shepard's searches for both cases show that state and lower federal courts have issued reported opinions in hundreds of regulatory and physical occupation cases over the past century.

<sup>41</sup> See Thomas W. Merrill, *Interpreting an Unamendable Text*, 71 VAND. L. REV. 547, 585 (2018) ("Specifically, whenever a dispute can be resolved under either the authority of a relatively unamendable text or a relatively more amendable text, the more amendable text should be

rill's assertion that the U.S. Constitution is "the most prominent example" of a text that is "perceived by interpreters as having an extremely low probability of amendment,"<sup>42</sup> because he is writing about the traditional amendment process. Instead, this Article demonstrates how dramatically the *Court* has changed the text, meaning, and breadth of the Takings Clause.

Professor Merrill's suggestion is related to the famous avoidance canons by Justice Brandeis, found in *Ashwander v. Tennessee Valley Authority*.<sup>43</sup> Among the seven "rules under which [the Court] has avoided passing upon a large part of all the constitutional questions pressed upon it for decision,"<sup>44</sup> Brandeis included the following:

The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. . . . Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.<sup>45</sup>

As this Article establishes, the Roberts Court has avoided the avoidance canons in many of the takings cases it has decided by (unnecessarily) expanding the Takings Gloss.<sup>46</sup>

Part III demonstrates the real dangers that the superfluous judicial activism embedded in the Takings Gloss<sup>47</sup> poses in three topical

the preferred basis for decision. Thus, if a dispute can be resolved either under the Constitution or a federal statute, the statute would be the preferred basis for decision.").

<sup>42</sup> *Id.* at 549.

<sup>43</sup> 297 U.S. 288, 346–48 (1936) (Brandeis, J., concurring).

<sup>44</sup> *Id.* at 346.

<sup>45</sup> *Id.* at 347.

<sup>46</sup> For a recent study of the Roberts Court's track record in employing these canons, see Anita S. Krishnakumar, *Passive Avoidance*, 71 STAN. L. REV. 513, 586 (2019) ("[W]hereas the early Roberts Court boldly invoked the canon to openly rewrite statutes whose plain meaning it found constitutionally problematic, in recent years the Court has tamped down its use of the avoidance canon . . . and instead [often] find[s] other interpretive tools through which to rewrite or reinterpret a statute whose most straightforward reading presents constitutional difficulties.").

<sup>47</sup> Parts I.A and I.B, *infra*, detail the new wrinkles added by the *Cedar Point* and *PennEast* Courts. Should the current Court continue this pattern of zealous protection of property rights, perhaps the near future will see the Justices recognizing judicial takings in the holding of a decision and extending its unconstitutional conditions approach to exactions effected by legislative tools (as opposed to individualized administrative determinations). *Cf.* *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot.*, 560 U.S. 702, 714 (2010) (Scalia, J., plurality opinion) ("It would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat."); *Cal. Bldg. Indus. Ass'n v. City of San Jose*, 577 U.S. 1179, 1181 (2016) (Thomas, J., concurring in denial of certiorari) ("Until we decide this issue, property owners and local governments are left uncertain about what legal standard governs legislative ordinances

and critical (literally life-and-death) contexts: (1) litigation designed to neutralize climate change mitigation and adaptation tools,<sup>48</sup> (2) landlords' and business owners' challenges (now numbering in the dozens) to government-imposed COVID-19 restrictions and regulations in federal and state courts,<sup>49</sup> and (3) potential takings challenges to land use

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and whether cities can legislatively impose exactions that would not pass muster if done administratively. These factors present compelling reasons for resolving this conflict at the earliest practicable opportunity.”).

<sup>48</sup> See *infra* text accompanying notes 307–19; see also Michael Allan Wolf, *Supreme Court Roadblocks to Responsive Coastal Management in the Wake of Lucas*, 53 REAL PROP. TR. & EST. L.J. 59, 64 (2018) (“[S]ince the *Lucas* majority’s elevation of property rights in the face of strong evidence of coastal erosion and tidal flooding, the Court’s continued reliance on the Takings Clause beyond the contexts of eminent domain and actual physical confiscation threatens the conscientious efforts of state and local government land use coastal regulators who are confronting the too-real efforts of climate change.”) (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992)).

<sup>49</sup> For examples of federal cases, see *Skatmore, Inc. v. Whitmer*, 40 F.4th 727, 739 (6th Cir. 2022) (affirming district court’s dismissal of bowling alley and roller-skating rink operators’ claims that restrictive orders violated the Fifth Amendment); *Heights Apartments, LLC v. Walz*, 30 F.4th 720, 733–35 (8th Cir. 2022), *reh’g denied*, 39 F.4th 479 (8th Cir. 2022) (reversing district court’s dismissal of residential rental unit owner’s claim that a statewide residential eviction moratorium violated the Takings Clause); *Hinkle Fam. Fun Ctr., LLC v. Grisham*, 586 F. Supp. 3d 1118, 1132 (D.N.M. 2022), *aff’d*, No. 22-2028, 2022 WL 17972138 (10th Cir. Dec. 28, 2022) (dismissing recreational facilities’ claims that executive orders closing nonessential businesses and restricting travel into New Mexico constituted takings under Fifth Amendment); *Everest Foods Inc. v. Cuomo*, 585 F. Supp. 3d 425, 445 (S.D.N.Y. 2022) (granting defendants’ motions to dismiss claims of food businesses that closed permanently or lost business that executive orders violated the Takings Clause); *Madsen v. City of Lincoln*, 574 F. Supp. 3d 683, 698–99 (D. Neb. 2021) (granting defendants’ motions for judgment on the pleadings on bowling alley and billiards hall owners’ claims that city’s restrictions amounted to regulatory takings); *Helbachs Café, LLC v. City of Madison*, 571 F. Supp. 3d 999, 1017–18 (W.D. Wis. 2021), *aff’d*, 46 F.4th 525 (7th Cir. 2022) (granting summary judgment to defendants on café’s claim that city’s order that businesses post signs requiring patrons to wear masks indoors constituted a taking); *Golden Glow Tanning Salon, Inc. v. City of Columbus*, No. 20-CV-103-GHD-DAS, 2021 WL 5225617, at \*4 (N.D. Miss. Nov. 9, 2021) (granting summary judgment to city on tanning salon’s claim that ordinance temporarily closing certain businesses effected a taking); *Lam v. Univ. of Fla.*, No. 21-cv-137-AW-GRJ, 2021 WL 7081491, at \*3 (N.D. Fla. Oct. 21, 2021) (dismissing student’s takings claim against university for value of difference in tuitions for online versus in-person courses); *Thiele v. Bd. of Trs. of Ill. State Univ.*, No. 20-cv-01197-SLD-TSH, 2021 WL 4496941, at \*27–28 (C.D. Ill. Sept. 30, 2021) (dismissing students’ takings claim challenging university’s collection of student fees after instruction was moved online); *Willowbrook Apartment Assocs. v. Mayor & City Council of Baltimore*, 563 F. Supp. 3d 428, 439–45 (D. Md. 2021) (holding that housing providers had not made out successful physical occupation or regulatory takings claims against local governments that restricted rent increases and assessment of late fees); *Jevons v. Inslee*, 561 F. Supp. 3d 1082, 1104–07 (E.D. Wash. 2021) (granting summary judgment to public defendants and holding that state eviction moratorium did not constitute per se physical taking); *Abshire v. Newsom*, No. 21-cv-00198-JAM-KJN, 2021 WL 3418678, at \*6–7 (E.D. Cal. Aug. 5, 2021) (dismissing with prejudice partial regulatory takings claim asserted by short-term lodging and restaurant businesses against state and local pandemic restrictions); *Bols v. Newsom*, 515 F. Supp. 3d 1120, 1130–33 (S.D. Cal. 2021) (denying state, county, and city defendants’ motion to dismiss regula-

regulations designed to increase the supply of affordable housing and to create more diverse, equitable, and inclusive communities.<sup>50</sup>

The possibility of profound public harm that the weaponization of the Takings Gloss poses in the pandemic setting is all too real. Moreover, as demonstrated by several takings cases decided by the Supreme Court over the past half-century, climate-change-related regulation and efforts to bring land use regulation more in line with social justice goals are also increasingly at risk. However, thanks to the alternatives discussed in Part II, these trends are reversible while leaving in place ample and effective protections for private property owners.

### I. ACTIVE SUMMER: TAKINGS CASES FROM THE END OF THE OCTOBER 2020 TERM

Each of the three takings cases from the summer of 2021 focused on different parts of the Takings Gloss. In fact, the opinions in this takings trio had little, if anything, to say about the express purpose and meaning of the actual Takings Clause—the use of the government’s power of eminent domain to take title to private property for public use in exchange for just compensation.

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tory and physical takings claims brought against eviction moratorium); *Student “A” v. Hogan*, 513 F. Supp. 3d 638, 645–47 (D. Md. 2021) (granting governor’s and Board of Regents’ motion to dismiss takings claims brought by university students seeking return of tuition and other fees because of move to online instruction); *Alsop v. DeSantis*, No. 20-cv-1052-T-23SPF, 2020 WL 9071427, at \*3 (M.D. Fla. Nov. 5, 2020) (granting motion to dismiss second amended complaint alleging that executive order that prohibited short-term vacation rentals constituted a regulatory taking); *McCarthy v. Cuomo*, No. 20-cv-2124 (ARR), 2020 WL 3286530, at \*5 (E.D.N.Y. June 18, 2020) (denying “gentleman’s club” owner temporary restraining order and preliminary injunction based on allegation that executive orders constituted regulatory taking).

For examples of state cases, see *640 Tenth, LP v. Newsom*, 78 Cal. App. 5th 840, 859–65 (Cal. Ct. App. 2022) (affirming judgment of trial court dismissing restaurant and gym owners’ takings challenges to state and county orders restricting business operations); *9795 Perry Highway Mgmt., LLC v. Bernard*, 273 A.3d 1098, 1107–08 (Pa. Super. Ct. 2022) (holding that Commonwealth’s closure order did not constitute a taking; therefore, defendants were not excused from paying rent); *Aquila Mgmt., Inc. v. Roman*, No. MID-LT-90-21, 2021 N.J. Super. LEXIS 112, at \*33–34 (N.J. Super. Ct. June 21, 2021) (“If the Plaintiff is left without the ability to regain possession through eviction, is unable to sell the property except at a ruinous loss and must pay property taxes and mortgage payments with no income to offset these expenses for the foreseeable future, it is difficult to deny he has suffered a taking.”); *Amherst Pizza & Ale House, Inc. v. Cuomo*, No. 816373-2020, 2021 WL 1145254, at \*14 (N.Y. Sup. Ct. Jan. 13, 2021) (finding that petitioners did not demonstrate likelihood of success for their categorial and non-categorial regulatory takings challenges to ban on indoor dining); *Friends of Danny Devito v. Wolf*, 227 A.3d 872, 895–96 (Pa. 2020), *cert. denied*, 141 S. Ct. 239 (2020) (finding that owners of businesses not categorized as life-sustaining had failed to demonstrate that restrictions in executive order constituted regulatory taking); *see also infra* text accompanying notes 320–29.

<sup>50</sup> *See infra* text accompanying notes 330–44.

A. Cedar Point Nursery v. Hassid

[N]or shall rights in property such as the right to exclude, be subjected to regulation that goes too far; nor shall private property be physically occupied even temporarily by private parties delegated by the government, without just compensation unless the property owner is seeking only injunctive relief.

On June 23, 2021, a divided Court in *Cedar Point Nursery v. Hassid* concluded that a California regulation allowing “labor organizations a ‘right to take access’ to an agricultural employer’s property in order to solicit support for unionization” up to four 30-day periods per year amounted to “a per se physical taking” under the Fifth and Fourteenth Amendments.<sup>51</sup> Five Justices joined Chief Justice Roberts’s opinion protecting the property rights of two growers: one owner claimed that the United Farm Workers (“UFW”) took access to its property without giving notice, while the other blocked UFW organizers from entering its property.<sup>52</sup> In federal district court, the growers sought declaratory and injunctive relief, arguing that the regulation was a per se physical taking under the Fifth and Fourteenth Amendments because it granted an easement for union organizers to enter their property without compensating the growers.<sup>53</sup> The trial court rejected this argument, and two of three judges on the Ninth Circuit panel agreed.<sup>54</sup>

To the Supreme Court’s majority, the “essential question” concerned “whether the government has physically taken property for itself or someone else—by whatever means—or has instead restricted a property owner’s ability to use his own property.”<sup>55</sup> The positive answer was ostensibly straightforward:

The access regulation appropriates a right to invade the growers’ property and therefore constitutes a *per se* physical taking. The regulation grants union organizers a right to physically enter and occupy the growers’ land for three hours per day, 120 days per year. Rather than restraining the growers’ use of their own property, the regulation appropriates for the enjoyment of third parties the owners’ right to exclude.<sup>56</sup>

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<sup>51</sup> *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2063–64 (2021).

<sup>52</sup> *Id.* at 2070.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 2072.

<sup>56</sup> *Id.*

The word “ostensibly” is appropriate because in reality Chief Justice Roberts focused on two non-Madisonian aspects of the Takings Gloss—(1) the notion that the government’s “appropriation” of “a right to invade” property by a regulation and not by the process of eminent domain is somehow a “*per se* physical taking,”<sup>57</sup> and (2) the idea that a regulation that appropriates “for the enjoyment of third parties” (and not for the government) a landowner’s “right to exclude” is not a restraint but an actual “taking.”<sup>58</sup>

The majority reviewed earlier decisions in which the Court placed special emphasis on the need to protect the property owner’s “treasured” right to exclude, noting that “[t]he Court has often described the property interest taken [by ‘government-authorized physical invasions’] as a servitude or easement.”<sup>59</sup> In this instance, the growers asserted that the state acquired an easement in gross without paying compensation.<sup>60</sup>

The majority invoked a 1982 case that equated a private party’s government-authorized installation of cable equipment without the permission of an apartment building owner to an eminent domain taking: “In *Loretto v. Teleprompter Manhattan CATV Corp.*, we made clear that a permanent physical occupation constitutes a *per se* taking regardless whether it results in only a trivial economic loss.”<sup>61</sup> Somehow, despite the prominence of the word “permanent” in *Loretto* and its progeny, the majority dismissed the dissent’s assertion that the physical occupation of *up to* four months occasioned by the regulation fell far short of an entire year.<sup>62</sup> Chief Justice Roberts now claimed that, “[t]o begin with, we have held that a physical appropriation is a taking whether it is permanent or temporary.”<sup>63</sup> Nevertheless, there were limits: “*Loretto* emphasized the heightened concerns associated with ‘[t]he permanence and absolute exclusivity of a physical occupation’ in contrast to ‘temporary limitations on the right to exclude,’ and stated that ‘[n]ot every physical *invasion* is a taking.’”<sup>64</sup>

Despite the Board’s “warn[ing] that treating the access regulation as a *per se* physical taking will endanger a host of state and federal

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 2072–74.

<sup>59</sup> *Id.* at 2072–73.

<sup>60</sup> *Id.* at 2070; *see generally* Michael Allan Wolf, 4 Powell on Real Property § 34A.02 (2022) (discussing easements in gross).

<sup>61</sup> *Cedar Point*, 141 S. Ct. at 2073 (citing 458 U.S. 419 (1982)).

<sup>62</sup> *See id.* at 2074.

<sup>63</sup> *Id.* at 2074.

<sup>64</sup> *Id.* (quoting *Loretto*, 458 U.S. at 435 n.12).



government activities involving entry onto private property,”<sup>65</sup> the majority claimed:

*First*, our holding does nothing to efface the distinction between trespass and takings. Isolated physical invasions, not undertaken pursuant to a granted right of access, are properly assessed as individual torts rather than appropriations of a property right. . . .<sup>66</sup>

*Second*, many government-authorized physical invasions will not amount to takings because they are consistent with longstanding background restrictions on property rights. . . .<sup>67</sup>

*Third*, the government may require property owners to cede a right of access as a condition of receiving certain benefits, without causing a taking.<sup>68</sup>

The case was reversed and remanded.<sup>69</sup>

In dissent, Justice Breyer, joined by Justices Kagan and Sotomayor, did not point out the obvious—that the text of the Takings Clause is not even remotely pertinent to a labor law regulation of this kind. Instead, Breyer, indulging in the rhetoric and (il)logic of the Takings Gloss, denied that a physical taking or appropriation had occurred,<sup>70</sup> asserting that the case involved not a permanent occupation but “temporary limitations on the right to exclude,”<sup>71</sup> and asked the reader to “[c]onsider the large numbers of ordinary regulations in a host of different fields that, for a variety of purposes, permit temporary entry onto (or an ‘invasion of’) a property owner’s land. They include activities ranging from examination of food products to inspections for compliance with preschool licensing requirements.”<sup>72</sup>

<sup>65</sup> *Id.* at 2078.

<sup>66</sup> *Id.*

<sup>67</sup> Examples include the privileges “to enter property in the event of public or private necessity” and “to enter property to effect an arrest or enforce the criminal law under certain circumstances.” *Id.* at 2079.

<sup>68</sup> *Id.* The majority noted: “Under this framework, government health and safety inspection regimes will generally not constitute takings.” *Id.* at 2079. This is an accurate assessment so long as the Court does not expand the scope of the unconstitutional conditions doctrine. *See supra* note 47.

<sup>69</sup> *Cedar Point*, 141 S. Ct. at 2080.

<sup>70</sup> *Id.* at 2082 (Breyer, J., dissenting) (“The ‘access’ that [the regulation] grants union organizers does not amount to any traditional property interest in land.”).

<sup>71</sup> *Id.* at 2084 (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 n.12 (1982)).

<sup>72</sup> *Id.* at 2087. Justice Breyer cited a wide range of federal and state regulations regarding inspections of workplaces, meat and dairy products facilities, manufactured home factories, coastal wetlands, historic resources, foster care facilities, preschool programs, slaughterhouses, solid waste management facilities, and owl surveys. *Id.* at 2087–88.

The dissenters were not reassured by the majority's claim that these types of regulations would fit into exceptions carved out of the *per se* rule, asking "if a regulation authorizing temporary access for purposes of organizing agricultural workers falls outside of the Court's exceptions and is a *per se* taking, then to what other forms of regulation does the Court's *per se* conclusion also apply?"<sup>73</sup>

Another bone of contention in *Cedar Point* concerned the distinction Chief Justice Roberts drew between trespass and takings. The majority insisted that "our holding does nothing to efface the distinction between trespass and takings. Isolated physical invasions, not undertaken pursuant to a granted right of access, are properly assessed as individual torts rather than appropriations of a property right."<sup>74</sup> Roberts explained that nine years previously, when the Court in *Arkansas Game and Fish Commission v. United States*<sup>75</sup> "held, 'simply and only,' that ['temporary government-induced'] flooding 'gains no automatic exemption from Takings Clause inspection,'"<sup>76</sup> this tactic "reflect[ed] nothing more than an application of the *traditional trespass-versus-takings distinction* to the unique considerations that accompany temporary flooding."<sup>77</sup> Remarkably, however, in neither Justice Ginsburg's opinion for a unanimous Court in *Arkansas Game*, nor in the Federal Circuit's opinion on remand, was there any discussion of such a distinction.<sup>78</sup>

The *Cedar Point* dissenters disagreed with Chief Justice Roberts. They noted that nothing in the cases discussing the difference between permanent and temporary occupations "support[s] the distinction that the majority gleans between 'trespass' and 'takings.'"<sup>79</sup> Breyer's skepticism was palpable when he then asked:

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<sup>73</sup> *Id.* at 2089.

<sup>74</sup> *Id.* at 2078.

<sup>75</sup> 568 U.S. 23 (2012).

<sup>76</sup> *Cedar Point*, 141 S. Ct. at 2078 (quoting *Ark. Game*, 568 U.S. at 38).

<sup>77</sup> *Id.* at 2079 (emphasis added).

<sup>78</sup> See *Ark. Game & Fish Comm'n v. United States*, 736 F.3d 1364 (Fed. Cir. 2013). The word "trespass" only appeared when the Supreme Court included the following quotation from a 1922 decision: "[W]hile a single act may not be enough, a continuance of them in sufficient number and for a sufficient time may prove [a taking]. Every successive trespass adds to the force of the evidence." *Ark. Game*, 568 U.S. at 39 (quoting *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 329–30 (1922)). Chief Justice Roberts quoted this language in the Court's opinion in *Cedar Point*, 141 U.S. at 2078, but left out this revealing sentence that indicates that a single trespass might suffice to effect a taking: "If the United States, with the admitted intent to fire across the claimants' land at will should fire a single shot or put a fire control upon the land, it well might be that the taking of a right would be complete." *Portsmouth Harbor*, 260 U.S. at 329.

<sup>79</sup> *Cedar Point*, 141 S. Ct. at 2088 (Breyer, J., dissenting).

How is an “isolated physical invasion” different from a “temporary” invasion . . . ? And where should one draw the line between trespass and takings? Imagine a school bus that stops to allow public school children to picnic on private land. Do three stops a year place the stops outside the exception? One stop every week? Buses from one school? From every school? Under current law a court would know what question to ask. The stops are temporary; no one assumes a permanent right to stop; thus the court will ask whether the school district has gone “too far.” Under the majority’s approach, the court must answer a new question (apparently about what counts as “isolated”).<sup>80</sup>

As will become more apparent in Section II.C of this Article, the consanguinity between trespass and physical occupation takings is much closer than the majority would have us believe.

*If the Court had adhered to the words and original understanding of the Takings Clause*, this state statute could not have effected a taking for three reasons: (1) the statute did not have anything to do with the affirmative exercise of the power of eminent domain to take title to property, (2) the Clause speaks of “private property” and not *rights* in property, and (3) temporary restrictions on the use of property do not rise to the level of “be[ing] taken” under any sensible definition of that phrase.<sup>81</sup> By massaging the “permanent” element of physical takings, reemphasizing the essentiality of the “right to exclude,” and expanding the reach of the Takings Clause to include routine government inspections, the Supreme Court has issued a ruling that promises to have ramifications far outside the realm of labor relations. The near future holds the promise of a spate of physical takings cases brought against all levels of government for official “invasions” large and small.<sup>82</sup>

## B. PennEast Pipeline Co. v. New Jersey

[N]or shall public property be taken by private parties delegated by the government, for public benefit, without just

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<sup>80</sup> *Id.*

<sup>81</sup> U.S. CONST. amend. V.

<sup>82</sup> *See, e.g.*, S. Cal. Rental Hous. Ass’n v. Cnty. of San Diego, 550 F. Supp. 3d 853, 865–66 (S.D. Cal. 2021) (“Plaintiff contends that the [eviction moratorium] Ordinance at issue here is a *per se* physical taking, and presumably by providing the Court with *Cedar Point* in support, believes that the cases are on all fours. However, *Cedar Point* is distinguishable from the facts before this Court.”).

compensation unless the property owner is seeking only injunctive relief.

In *PennEast Pipeline Co. v. New Jersey*, an unorthodox five-Justice majority (Chief Justice Roberts, writing for himself and Justices Alito, Breyer, Kavanaugh, and Sotomayor), held that “the Federal Government can constitutionally confer on pipeline companies the authority to condemn necessary rights-of-way in which a State has an interest.”<sup>83</sup> The Court, invoking the milieu of the Framers (and over the vociferous objections of Justices Barrett, Gorsuch, Kagan, and Thomas), held: “Although nonconsenting States are generally immune from suit, they surrendered their immunity from the exercise of the federal eminent domain power when they ratified the Constitution.”<sup>84</sup>

When Congress amended the nine-year-old Natural Gas Act (“NGA”)<sup>85</sup> in 1947, it authorized those private natural gas companies that had received certificates of public convenience and necessity from the Federal Energy Regulatory Commission (“FERC”) “to exercise the *federal* eminent domain power” in order to build interstate pipelines.<sup>86</sup> Seven decades later, in 2015, PennEast Pipeline Company (“PennEast”), a joint venture among energy companies, applied for a certificate to build “a 116-mile pipeline from Luzerne County, Pennsylvania, to Mercer County, New Jersey.”<sup>87</sup> After a three-year period featuring a draft environmental impact statement, thousands of public comments, and route modifications by PennEast in response to some of those comments, FERC granted the certificate.<sup>88</sup>

Soon after, PennEast filed complaints in New Jersey federal district court in order to exercise federal eminent domain power.<sup>89</sup> Among the targeted parcels were two “in which New Jersey asserts a possessory interest, and 40 parcels in which the State claims nonpossessory interests, such as conservation easements.”<sup>90</sup> The federal district court denied New Jersey’s motion to dismiss the company’s complaints on sovereign immunity grounds, “holding that New Jersey was not immune from PennEast’s exercise of the Federal Govern-

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<sup>83</sup> 141 S. Ct. 2244, 2251 (2021).

<sup>84</sup> *Id.* at 2251–52.

<sup>85</sup> 15 U.S.C. §§ 717–717w.

<sup>86</sup> *PennEast Pipeline Co.*, 141 S. Ct. at 2252.

<sup>87</sup> *Id.* at 2253.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

ment's eminent domain power."<sup>91</sup> A Third Circuit panel vacated the lower court's order, basing its ruling in part on Supreme Court decisions "holding that Congress cannot abrogate state sovereign immunity in the absence of an 'unmistakably clear' statement,"<sup>92</sup> and finding "that [15 U.S.C.] § 717f(h) did not clearly delegate to certificate holders the Federal Government's ability to sue nonconsenting States."<sup>93</sup>

Chief Justice Roberts and his colleagues disagreed, leaving a sovereign state out to dry while elevating the power of an energy company to stand in the shoes of the federal government: "§ 717f(h) authorizes FERC certificate holders to condemn all necessary rights-of-way, whether owned by private parties or States. Such condemnation actions do not offend state sovereignty, because the States consented at the founding to the exercise of the federal eminent domain power, whether by public officials or private delegates."<sup>94</sup>

The *PennEast* opinion's house of cards rests on a shaky foundation comprising the early history of eminent domain before and during the framing of the Constitution, nineteenth-century decisions establishing that the federal government's taking power reached "areas subject to exclusive federal jurisdiction" and "property within state boundaries as well,"<sup>95</sup> and a 1941 decision in which the Court "upheld an Act of Congress authorizing construction of a dam and a reservoir that would inundate thousands of acres of state-owned land."<sup>96</sup> "For as long as the eminent domain power has been exercised by the United States," Chief Justice Roberts concluded from this historical *mélange*, "it has also been delegated to private parties. It was commonplace before and after the founding for the Colonies and then the States to authorize the private condemnation of land for a variety of public works."<sup>97</sup> Moreover (and more to the point), "[s]tate property was not immune from the exercise of delegated eminent domain power."<sup>98</sup>

The majority then dismissed the notions "that sovereign immunity bars condemnation actions against nonconsenting States"<sup>99</sup> and

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 2254 (quoting *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 786 (1991)).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 2263.

<sup>95</sup> *Id.* at 2255.

<sup>96</sup> *Id.* (citing *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508 (1941)).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 2256.

<sup>99</sup> *Id.* at 2257.

“that § 717f(h) does not speak with sufficient clarity to authorize” those condemnation actions.<sup>100</sup> In response to the respondents’ and dissenters’ assertion that Congress does not have the power under the Commerce Clause to authorize private suits against nonconsenting states, Chief Justice Roberts and his colleagues sounded more like committed nationalists than federalists, asserting that “congressional abrogation is not the only means of subjecting States to suit. . . . States can also be sued if they have consented to suit in the plan of the [Constitutional] Convention.”<sup>101</sup> “[W]hen the States entered the federal system,” according to the majority, “they renounced their right to the ‘highest dominion in the lands comprised within their limits.’”<sup>102</sup> “The plan of the Convention,” he continued in language that would make many believers in dual sovereignty blush, “contemplated that States’ eminent domain power would yield to that of the Federal Government ‘so far as is necessary to the enjoyment of the powers conferred upon it by the Constitution.’”<sup>103</sup>

The *PennEast* Court then dismissed Justice Gorsuch’s argument in dissent “that even if the States consented in the plan of the Convention to the proceedings below, the Eleventh Amendment nonetheless divests federal courts of subject-matter jurisdiction over a suit filed against a State by a diverse plaintiff.”<sup>104</sup> Because states consented to eminent domain suits by the federal government and its designees as part of the constitutional plan, according to Chief Justice Roberts, any Eleventh Amendment objection would have been, in effect, waived.<sup>105</sup>

The majority concluded by finding that “[t]he NGA fits well within [a] tradition”<sup>106</sup> of the use of federal eminent domain to achieve a strong national infrastructure program:

When the Framers met in Philadelphia in the summer of 1787, they sought to create a cohesive national sovereign in response to the failings of the Articles of Confederation. Over the course of the Nation’s history, the Federal Government and its delegates have exercised the eminent domain

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<sup>100</sup> *Id.* at 2258–59, 2263.

<sup>101</sup> *Id.* at 2259.

<sup>102</sup> *Id.* (quoting *Cherokee Nation v. S. Kan. Ry. Co.*, 135 U.S. 641, 656 (1890)).

<sup>103</sup> *Id.* at 2259 (quoting *Kohl v. United States*, 91 U.S. 367, 372 (1875)). For the related claim by some commentators that “the Takings Clause . . . trump[s] state sovereign immunity by automatically abrogating—or stripping—the immunity that states usually enjoy in actions at law,” see Eric Berger, *The Collision of the Takings and State Sovereign Immunity Doctrines*, 63 WASH. & LEE L. REV. 493, 498 (2006).

<sup>104</sup> *PennEast Pipeline Co.*, 141 S. Ct. at 2262.

<sup>105</sup> *See id.*

<sup>106</sup> *Id.* at 2263.

power to give effect to that vision, connecting our country through turnpikes, bridges, and railroads—and more recently pipelines, telecommunications infrastructure, and electric transmission facilities. And we have repeatedly upheld these exercises of the federal eminent domain power—whether by the Government or a private corporation, whether through an upfront taking or a direct condemnation proceeding, and whether against private property or state-owned land.<sup>107</sup>

As a matter of history, this assertion is undeniable. However, just because government officials agreed to commodify aspects of sovereignty (often under immense economic pressure including widespread bribery) does not mean that taking that step was judicious, necessary, or consistent with the text and original understanding of the Constitution.

Justice Barrett, joined by Justices Gorsuch, Kagan, and Thomas, parted ways with the majority's conclusions regarding the plan of the Philadelphia convention: "This argument has no textual, structural, or historical support. Because there is no reason to treat private condemnation suits differently from any other cause of action created pursuant to the Commerce Clause, I respectfully dissent."<sup>108</sup>

*If the Court had adhered to the words and original understanding of the Takings Clause*, Congress would not have been able to delegate its eminent domain power to a private utility for two reasons: (1) the Clause does not authorize the taking of *public* property and (2) because only natural gas customers (some in states other than New Jersey) would be using the energy source flowing through the privately owned pipeline, it would fall short of *public* use. Those who, since the highly controversial ruling in *Kelo v. City of New London*,<sup>109</sup> have harbored the hope that a newly reconstituted Court would reconsider the expansive use of eminent domain to take property for economic development purposes<sup>110</sup> should be disappointed by this pro-condemnation ruling. The more cynical among commentators might point out that the most direct beneficiaries of the *PennEast* ma-

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<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 2265 (Barrett, J., dissenting).

<sup>109</sup> 545 U.S. 469 (2005).

<sup>110</sup> *See, e.g.,* Eychaner v. City of Chicago, 141 S. Ct. 2422, 2423 (Thomas, J., dissenting from denial of certiorari) ("[T]his petition provides us the opportunity to correct the mistake the Court made in *Kelo*. There, the Court found the Fifth Amendment's 'public use' requirement satisfied when a city transferred land from one private owner to another in the name of economic development. That decision was wrong the day it was decided. And it remains wrong today.") (citation omitted).

majority's ruling are energy companies who prevail in court at the expense of blue states fighting greenhouse gas emissions.<sup>111</sup>

### C. *Pakdel v. City and County of San Francisco*

[N]or shall private property be subjected to regulation that goes too far by the government; nor shall private property be physically occupied even temporarily by private parties delegated by the government, without just compensation unless the property owner is seeking only injunctive relief.

In its per curiam opinion in *Pakdel v. City and County of San Francisco*, the Court, following up on the 2019 ruling in *Knick v. Township of Scott*,<sup>112</sup> vacated and remanded a Ninth Circuit ruling that petitioners, who brought a challenge under 42 U.S.C. § 1983, were required “to show not only that the San Francisco Department of Public Works had firmly rejected their request for a property-law exemption (which they did show), but *also* that they had complied with the agency’s administrative procedures for seeking relief.”<sup>113</sup>

The case involved a married couple, Peyman Pakdel and Sima Chegini, who owned part of a multiunit residential building as tenants in common with other unit owners.<sup>114</sup> Hoping to convert the units “into modern condominium-style arrangements,” the couple and the other unit owners sought government permission, which was available “subject to a filing fee and several conditions,” the most important being “that nonoccupant owners who rented out their units had to offer their tenants a lifetime lease.”<sup>115</sup> When they applied for the conversion, Pakdel and Chegini agreed to offer a lifetime lease to their

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111 See *Climate Change*, N.J. DEP’T OF ENV’T PROT., <https://www.nj.gov/dep/climatechange/> [<https://perma.cc/Z5XK-WG27>]. The Supreme Court victory was not enough to save the pipeline project. On November 30, 2021, PennEast told FERC that PennEast “determined that further development of the Project is no longer supported given the challenges in acquiring certain permits needed to construct the Project” and that “PennEast has ceased all further development of the Project.” Letter from Jeffrey D. England, Project Manager, PennEast Pipeline Co., to Honorable Kimberly D. Bose, Sec’y, FERC (Nov. 20, 2021), [https://www.iso-ne.com/static-assets/documents/2023/01/tsa\\_neco\\_83.pdf](https://www.iso-ne.com/static-assets/documents/2023/01/tsa_neco_83.pdf) [<https://perma.cc/PL5G-9ND3>].

112 139 S. Ct. 2162 (2019).

113 *Pakdel v. City & Cnty. of San Francisco*, 141 S. Ct. 2226, 2228 (2021) (per curiam).

114 See *id.*; see generally Marcia Rosen & Wendy Sullivan, *From Urban Renewal and Displacement to Economic Inclusion: San Francisco Affordable Housing Policy 1978–2014*, 25 STAN. L. & POL’Y REV. 121, 134 n.57 (2014) (“[Tenancy in common] allows apartment property owners to sell ‘units’ to separate owners, who then own the property in common with other buyers. These units then become owner-occupied, effectively removing purchased apartments, otherwise subject to the Rent Ordinance, from the rental pool.”).

115 *Pakdel*, 141 S. Ct. at 2228.



current tenant.<sup>116</sup> But, a few months after the conversion was approved, they “requested that the city either excuse them from executing the lifetime lease or compensate them for the lease.”<sup>117</sup> The city refused, informing the couple that their failure to offer the lifetime lease “could result in an enforcement action.”<sup>118</sup> The couple sued, asserting, among other claims, “that the lifetime-lease requirement was an unconstitutional regulatory taking.”<sup>119</sup>

In 2017, the federal district court sided with the city, finding that the case was not ripe because the couple had not sought compensation through state takings procedures.<sup>120</sup> However, in 2019, the *Knick* Court “explained that ‘[t]he Fifth Amendment right to full compensation arises at the time of the taking’ and that ‘[t]he availability of any particular compensation remedy, such as an inverse condemnation claim under state law, cannot infringe or restrict the property owner’s federal constitutional claim.’”<sup>121</sup> A divided Ninth Circuit affirmed the lower court’s dismissal of the couple’s claims: “Noting that *Knick* left untouched *Williamson County*’s<sup>122</sup> alternative holding that plaintiffs may challenge only ‘final’ government decisions, the panel concluded that petitioners’ regulatory ‘takings claim remain[ed] unripe because they never obtained a final decision regarding the application of the Lifetime Lease Requirement to their Unit.’”<sup>123</sup> According to the two judges in the majority:

Although the city had twice denied their requests for the exemption—and in fact the “relevant agency c[ould] no longer grant” relief— . . . this decision was not truly “final” because petitioners had made a belated request for an exemption at the end of the administrative process instead of timely seeking one “through the prescribed procedures.”<sup>124</sup>

A unanimous Supreme Court reversed, concluding that “[t]he Ninth Circuit’s demand that a plaintiff seek ‘an exemption through the prescribed [state] procedures,’ plainly requires exhaustion.”<sup>125</sup> However, “[w]hatever policy virtues this doctrine might have, admin-

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* (quoting Brief for Respondents, at 9).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 2228–29.

<sup>121</sup> *Id.* at 2229 (quoting *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2170–71 (2019)).

<sup>122</sup> *Williamson Cnty. Reg’l Plan. Comm’n v. Hamilton Bank*, 473 U.S. 172 (1985).

<sup>123</sup> *Pakdel*, 141 S. Ct. at 2229 (citations omitted) (quoting *Pakdel v. City & Cnty. of San Francisco*, 952 F.3d 1157, 1163 (9th Cir. 2020), *rev’d*, 141 S. Ct. 2226 (2021)).

<sup>124</sup> *Id.* (quoting *Pakdel*, 952 F.3d at 1166–67).

<sup>125</sup> *Id.* at 2230 (quoting *Pakdel*, 952 F.3d at 1167).

istrative ‘exhaustion of state remedies’ is not a prerequisite for a takings claim when the government has reached a conclusive position.”<sup>126</sup> This was not a situation in which “a plaintiff’s failure to properly pursue administrative procedures may render a claim unripe *if* avenues still remain for the government to clarify or change its decision,”<sup>127</sup> as when a landowner could still pursue a zoning variance.<sup>128</sup> Should local governments and other vulnerable defendants desire a change, they should take their case to Congress, which “always has the option of imposing a strict administrative-exhaustion requirement—just as it has done for certain civil-rights claims filed by prisoners.”<sup>129</sup> In a footnote, the Court suggested that, in the light of the *Cedar Point* ruling, “the Ninth Circuit may give further consideration” to a Takings Gloss triad—“an exaction, a physical taking, [or] a private taking.”<sup>130</sup>

*If the Court had adhered to the words and original understanding of the official Takings Clause*, the dismissal of the claim would have been simple and noncontroversial for two reasons. First, the imposition of a condition on the government’s grant of permission to change the mode of ownership of real property (and the enforcement of a private party’s agreement to that condition) is a far cry from the situation in which private property has “*be[en] taken*” by eminent domain.<sup>131</sup> Second, Pakdel and Chegini remained the title owners of a fee interest in their property even after agreeing to extend a lifetime lease.<sup>132</sup> The Supreme Court thus made it even easier for claimants to bring 42 U.S.C. § 1983 takings claims of all varieties in federal courts, tribunals to which the most recent former President appointed dozens, if not hundreds, of judges who likely are no friends to government regulation of property to protect tenants who occupy a dwindling supply of affordable housing or to mitigate and accommodate climate change.<sup>133</sup>

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<sup>126</sup> *Id.* at 2231 (citing *Knick*, 139 S. Ct. at 2167).

<sup>127</sup> *Id.* (citing *Williamson Cnty.*, 473 U.S. at 192–94).

<sup>128</sup> *See id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 2229 n.1 (quoting *Pakdel*, 952 F.3d at 1162, n.4).

<sup>131</sup> *See* U.S. CONST. amend. V.

<sup>132</sup> *See Pakdel*, 141 S. Ct. at 2229.

<sup>133</sup> *See, e.g.,* Rebecca R. Ruiz & Robert Gebeloff, *More than Others, Trump Judges Show Penchant for Dissent*, N.Y. TIMES, Dec. 17, 2020, at A16 (“[A]n analysis of decisions by the country’s appellate bench . . . shows the transformation of the judiciary under Mr. Trump. . . . ‘It’s more polarized,’ said Joshua Fischman, a law professor at the University of Virginia. ‘We’ve seen a huge conservative shift. A lot of these judges are very young, and they’ll be there for a long time.’”).

## II. STEPPING BACK FROM THE BRINK: CONSIDERING TAKINGS PROXIES

The expansion of the Takings Clause in some instances feels inevitable; in others it appears to be a public policy choice. The cases such as *PennEast* in which the Court has widened the range of situations in which the sovereign power of eminent domain can be exercised are somewhat problematic for their departure from the actual words of the Constitution (“public property,” not private, “public benefit,” not actual use by the public), and from the condemnation dynamic (the power being exercised by private designees, not the federal government itself<sup>134</sup>). Nevertheless, these property owners are still entitled to the constitutionally protected right to “just compensation” (usually set at “fair market value”).<sup>135</sup>

Just compensation is a benefit that the government has not provided to parties who feel the need to resort to the Takings Gloss by bringing regulatory, physical occupation, and exactions taking claims.<sup>136</sup> Only the most zealous and steadfast defender of government regulation would assert that federal, state, and local officials never or even rarely victimize property owners purposefully, recklessly, negligently, or otherwise. In *Cedar Point* and *Pakdel*, landowners felt overburdened by state-sanctioned union activities on their property and a requirement to offer a lifetime lease to current tenants, respectively. These plaintiffs are more sympathetic and perhaps more deserving of judicial “creativity”—in the form of striking down bad laws, making government pay for its excesses, or both—than “victims” of eminent domain who at least receive fair market value for their lost property.

Politicians and lay people often view creativity, which we label judicial activism, as a practical necessity in a wide range of cases.<sup>137</sup> For example, without the judicial activism that identified and amplified the extratextual privacy and marriage rights, what other legal recourse would adults who want to use birth control, women seeking to terminate pregnancies, and loving couples have had against the stranglehold effected by state restrictions on contraception, abortion, and

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<sup>134</sup> See *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244, 2248 (2021); U.S. CONST. amend. V.

<sup>135</sup> See, e.g., *United States v. 50 Acres of Land*, 469 U.S. 24, 25 (1984) (“The Fifth Amendment requires that the United States pay ‘just compensation’—normally measured by fair market value—whenever it takes private property for public use.”) (footnote omitted).

<sup>136</sup> See, e.g., *Pakdel*, 141 S. Ct. at 2226.

<sup>137</sup> See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 421 n.46 (2010) (Stevens, J., concurring in part and dissenting in part).

same-sex marriage? The same could be said about the fulsome meaning of “free speech” in cases involving “dark money,” such as the funding of political broadcasts by corporate “persons.”<sup>138</sup> For decades, the judicial activism that gave birth to the Takings Gloss fit that “no other recourse” pattern. But what if the “necessity” that justified judicial activism via the Takings Clause were no longer present? What if, in other words, avenues of relief carved out by federal and state courts and by legislatures over the past century have made most if not all of the Takings Gloss redundant, even superfluous?

The opening chapters of the American constitutional law saga provide examples of regulatory overreach at the expense of real and personal property owners. In early 1798, for example, the Supreme Court delivered unwelcome news to Mr. and Mrs. Caleb Bull, victims of Connecticut legislators who had ordered a new trial in a will dispute, thereby reversing a previous ruling in the Bulls’ favor.<sup>139</sup> The case is known today for two aspects: (1) the rule that the Ex Post Facto Clauses apply only in the criminal context<sup>140</sup> and (2) the dictum that it would be “against all reason and justice, for a people to entrust a Legislature” with the power to “take[] *property* from A. and give[] it to B.”<sup>141</sup> All four Justices who submitted opinions (*seriatim*, not collectively) agreed that the Supreme Court was not in a position to reverse the action of the state legislature, leaving the Bulls out to dry.<sup>142</sup>

Thirty-five years later, Chief Justice Marshall, writing for a unanimous Court (as became the practice under his leadership<sup>143</sup>), dismissed the claim of John Barron and his business associate alleging that the city of Baltimore, by operating construction projects authorized by a series of local ordinances, had destroyed their wharf, costing

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<sup>138</sup> See *id.* at 318–19 (majority opinion) (“The Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether.”).

<sup>139</sup> See *Calder v. Bull*, 3 U.S. (3. Dall.) 386, 396 (1798) (opinion of Paterson, J.). The Ex Post Facto Clauses are found in Article I, Sections 9 (federal government) and 10 (state governments) of the Constitution. U.S. CONST. art. I, §§ 9–10.

<sup>140</sup> *Calder*, 3 U.S. (3. Dall.) at 391 (opinion of Chase, J.) (“But I do not consider any law *ex post facto*, within the prohibition, that mollifies the rigor of the *criminal* law; but only those that *create*, or *aggravate*, the *crime*; or increase the punishment, or change the rules of evidence, *for the purpose of conviction*.”).

<sup>141</sup> *Id.* at 388.

<sup>142</sup> See *id.* at 387; *id.* at 395–397 (opinion of Paterson, J.); *id.* at 398–400 (opinion of Iredell, J.); *id.* at 400–01 (opinion of Cushing, J.).

<sup>143</sup> See, e.g., M. Todd Henderson, *From Seriatim to Consensus and Back Again: A Theory of Dissent*, 2007 SUP. CT. REV. 283, 313 (“In an expression of raw political power, Marshall abandoned the tradition of *seriatim* opinions and established an ‘Opinion of the Court’ that would speak for all Justices through a single voice.”).

them thousands of dollars.<sup>144</sup> Once again, the Court found the constitutional provision proffered by the aggrieved landowner (the Fifth Amendment's Takings Clause) inapplicable, this time for the simple but profound reason that the Clause, like the others in the Bill of Rights, was "intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states."<sup>145</sup>

Short of throwing themselves at the mercy of politicians,<sup>146</sup> the Bulls and Barons in the years prior to Reconstruction had little legal recourse. The same is far from true today, when landowners and other property owners can find solace (and legal relief) in a wide range of common, statutory, regulatory, and constitutional law. Twenty-first century land barons (and other property owners) who are truly victimized by confiscatory and arbitrary laws (and not just claiming to be overly burdened in order to gain negotiation leverage with land use regulators) can be a bit more bullish about their prospects for legal vindication thanks to: (1) judicial interpretation of the Fourteenth Amendment with its Due Process and Equal Protection Clauses, coupled with the possibility of recovering damages to redress constitutional torts committed by some bad governmental actors under 42 U.S.C. § 1983, (2) the protection of vested rights under statutory or judge-made zoning law, (3) judicial and legislative modification or abrogation of sovereign and governmental immunity for certain torts and contract breaches, and (4) the promulgation and later enhancement of the federal Fair Housing Act,<sup>147</sup> state counterparts, and supplementary anti-discrimination laws such as the Religious Land Use and Institutionalized Persons Act ("RLUIPA").<sup>148</sup> During the period

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<sup>144</sup> *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833); see also WILLIAM DAVENPORT MERCER, 3 DIMINISHING THE BILL OF RIGHTS: *BARRON V. BALTIMORE* AND THE FOUNDATIONS OF AMERICAN LIBERTY 5–6 (2017).

<sup>145</sup> *Barron*, 32 U.S. (7 Pet.) at 250–51.

<sup>146</sup> See, e.g., Charles E. Schamel, *Untapped Resources: Private Claims and Private Legislation in the Records of the U.S. Congress*, 27 PROLOGUE MAG., no. 1, 1995, <http://www.archives.gov/publications/prologue/1995/spring/private-claims-1.html> [<https://perma.cc/Z8J7-RC8Q>] ("Private claims generally fall into three categories: refund cases, waiver cases, and tort claims."); James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1871–73 (2010).

<sup>147</sup> 42 U.S.C. §§ 3601–3619.

<sup>148</sup> Pub. L. No. 106-274, 114 Stat. 803 (codified at 42 U.S.C. §§ 2000cc to 2000cc-5). Moreover, several states have takings statutes that lower the threshold for allegedly confiscatory regulations or that make it more difficult to enact new kinds of land use regulations. See, e.g., John D. Echeverria & Thekla Hansen-Young, *The Track Record on Takings Legislation: Lessons from Democracy's Laboratories*, 28 STAN. ENV'T L.J. 439, 442 (2009) ("[A] half-dozen states have

before these protections were in place one could certainly empathize with the Supreme Court's creative rewriting of the Takings Clause in response to property owners' grievances.<sup>149</sup>

Part II considers how these property owner protections serve as effective proxies for the increasingly complex Takings Gloss. Each of the four subparts below introduces a scenario involving aggrieved landowners who "suffer the slings and arrows of outrageous fortune"<sup>150</sup> at the hands of overzealous, spiteful, biased, and arbitrary government officials, and then discusses potential avenues for relief that are independent of the Takings Gloss and its increasingly muddled jurisprudence.

#### A. *Due Process and Equal Protection*

*Amira owns an undeveloped two-acre parcel that is currently zoned by the city to permit commercial use. Amira's land, surrounded by stores and offices, is the only undeveloped parcel. She purchased the property twenty years ago for \$30,000, and eight months ago she applied for a permit to build a strip center (a set of contiguous one- and two-story retail spaces) on the parcel. She is still waiting for the permit. Six months ago, a new slate of anti-development candidates swept all five city council seats. Amira was the largest contributor to the slate of five pro-development candidates who all lost in the election. Last week the city council passed a zoning amendment that reclassified Amira's parcel, allowing only one single-family, detached residence. No other similarly situated property was rezoned at that meeting (or at any previous meeting since zoning went into effect fifty years before), nor did the city council announce plans to do so in the foreseeable future. At the city council meeting one member made a joke about landowners in the future "being more careful about their campaign contributions," and the other members nodded their heads in agreement. Real estate appraisers have informed Amira that her*

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adopted substantive legislation. These laws, popularly called takings 'compensation' laws, require the government to pay property owners subject to regulatory restrictions when compensation is not owed under the federal (or state) constitutions.").

<sup>149</sup> In some ways, the Justices were refashioning the Takings Clause to match the version found in dozens of state constitutions, which provides compensation not solely when private property is "taken," but when it is "damaged" or "injured" as well. See Maureen E. Brady, *The Damagings Clauses*, 104 VA. L. REV. 341, 344, 352, 398 (2018) ("More than half of the state constitutions contain a takings clause that is materially different from the federal one, in that it prohibits property from being both 'taken' and 'damaged' or 'injured' for public use without just compensation.").

<sup>150</sup> WILLIAM SHAKESPEARE, *HAMLET* act 3, sc. 1, I. 57–58.

*two-acre parcel, which was worth \$250,000 two weeks ago (when it was zoned for commercial use), is now worth between \$60,000 and \$75,000. Amira has consulted a lawyer who advises filing a partial regulatory takings claim in order to overturn the rezoning, to recover thousands of dollars in just compensation, or both. This litigation, in effect, would be based on these words from the Takings Gloss: [N]or shall private property be subjected to regulation that goes too far by the government without just compensation, unless the property owner is seeking only injunctive relief.*

Because Amira still has title to her property, and because even with the new zoning classification the property is worth at least twice as much as her original purchase price, a commonsense reading of the Takings Clause would not suggest that her property had been “taken.” It is only because the Supreme Court has repeated Justice Holmes’s 1922 invocation of what he called (without one supporting citation) the “general rule . . . that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking,”<sup>151</sup> that Amira’s counsel can make a good-faith claim that her property has been the subject of what is called a “partial taking.” The adjective “partial” in this context refers not to the size of the land “taken,” but instead to the fact that the challenged regulation has partially (and not completely) reduced the use and value of the parcel.<sup>152</sup>

There is another clause in the Fifth Amendment—indeed it is the Clause preceding the Takings Clause (replicated in the Fourteenth Amendment)—whose text more closely matches Amira’s predicament. It is not as much of a semantic stretch to say that the city council has “deprived” her of the full use of her property. The requirement that such a deprivation can only proceed if the owner is allowed “due process of law” has been interpreted literally: the expectation that the person deprived will be provided with notice and a fair hearing—that is, procedural due process—<sup>153</sup>and figuratively: the expectation that the government doing the deprivation will not act in an arbitrary fashion.<sup>154</sup> The former is known by the somewhat redundant appellation

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<sup>151</sup> Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

<sup>152</sup> See, e.g., Palazzolo v. Rhode Island, 533 U.S. 606, 633 (2001) (“Our polestar instead remains the principles set forth in *Penn Central* itself and our other cases that govern partial regulatory takings.”) (O’Connor, J., concurring).

<sup>153</sup> See, e.g., Mackey v. Montrym, 443 U.S. 1, 20 (1979) (“And the constitutional guarantee of procedural due process has always been understood to embody a presumptive requirement of notice and a meaningful opportunity to be heard *before* the State acts finally to deprive a person of his property.”).

<sup>154</sup> See, e.g., Randy E. Barnett & Evan D. Bernick, *No Arbitrary Power: An Originalist*

“procedural due process,” while the latter carries the unfortunately oxymoronic label “substantive due process.”<sup>155</sup>

Because our hypothetical facts do not indicate that the city council failed to provide Amira with adequate notice or with an opportunity to respond in a public hearing, Amira’s due process challenge would be of the substantive variety. As it turns out, the Supreme Court has entertained substantive due process challenges to zoning since its first decision on the subject only four years after Holmes introduced his “general rule.” That 1926 opinion came in *Village of Euclid v. Ambler Realty Co.*<sup>156</sup> Rejecting a facial challenge to the village’s zoning ordinance, the Court majority (the three most conservative Justices dissented without writing an opinion) explained that to prevail the owner needed to demonstrate that the offending regulatory “provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.”<sup>157</sup>

Two years later, in *Nectow v. City of Cambridge*,<sup>158</sup> a more fortunate landowner brought a successful as-applied challenge to the city’s classification of a parcel in an industrial neighborhood as residential. The unanimous Court noted that “[t]he attack upon the ordinance is that, as specifically applied to plaintiff in error, it deprived him of his property without due process of law in contravention of the Fourteenth Amendment,”<sup>159</sup> and agreed with the state court below “that a

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*Theory of the Due Process of Law*, 60 WM. & MARY L. REV. 1599, 1605 (2019) (“We then apply our model of good-faith construction based on the [Due Process C]lauses’ original functions—their ‘spirit’—of barring arbitrary exercises of power over individuals.”).

<sup>155</sup> For a convincing argument that *Pennsylvania Coal* was itself a substantive due process, and not Takings Clause, decision, see Bradley C. Karkkainen, *The Police Power Revisited: Phantom Incorporation and the Roots of the Takings “Muddle,”* 90 MINN. L. REV. 826, 829 (2006).

<sup>156</sup> 272 U.S. 365, 384 (1926) (“The ordinance is assailed on the grounds that it is in derogation of § 1 of the Fourteenth Amendment to the Federal Constitution *in that it deprives appellee of liberty and property without due process of law* and denies it the equal protection of the law, and that it offends against certain provisions of the Constitution of the State of Ohio.”) (emphasis added).

<sup>157</sup> *Id.* at 395. With the exception of the word “substantial,” this test remains in place even today. *See, e.g.,* *Bannum, Inc. v. City of Louisville*, 958 F.2d 1354, 1360 (6th Cir. 1992) (“Zoning is a quasi-legislative function, and, therefore, zoning decisions are reviewed to determine whether the classifications drawn by the regulations are *rationally* related to a legitimate interest of the state or municipality.”) (emphasis added); *see also* *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 540–42 (2005) (“The ‘substantially advances’ formula suggests a means-ends test: It asks, in essence, whether a regulation of private property is *effective* in achieving some legitimate public purpose. An inquiry of this nature has some logic in the context of a due process challenge, for a regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause.”).

<sup>158</sup> 277 U.S. 183 (1928).

<sup>159</sup> *Id.* at 185.



court should not set aside the determination of public officers in such a matter unless it is clear that their action ‘has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense.’”<sup>160</sup> Later that same year, in *Washington ex rel. Seattle Title Trust Co. v. Roberge*,<sup>161</sup> the Court (again unanimously) struck down a Seattle zoning provision that required a supermajority of neighbors to consent to the use of a building as a home for the elderly as a violation of substantive due process protections: “As the attempted delegation of power cannot be sustained, and the restriction thereby sought to be put upon the permission is arbitrary and repugnant to the due process clause, it is the duty of the superintendent to issue, and the trustee is entitled to have, the permit applied for.”<sup>162</sup> The stage was thus set for the Court to view challenges to land use restrictions primarily through the substantive due process lens. It was not until the revival of regulatory takings in the late 1970s, beginning with *Penn Central Transportation Co. v. City of New York*,<sup>163</sup> that the Supreme Court took seriously and gave substance to Holmes’s prematurely labeled “general rule.”

Unfortunately, in recent decades the Justices themselves have mischaracterized *Euclid* and other substantive due process challenges as regulatory takings cases.<sup>164</sup> Chief Justice Roberts repeated this er-

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<sup>160</sup> *Id.* at 187–88 (quoting *Nectow v. City of Cambridge*, 157 N.E. 618, 620 (Mass. 1927)).

<sup>161</sup> 278 U.S. 116 (1928).

<sup>162</sup> *Id.* at 122–23. For the background, implications, and unique legacy of *Roberge*, see Michael Allan Wolf, *A Reign of Error: Property Rights and Stare Decisis*, 99 WASH. U.L. REV. 449 (2021).

<sup>163</sup> 438 U.S. 104 (1978). *Penn Central* quickly ushered in a spate of regulatory takings challenges in the Supreme Court. See, e.g., *Andrus v. Allard*, 444 U.S. 51, 65 (1979) (“[A] significant restriction has been imposed on one means of disposing of the artifacts. But the denial of one traditional property right does not always amount to a taking.”); *Kaiser Aetna v. United States*, 444 U.S. 164, 178 (1979) (“Here, the Government’s attempt to create a public right of access to the improved pond goes so far beyond ordinary regulation or improvement for navigation as to amount to a taking . . . .”); *Agins v. City of Tiburon*, 447 U.S. 255, 261 (1980) (“The specific zoning regulations at issue are exercises of the city’s police power to protect the residents of Tiburon from the ill effects of urbanization. Such governmental purposes long have been recognized as legitimate.”) (footnote omitted).

<sup>164</sup> See, e.g., *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’t Prot.*, 560 U.S. 702, 717 (2010) (plurality opinion) (including a parenthetical following the citation for *Euclid* that reads: “recognizing that block zoning ordinances could constitute a taking, but holding that the challenged ordinance did not do so”); *Concrete Pipe & Prods. v. Constr. Laborers Pension Tr. For S. Cal.*, 508 U.S. 602, 645 (1993) (“[O]ur cases have long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking.”) (citing *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926) (“approximately 75% diminution in value”); *Hadacheck v. Sebastian*, 239 U.S. 394, 405 (1915) (“92.5% diminution”)).

ror in his majority opinion in *Cedar Point*, when he cited *Euclid* to illustrate that the “too far” regulatory takings framework established in *Pennsylvania Coal Co. v. Mahon*<sup>165</sup> “now applies to use restrictions as varied as zoning ordinances.”<sup>166</sup> Even though *Euclid* was decided merely four years after *Pennsylvania Coal*, the *Euclid* Court in fact did not quote, cite, or otherwise indicate that its opinion was related to Justice Holmes’s “too far” ruminations.<sup>167</sup>

The failure to maintain the line between takings and substantive due process is best represented by the Court’s 2005 decision in *Lingle v. Chevron U.S.A. Inc.*<sup>168</sup> Justice O’Connor, writing for a unanimous Court, corrected dictum that had plagued takings jurisprudence for a quarter century:

In *Agins v. City of Tiburon*,<sup>169</sup> a case involving a facial takings challenge to certain municipal zoning ordinances, the Court declared that “[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, or denies an owner economically viable use of his land.” Because this statement is phrased in the disjunctive, *Agins*’ “substantially advances” language has been read to announce a stand-alone regulatory takings test that is wholly independent of *Penn Central* or any other test. . . . [T]his is our first opportunity to consider its validity as a freestanding takings test. We conclude that this formula prescribes an inquiry in the nature of a due process, not a takings, test, and that it has no proper place in our takings jurisprudence.<sup>170</sup>

The *Lingle* Court attempted to clarify that physical invasion and regulatory takings (total and partial) fit into the takings mold because “[e]ach aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropri-

<sup>165</sup> 260 U.S. 393, 415 (1922) (“The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”).

<sup>166</sup> *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021) (citing *Euclid*, 272 U.S. at 387–88).

<sup>167</sup> Charles M. Haar & Michael Allan Wolf, *Euclid Lives: The Survival of Progressive Jurisprudence*, 115 HARV. L. REV. 2158, 2165–66 (2002) (noting that *Pennsylvania Coal* “apparently had little impact on how the Court analyzed the legitimacy of regulations affecting the use and development of land in the years immediately following the issuance of the opinion,” and that the 1922 decision “did not earn even a mention in the four cases decided between 1926 and 1928 in which landowners claimed that government officials were passing and enforcing arbitrary and confiscatory regulations”).

<sup>168</sup> 544 U.S. 528 (2005).

<sup>169</sup> 447 U.S. 255 (1980).

<sup>170</sup> *Lingle*, 544 U.S. at 540 (quoting *Agins*, 447 U.S. at 260) (citations omitted).

ates private property or ousts the owner from his domain.”<sup>171</sup> The effort to connect physical invasions and regulatory takings holds up so long as we put out of our mind the facts that with eminent domain (1) the owner actually transfers legal title to all or a portion of the property and (2) the government must establish that it is furthering a public use.

It would be disingenuous to assert that all substantive due process challenges to regulations of real property will receive the same generous reception as the landowners in the two 1928 cases. The reality is that, given the property owner’s heavy burden to show either arbitrariness<sup>172</sup> or the lack of a legitimate police power goal, and because (since the late 1930s) property rights is not an area in which the Supreme Court will elevate scrutiny,<sup>173</sup> regulators almost always prevail in federal court.<sup>174</sup> Nevertheless, this avenue for relief has by no means been foreclosed by the Court. And, when one considers that, since 1978, the Court has made it possible to recover monetary damages against local governments and officials under 42 U.S.C. § 1983,<sup>175</sup> the remedy obtained by the fortuitous substantive due process claimant will be hard to distinguish from that gained by the relatively rare victorious regulatory takings challenger.<sup>176</sup>

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<sup>171</sup> *Id.* at 539.

<sup>172</sup> Some federal circuits use the “shock the conscience” standard to determine arbitrariness. *See, e.g.*, *CEnergy-Glenmore Wind Farm #1, LLC v. Town of Glenmore*, 769 F.3d 485, 488 (7th Cir. 2014) (“On the issue of arbitrariness, we have said that a land-use decision must ‘shock the conscience’ to run afoul of the Constitution.”).

<sup>173</sup> *But cf.* *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (plurality opinion) (“When a city undertakes such intrusive regulation of the family, neither *Belle Terre* nor *Euclid* governs; the usual judicial deference to the legislature is inappropriate.”) (citing *Vill. of Belle Terre*, 416 U.S. 1 (1974); *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)).

<sup>174</sup> Because state judges are free to develop their own frameworks for determining state substantive due process violations in the land use regulatory context, there is a slightly better chance of prevailing in some state courts. *See, e.g.*, ROBERT C. ELLICKSON, VICKI BEEN, RODERICK M. HILLS JR. & CHRISTOPHER SERKIN, *LAND USE CONTROLS* 126–28 (5th ed. 2021).

<sup>175</sup> *See Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690 (1978) (“Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies. Local governing bodies, therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body’s officers.”); *see also* 42 U.S.C. § 1988(b) (allowing for the recovery of “a reasonable attorney’s fee” for prevailing parties in § 1983 lawsuits) (footnotes omitted).

<sup>176</sup> *See, e.g.*, *City of Monterey v. Del Monte Dunes at Monterey*, 526 U.S. 687, 701 (1999) (“The jury delivered a general verdict for Del Monte Dunes on its takings claim, a separate verdict for Del Monte Dunes on its equal protection claim, and a damages award of \$1.45 million. After the jury’s verdict, the District Court ruled for the city on the substantive due process

The Justice who for years occupied the often outcome-determinative swing position on the Court—Anthony Kennedy<sup>177</sup>—on several occasions urged his colleagues to resolve property rights disputes using the Due Process Clause rather than to further complicate the already bewildering state of takings jurisprudence. In *Eastern Enterprises v. Apfel*,<sup>178</sup> although agreeing with the plurality that a retroactive federal coal miner benefits statute was unconstitutional, Justice Kennedy parted ways when it came to the operative clause: “Given that the constitutionality of the Coal Act appears to turn on the legitimacy of Congress’ judgment rather than on the availability of compensation, . . . the more appropriate constitutional analysis arises under general due process principles rather than under the Takings Clause.”<sup>179</sup> Similar statements can be found in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*,<sup>180</sup> in which he distanced himself from the conservative plurality that recognized the possibility of a regulatory taking by the judiciary,<sup>181</sup> and in *Lingle*, in which Kennedy “note[d] that [the] decision does not foreclose the possibility that a regulation might be so arbitrary or irrational as to violate due process.”<sup>182</sup>

If Amira can demonstrate that the ordinance targeted her because she was exercising a fundamental right (the First Amendment right to make political donations, for example<sup>183</sup>), she might benefit from elevated scrutiny and a burden shift to the government. This fundamental right variety of substantive due process was key to the success of the plaintiff in *Moore v. City of East Cleveland*.<sup>184</sup> The *Moore* plurality voted to strike down a definition of “family” in a zoning ordi-

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claim, stating that its ruling was not inconsistent with the jury’s verdict on the equal protection or the takings claim.”).

<sup>177</sup> Alicia Parlapiano & Jugal K. Patel, *With Kennedy’s Retirement, the Supreme Court Loses Its Center*, N.Y. TIMES (June 27, 2018), <https://www.nytimes.com/interactive/2018/06/27/us/politics/kennedy-retirement-supreme-court-median.html> [<https://perma.cc/8WZ8-56Q8>]. (“Justice Kennedy, the court’s crucial swing vote, has served on the court for 30 years.”).

<sup>178</sup> 524 U.S. 498 (1998).

<sup>179</sup> *Id.* at 545 (Kennedy, J., concurring in the judgment and dissenting in part).

<sup>180</sup> 560 U.S. 702, 734–35 (2010) (plurality opinion).

<sup>181</sup> *See id.* at 735 (Kennedy, J., concurring in part and concurring in the judgment) (“If a judicial decision, as opposed to an act of the executive or the legislature, eliminates an established property right, the judgment could be set aside as a deprivation of property without due process of law.”).

<sup>182</sup> *Lingle v. Chevron U.S.A. Inc.* 544 U.S. 528, 548 (2005) (Kennedy, J., concurring).

<sup>183</sup> *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 14, 19 (1976) (per curiam) (“The expenditure limitations contained in the [Federal Election Campaign] Act [of 1971] represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech.”).

<sup>184</sup> 431 U.S. 494 (1977) (plurality opinion).

nance that was unconstitutionally restrictive,<sup>185</sup> noting: “[W]hen the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation.”<sup>186</sup> Even without the benefit of elevated scrutiny, however, landowners like Amira who have been the victim of arbitrary decision-making are still entitled to relief under long-standing substantive due process precedents such as *Nectow*.<sup>187</sup>

The Due Process and Equal Protection Clauses often run in tandem, with courts using the same rational basis (minimal) scrutiny when considering challenges to run-of-the-mill economic regulations like zoning and other land use restrictions.<sup>188</sup> *Euclid* is a seminal and prototypical example, as the Ambler Realty Company alleged that the village had violated the Fourteenth Amendment’s Equal Protection Clause as well.<sup>189</sup> At first glance, one might assume that, because Amira’s situation is not shared by others, she is not a member of a class that might be entitled to protection from harmful, differential treatment. As if one oxymoron (substantive due process) were not enough when it came to challenges brought by property owners, in its 2000 “class of one” decision in *Village of Willowbrook v. Olech*,<sup>190</sup> the Court affirmed a circuit court ruling permitting an equal protection claim to proceed even though “the plaintiff did not allege membership in a class or group.”<sup>191</sup> Olech had “alleg[ed] that the Village intentionally demanded a 33-foot easement as a condition of connecting her property to the municipal water supply where the Village required

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<sup>185</sup> *See id.* at 495–96, 495 n.2.

<sup>186</sup> *Id.* at 499. Justice Stevens, in his concurring opinion, believed that the “unprecedented ordinance” that did not allow a grandmother to live in the same household as her grandson “constitutes a taking of property without due process and without just compensation.” *Id.* at 521 (Stevens, J., concurring). As illustrated by the quotation that introduces this Article, Justice Stevens expressed skepticism about the concept of regulatory takings later in his long tenure on the Court. *See supra* text accompanying note 1.

<sup>187</sup> *See Nectow v. City of Cambridge*, 277 U.S. 183, 188–89 (1928). Disgruntled landowners in some jurisdictions can also rely on state high court jurisprudence that is more protective of private property rights. *See, e.g., Cmty. Res. for Just., Inc. v. City of Manchester*, 917 A.2d 707, 717 (N.H. 2007) (“As the right to use and enjoy property is an important substantive right, we use our *intermediate scrutiny test* to review equal protection challenges to zoning ordinances that infringe upon this right.”) (emphasis added).

<sup>188</sup> CHEMERINSKY, *supra* note 31, at 690 (“Since 1937, the Court has made it clear that it will defer to government economic and social regulations unless they infringe on a fundamental right or discriminate against a group that warrants special judicial protection.”).

<sup>189</sup> *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926).

<sup>190</sup> 528 U.S. 562 (2000) (per curiam).

<sup>191</sup> *Id.* at 564.

only a 15-foot easement from other similarly situated property owners.”<sup>192</sup> *Olech* characterized regulators’ behavior as “irrational and wholly arbitrary” and “motivated by ill will.”<sup>193</sup> Unperturbed by the fact that “the plaintiff did not allege membership in a class or group,”<sup>194</sup> the Court observed that “[o]ur cases have recognized successful equal protection claims brought by a ‘class of one,’ where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.”<sup>195</sup> In the typical, *Olech*-based, class-of-one equal protection challenge brought by property owners, the plaintiffs have trouble convincing the court that they have been victimized by regulators who treated similarly-situated owners (“comparators”) more favorably.<sup>196</sup> *Amira*, by contrast, can demonstrate the “ill will” directed against her by the retributive city council. The fact that her single-parcel rezoning was unique also bodes well for her equal protection claim.

#### B. Vesting Rights Under Zoning Regimes

*Barb and Beth own a large, run-down four-family house on a half-acre parcel that is currently zoned for multi-family residential use. They purchased the crumbling structure two years ago with plans to convert it into a bed-and-breakfast with eight units (they would live in one unit and make the others available to paying guests). Six months ago, after paying an architect thousands of dollars for rehab plans, the couple received a building permit to make significant changes in the structure outside and inside. They ordered (with nonrefundable deposits) new furniture and other equipment. Two months ago, however, the state legislature authorized any city that was concerned about the popularity of Airbnb, Vrbo, and other short-term rental, online marketplaces, to pass a local ordinance restricting all owners of residential properties to no*

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<sup>192</sup> *Id.* at 565.

<sup>193</sup> *Id.* at 563.

<sup>194</sup> *Id.* at 564.

<sup>195</sup> *Id.*

<sup>196</sup> See Alex M. Hagen, *Mixed Motives Speak in Different Tongues: Doctrine, Discourse, and Judicial Function in Class-of-One Equal Protection Theory*, 58 S.D. L. REV. 197, 206, 211 (2013) (“Numerous courts have concluded that a claim fails on its face because the plaintiff has failed to allege that others are similarly situated with a requisite degree of precision.”); Michael Pappas, *Singled Out*, 76 MD. L. REV. 122, 162 (2016) (“In determining whether an individual ‘has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment,’ a court must define a class of similarly situated comparators and must assess the rationality of treatment.”) (footnote omitted).

*more than six short-term rentals per calendar year, with no rental to exceed five days. Owners of existing inns and B&Bs in residential areas are permitted to continue to operate as nonconforming uses, but when the city enacts this ban officials inform Barb and Beth that they do not qualify for the exemption. Barb and Beth consult with a lawyer who advises filing a total or partial (regulatory) takings claim against the city and state to invalidate the short-term rental ordinance as applied to the couple, to recover thousands of dollars in just compensation, or both. This litigation, in effect, would be based on these words from the Takings Gloss: **[N]or shall private property, including rights in property, be subjected to regulation that goes too far by the government without just compensation, unless the property owner is seeking only injunctive relief.***

The question of whether retroactive legislation in the civil (as opposed to criminal) context violates constitutional norms has puzzled courts since *Calder v. Bull* was decided in the early years of the new republic.<sup>197</sup> The best (and most lucrative) plans of landowners and developers may be instantly eradicated when government regulators impose new or amended restrictions on the use of land or other valuable property. The predicament faced by Barb and Beth can be frustrating, but their chances of prevailing are strong, thanks to a well-developed body of statutory and common law regarding zoning and other forms of land use regulation.

Provisions protecting the rights of owners to continue to use their property even if that use should be outlawed by new regulations, or to continue to occupy structures that do not meet the specifications found in new regulations, are ubiquitous and, for the most part, quite reasonable.<sup>198</sup> True, it is not unusual for zoning laws to restrict the

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<sup>197</sup> See *supra* text accompanying notes 139–42.

<sup>198</sup> 2 PATRICIA E. SALKIN, *AMERICAN LAW OF ZONING* § 12:1 (5th ed. 2022) (“A use lawfully existing prior to the enactment of a zoning ordinance, and that is maintained after the effective date of the ordinance, although it does not comply with the zoning restrictions applicable to the district in which it is situated, is commonly referred to as a ‘nonconforming use.’”); see also DANIEL R. MANDELKER & MICHAEL ALLAN WOLF, *LAND USE LAW* § 5.74 (6th ed. 2021) (“A true nonconforming use is a use of land or a building that does not conform with the use restrictions of the zoning ordinance.”). For a critical analysis of related provisions in other legal contexts, see Heidi Gorovitz Robertson, *If Your Grandfather Could Pollute, So Can You: Environmental “Grandfather Clauses” and Their Role in Environmental Inequity*, 45 *CATH. U. L. REV.* 131 (1995). Professor Serkin has observed that, while “a strong current running through land use law protects existing uses from being regulated away without compensation[.] . . . the supposed doctrinal underpinnings for existing use protection” are “startlingly weak.” Christopher Serkin, *Existing Uses and the Limits of Land Use Regulations*, 84 *N.Y.U. L. REV.* 1222, 1242 (2009). Despite the analytical problems posed by judicial application of the Takings and Due

owner from making a major change or intensifying the nonconformity,<sup>199</sup> to withdraw protected status after an owner abandons the nonconformity,<sup>200</sup> or to amortize the nonconformity for a reasonable period after the new law goes into effect.<sup>201</sup> Still, owners are far from a “now you have it, now you don’t” situation.

The scenario involving Barb and Beth raises a related question—can a property owner obtain the protected status afforded by prospective laws if the owner has not yet begun the use that will be restricted or prohibited? This vested rights issue is typically handled two ways—by court decisions that weigh a number of relevant factors (expending funds, performing preparatory work on the site, and the like, in reliance on the current state of the law<sup>202</sup>), or by legislation that establishes a bright line, such as a specific period time (six months, one year, and the like) after the owner obtains permission in the form of a zoning or building permit.<sup>203</sup> Making a federal takings case out of Barn and Beth’s plight would be a waste of time, money, and energy.

### C. *The Modern Sovereign and Government Immunity Landscape*

*Carmen was excited about the eighteenth-century townhouse they purchased six months ago. Their excitement increased when state officials announced three months ago that historians had discovered for the first time that the townhouse was*

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Process Clauses in these contexts, so skillfully exposed by Professor Serkin, the protection of vested rights remains robust.

<sup>199</sup> MANDELKER & WOLF, *supra* note 198, § 5.75 (“A nonconforming use may lose its protected status if the owner changes or expands the nonconformity. Most zoning ordinances contain provisions covering this problem.”); *see also* 2 Salkin, *supra* note 198, § 12:19.

<sup>200</sup> 2 SALKIN, *supra* note 198, § 12:22 (“Nonconforming uses will be terminated if they are abandoned. Municipal ordinances also frequently contain discontinuance provisions, which operate by terminating nonconforming use that cease being used for a specific period of time, usually ranging from six months to two years or so.”); *see also* MANDELKER & WOLF, *supra* note 198, § 5.77.

<sup>201</sup> *See* 2 SALKIN, *supra* note 198, § 12:23 (“Although it was initially believed that nonconforming uses would gradually disappear due to obsolescence and restrictions on their change and expansion, it soon became clear that more stringent measures were necessary to eliminate nonconforming uses. Amortization arose as the most popular solution.”); *see also* MANDELKER & WOLF, *supra* note 198, § 5.78.

<sup>202</sup> *See* 2 SALKIN, *supra* note 198, § 32:2 (“The purpose of vested rights is to ensure a balance—the municipality’s police power to protect the health, safety, and welfare versus the landowner’s right to finish development of his or her land once begun. In essence, state courts apply the doctrine on a case-by-case basis and decide at what point in time the owner’s plan proceeds enough towards completion of the project that his rights vest in the property.”).

<sup>203</sup> *See id.* § 32:7 (“Some states, typically by statute, limit the time a landowner has vested rights to complete the project before the new ordinance is enforceable against the land.”); *see also* MANDELKER & WOLF, *supra* note 198, § 6.21 (citing statutes).



*the site of an important stop on the Underground Railroad during the antebellum period. One month later, however, Carmen's excitement is dampened when they learn that, without seeking Carmen's permission, the state education department is arranging for monthly visits of public schoolchildren to the townhouse. A state law regarding historic sites provides for these visits without the need to secure permission from the owner. Protective of their privacy and private property rights, Carmen files a physical occupation takings claim against the state seeking an injunction to prevent the schoolchildren visits. This litigation, in effect, would be based on these words from the Takings Gloss: [N]or shall rights in property such as the right to exclude, be taken or subjected to regulation that goes too far; nor shall private property be physically occupied even temporarily by private parties delegated by the government, without just compensation, unless the property owner is seeking only injunctive relief.*

The first time an uninvited public school student or chaperone intentionally steps foot on Carmen's property without their permission, the tort of trespass to land will have occurred, according to traditional and modern common-law rules.<sup>204</sup> The same is true for any government agency responsible for causing the unwanted invasion of Carmen's property.<sup>205</sup> One leading treatise identifies the essence of the tort of trespass to land as the interference with exclusive possession, known otherwise (as in *Cedar Point*<sup>206</sup>) as the "right to exclude": "The gist of the tort is intentional interference with rights of exclusive possession; no other harm is required."<sup>207</sup> Because the common law of

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<sup>204</sup> See RESTATEMENT (FIRST) OF TORTS § 158 (AM. L. INST. 1934) ("One who intentionally and without a consensual or other privilege (a) enters land in possession of another or any part thereof or causes a thing or third person so to do, or (b) remains thereon, or (c) permits to remain thereon a thing which the actor or his predecessor in legal interest brought thereon . . . is liable as a trespasser to the other irrespective of whether harm is thereby caused to any of his legally protected interests.").

<sup>205</sup> See *id.* § 158 cmt. i; see also DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 49 (2d ed. 2022) ("One who intentionally enters or *causes tangible entry* upon the land in possession of another is a trespasser and liable for the tort of trespass, unless the entry is privileged or consented to.") (emphasis added) (footnotes omitted).

<sup>206</sup> See *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2073 (2021) ("Given the central importance to property ownership of the right to exclude, it comes as little surprise that the Court has long treated government-authorized physical invasions as takings requiring just compensation.").

<sup>207</sup> DOBBS ET AL., *supra* note 205, § 49; see also W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 67 (W. Page Keeton ed., 5th ed. 1984) ("In the bundle of rights, privileges, powers, and immunities that are enjoyed by an owner of real property, perhaps the most important is the right to exclusive 'use'

torts protects a landowner's cherished right to exclude, why did the Supreme Court, shortly after the adoption of the Fourteenth Amendment, feel the need to effectively amend the Takings Clause to include physical takings (much different in kind from the affirmative exercise of eminent domain) by government or by persons or things related to the government?

An important clue lies in the state constitutional background to the Supreme Court's first physical takings case (indeed the first major departure from the constitutional text), decided in 1871: *Pumpelly v. Green Bay Co.*<sup>208</sup> The plaintiff claimed that, as a result of a dam whose construction was authorized by the state of Wisconsin to improve the navigability of the Fox River:

[T]he water of [Lake Winnebago] was so raised as to cause it to overflow all his land, and that the overflow remained continuously from the completion of the dam, in the year 1861, to the commencement of the suit in the year 1867, and the nature of the injuries set out in the declaration are such as show that it worked an almost complete destruction of the value of the land.<sup>209</sup>

The default position at the time was state sovereignty from tort lawsuits, and the state chose not to enact "any provision for compensating the plaintiff for the injury."<sup>210</sup> Therefore, the injured property owner turned instead to the takings clause found in the Wisconsin Constitution of 1848, which remains unchanged today: "The property of no person shall be taken for public use without just compensation therefor."<sup>211</sup>

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of the realty."). For a nineteenth-century case linking the protections afforded by trespass to land with the right to exclude, see *Kimball v. Yates*, 14 Ill. 464, 465 (1853) ("The plaintiff always retained the entire possession of the premises. He allowed bars and a gate to be erected, and the public to pass through them and over his land for a time. But this was a mere matter of sufferance, and he retained the right to forbid it. He could not be divested of his legal right to the *exclusive possession* of his land, and the public invested with an easement over it, till the road had been regularly laid out and actually opened, and the damages paid, or an actual or implied waiver by him of his right to claim damages. This had never been done, and his *right to exclude* the public, or any portion of the public, from the privilege of passing over his premises was undoubted.") (emphasis added).

<sup>208</sup> 80 U.S. (13 Wall.) 166 (1871).

<sup>209</sup> *Id.* at 177.

<sup>210</sup> *Id.* at 176.

<sup>211</sup> WIS. CONST. art I, § 13. For those wondering why the claim was not made under the Takings Clause of the U.S. Constitution, the *Pumpelly* Court explained that "though the Constitution of the United States provides that private property shall not be taken for public use without just compensation, it is well settled that this is a limitation on the power of the Federal Government, and not on the States." 80 U.S. (13 Wall.) at 176–77. At this time, before the

Justice Miller, writing for a unanimous Court that apparently was moved by the landowner's predicament, did not let the actual wording of the state takings clause get in the way of relief:

It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use.<sup>212</sup>

Notice how Miller acknowledged that the private property was “not *taken*” (his emphasis) “in the narrowest sense of that word,”<sup>213</sup> which is the sense that careful lawyers and judges are trained to respect. Perhaps that is why the Court tried to make clear that it was opening the door to relief under the state analogue to the Takings Clause only a wee bit:

[W]here real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution, and that this proposition is not in conflict with the weight of judicial authority in this country, and certainly not with sound principle. Beyond this we do not go, and this case calls us to go no further.<sup>214</sup>

Today that door is open so wide that it accommodates a farmer aggravated by occasional uninvited labor organizers,<sup>215</sup> a coaxial cable for

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Takings Clause of the Fifth Amendment had been incorporated through the Due Process Clause of the brand-new Fourteenth Amendment, the Court was following the precedent of *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

<sup>212</sup> *Pumpelly*, 80 U.S. (13 Wall.) at 177–78.

<sup>213</sup> *Id.* at 178.

<sup>214</sup> *Id.* at 181.

<sup>215</sup> See *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021) (holding that labor organization's presence on land under California statute constituted a physical taking).

transmitting television programming,<sup>216</sup> and, if the plaintiffs in *Pakdel* have their way in the court below, a requirement to offer a lifetime lease to which they apparently agreed before filing suit.<sup>217</sup>

But what if the legal justification for the Court's resort to broadening the word "taken" were no longer applicable? Stated otherwise, what if today landowners in a *Pumpelly*-like predicament could successfully employ a simple tort claim against the state and its agents without relying on a contortion of the constitutional text? The reader will recall that Justice Miller noted that Wisconsin had not enacted "any provision for compensating the plaintiff for the injury."<sup>218</sup> Because they had not, sovereign immunity, which at the time was the default rule for the federal and all state governments, came into play.<sup>219</sup>

Today, the landscape has changed dramatically. Widespread immunity of state agencies and officers is no longer the rule in the United States. As one leading treatise reports, "[a]lmost all states have now enacted tort claims statutes waiving the blanket common law immunity of the state and its agencies."<sup>220</sup> What about Chief Justice Roberts' invocation of the trespass-taking distinction? The *Cedar Point* dissenters had the upper hand in this argument for four reasons: (1) the precedent cited by Chief Justice Roberts did not actually draw that distinction,<sup>221</sup> (2) both the tort and the Takings Gloss strongly protect an abstract "right to exclude" any unpermitted invasion re-

<sup>216</sup> See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (holding that installing television cables in a building constituted a physical taking under New York statute).

<sup>217</sup> See *Pakdel v. City & Cnty. of San Francisco*, 141 S. Ct. 2226 (2021) (per curiam).

<sup>218</sup> *Pumpelly*, 80 U.S. (13 Wall.) at 176.

<sup>219</sup> See WIS. CONST. art. IV, § 27 ("The legislature shall direct by law in what manner and in what courts suits may be brought against the state."). Even seventy years later, the authors of a state-by-state examination of sovereign immunity explained that, at the time, plaintiffs bringing trespass to land and other tort actions against the state of Wisconsin or its agencies, would be out of luck: "The constitution of Wisconsin permits the legislature to authorize suits against the state, and the legislature by general statute has done so, but the statute is interpreted as not creating state liability in tort." Robert A. Leflar & Benjamin E. Kantrowitz, *Tort Liability of the States*, 29 N.Y.U. L. Rev. 1363, 1405 (1954) (footnotes omitted).

<sup>220</sup> DOBBS ET AL., *supra* note 205, § 342.

<sup>221</sup> See *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2079 (2021) ("Our approach in *Arkansas Game and Fish Commission* reflects nothing more than an application of the traditional trespass-versus-takings distinction to the unique considerations that accompany temporary flooding."). In reality, trespass is referred to only once in *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 29 (2012), in a reference to a 1922 decision. The *Arkansas Game* Court quoted Justice Holmes's explanation that "[e]very successive trespass adds to the force of the evidence." *Id.* (quoting *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 329–330 (1922)) (emphasis added). Professor Lynda Butler has noted, citing *Arkansas Game*, that "[t]oday, the physical takings concept has been stretched so thin that it could encom-

ardless of duration or intensity,<sup>222</sup> (3) if the meaning of the term “trespass” were really confined to a single or occasional invasion, then a landowner victimized by a private defendant who flooded neighboring property would be without recourse, and (4) discussions of the common law of trespass to land often center on “continuing” and “permanent” trespasses.<sup>223</sup> One leading torts treatise treats trespass and takings, under certain circumstances, as two sides of the same coin:

A city with the power of eminent domain erects a dam, one effect of which is that water periodically floods parts of the plaintiff’s land and will continue to do so indefinitely into the future. The dam is durable. Its physical or factual permanence, together with the city’s power to condemn a flooding easement in the plaintiff’s land, suggests that the case *should be treated as a kind of taking of property*.<sup>224</sup>

If the city in the hypothetical in the paragraph above (or the state education department that is posing problems for Carmen) has no or only limited tort immunity (which is now the default position<sup>225</sup>), there would be no need for the plaintiff to go through the complications of pursuing a takings claim.<sup>226</sup>

pass . . . a single government trespass inflicting significant damage . . .” Lynda L. Butler, *The Governance Function of Constitutional Property*, 48 U.C. DAVIS L. REV. 1687, 1766 (2015).

222 DOBBS ET AL., *supra* note 205, § 52 (“The common law recognizes and protects two major kinds of rights or interests in land from direct invasion by physical forces: (1) The right to exclusive possession of land; that is, the right to exclude others from the land . . . .”).

223 See KEETON ET AL., *supra* note 207, at 83–84.

224 DOBBS ET AL., *supra* note 205, § 57 (emphasis added).

225 *Id.* § 342 (“[A]bout thirty states abolish the tort immunity generally, but retain it in specified circumstances. A second group works in reverse, retaining the immunity generally, but abolishing it for a list of cases in which liability is permitted. In several states, a tort claim against the state must be presented to an administrative body instead of to a court. Some states set up a separate court of claims for hearing tort claims against the state. About three states appear to retain a very broad sovereign immunity.”) (footnotes omitted); see also KEVIN M. LEWIS, CONG. RSCH. SERV., R45732, THE FEDERAL TORT CLAIMS ACT (FTCA): A LEGAL OVERVIEW (2019), <https://fas.org/sgp/crs/misc/R45732.pdf> [<https://perma.cc/8J3L-ARR3>]; *Hatahley v. United States*, 351 U.S. 173, 181 (1956) (“These acts were wrongful trespasses not involving discretion on the part of the agents, and they do give rise to a claim compensable under the Federal Tort Claims Act.”); *United States v. Gaidys*, 194 F.2d 762, 765 (10th Cir. 1952) (“[T]he flying of the plane below a safe altitude immediately adjacent to the property of plaintiffs, the crash, and the resulting injuries sustained by plaintiffs, constituted a redressible wrong in the nature of trespass for which the United States is similarly liable under the [Federal] Tort Claims Act.”).

226 The Supreme Court has made it somewhat easier to bring inverse condemnation cases in federal courts, *Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019), by ruling that “the property owner has suffered a violation of his Fifth Amendment rights when the government takes his property without just compensation, and therefore may bring his claim in federal court under § 1983 at that time.” *Id.* at 2168. Still, ample procedural and substantive barriers remain.

#### D. *Outlawing Property-Related Discrimination*

*For the past year, the Davidic Messianic Center (“DMC”) has been looking for a new location in the county for its congregation and private school. DMC members found what they believed to be a suitable site—a building in a residential neighborhood that formerly housed a church. County officials have informed DMC members that they could use the former church sanctuary for their religious services, but could not build an additional structure on the site for the private school without securing a special use permit. At the hearing for the permit, members of the zoning board of appeals voice opposition to the school. One board member states that while she has no problem with “mainstream Christian schools,” this school is a different matter. Another board member wants some assurances from DMC that students will not be trained to proselytize Jews and Christians from other denominations. The board votes to deny the special use permit, and DMC’s lawyer has advised the center to file a regulatory takings claim against the city seeking damages (because of the lost income from the school) and an injunction ordering the board to grant the special use permit. This litigation, in effect, would be based on these words from the Takings Gloss: **[N]or shall private property be subjected to regulation that goes too far without just compensation, unless the property owner is seeking only injunctive relief.***

Too often, landowners and occupiers are victimized by government officials who appear to be motivated by prejudice and bias.<sup>227</sup> As the DMC’s predicament illustrates, the economic impact of religious discrimination—the inability to make productive use of their private property—is indistinguishable from the harm suffered at the hands of otherwise arbitrary or retributive land use regulators.<sup>228</sup> As early as 1924, in the federal trial court opinion (reversed two years later) that declared Euclid, Ohio’s zoning ordinance unconstitutional, Judge David C. Westenhaver commented on the socioeconomic bias cooked into the village’s zoning ordinance, an ordinance that he believed constituted a taking:

[T]he result to be accomplished is to classify the population and segregate them according to their income or situation in life. The true reason why some persons live in a mansion and

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<sup>227</sup> See, e.g., *Ambler Realty Co. v. Vill. of Euclid*, 297 F. 307, 316 (N.D. Ohio 1924), *rev’d*, 272 U.S. 365 (1926).

<sup>228</sup> See *id.*

others in a shack, why some live in a single-family dwelling and others in a double-family dwelling, why some live in a two-family dwelling and others in an apartment, or why some live in a well-kept apartment and others in a tenement, is primarily economic.<sup>229</sup>

The Supreme Court concluded otherwise, and Justice Sutherland included in his majority opinion some objectionable rhetoric concerning apartments and their occupants.<sup>230</sup>

Since the early decades of the twentieth century, an increasing chorus of commentators,<sup>231</sup> courts,<sup>232</sup> and state legislators<sup>233</sup> have been concerned about the exclusionary potential of zoning and other forms of land use regulations that price lower-income families out of certain neighborhoods and communities by requiring large minimum lot sizes for single-family detached dwellings,<sup>234</sup> severely restricting or forbidding the location of least-cost housing such as apartment houses and mobile home parks within municipal limits,<sup>235</sup> or subjecting approval of affordable housing to the whims and biases of voters (known as ballot-box zoning).<sup>236</sup>

229 *See id.*

230 *See* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 394 (1926) (“[V]ery often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district.”).

231 *See* Michael Allan Wolf, *A Common Law of Zoning*, 61 ARIZ. L. REV. 771, 808 nn. 223–24 (2019) (citing Charles M. Haar, *Zoning for Minimum Standards: The Wayne Township Case*, 66 HARV. L. REV. 1051, 1062 (1953); Norman Williams Jr., *Planning Law and Democratic Living*, 20 LAW & CONTEMP. PROBS. 317, 345 (1955)).

232 *See* S. Burlington Cnty. NAACP v. Twp. of Mount Laurel (*Mount Laurel I*), 336 A.2d 713, 728, 731 (N.J. 1975) (*Mount Laurel I* remains the leading and most controversial case on this topic); *see also* Roderick M. Hills Jr., *Saving Mount Laurel?*, 40 FORDHAM URB. L.J. 1611, 1612 (2013) (“The *Mount Laurel* doctrine seems perennially hovering on the brink of extinction. It was surrounded by controversy when it was finally made effective with a ‘builder’s remedy’ in 1983, and it barely survived its transition to statutory implementation in the form of the New Jersey Fair Housing Act in 1985.”) (footnote omitted).

233 *See, e.g.*, 2 SALKIN, *supra* note 198, §§ 22:26–:39 (“State Affordable Housing Laws”).

234 *See, e.g.*, *Mount Laurel I*, 336 A.2d at 719–20, 729 (stating that the relevant ordinance requires a minimum lot size of one-half acre, or 20,000 square feet).

235 *Id.* at 729 (“The township’s general zoning ordinance . . . permits . . . only one type of housing—single-family detached dwellings. This means that all other types—multi-family including garden apartments and other kinds housing more than one family, town (row) houses, mobile home parks—are prohibited.”).

236 *See* City of Cuyahoga Falls v. Buckeye Cmty. Hope Found., 538 U.S. 188, 191 (2003) (“In 1995, the city of Cuyahoga Falls, Ohio . . . submitted to voters a facially neutral referendum petition that called for the repeal of a municipal housing ordinance authorizing construction of a low-income housing complex.”); *see also* David L. Callies, Nancy C. Neuffer & Carlito P. Caliboso, *Ballot Box Zoning: Initiative, Referendum and the Law*, 39 WASH. U. J. URB. & CONTEMP. L. 53, 54, 94–95 (1991) (“While there are some obvious points to be made in favor of

Until the late 1960s, protections for racial and religious minorities, persons with disabilities, families with small children, and other vulnerable existing and potential property owners or residents were negligible. Passage of the Fair Housing Act (“FHA”)<sup>237</sup> in 1968 (Title VIII of the Civil Rights Act), one week after the assassination of Dr. Martin Luther King Jr., was an important first step in leveling the playing field, at least for those who were victims of “discrimination in the sale or rental of housing”<sup>238</sup> based on “race, color, religion, or national origin.”<sup>239</sup> Subsequent amendments widened FHA’s target to include discrimination based on sex, familial status, and disability.<sup>240</sup> Most states, through their own versions of the FHA, have outlawed discrimination based on sexual orientation and gender identity as well.<sup>241</sup>

In 2020, the Supreme Court, in *Bostock v. Clayton County*,<sup>242</sup> interpreted language from Title VII of the Civil Rights Act forbidding workplace discrimination “because of . . . sex”<sup>243</sup> to mean that “[a]n employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex.”<sup>244</sup> President Joe Biden, by executive order, concluded that, “[u]nder *Bostock*’s reasoning, laws that prohibit sex discrimination—including . . . the Fair Housing Act, . . . along with their respective implementing regulations—prohibit discrimination on the basis of gender identity or sexual orientation, so long as the laws do not contain sufficient indications to the contrary.”<sup>245</sup> In accordance with this Order, the U.S. Department of Housing and Urban Development issued a memorandum outlining compliance.<sup>246</sup>

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direct democracy, on balance it is difficult to make a consistent case for the use of initiative or referendum to rezone land.”).

<sup>237</sup> Pub. L. No. 90-284, 82 Stat. 81 (1968) (codified as amended at 42 U.S.C. §§ 3601–3631).

<sup>238</sup> *Id.* § 803(a), 82 Stat. at 82 (codified as amended at 42 U.S.C. § 3603(a)).

<sup>239</sup> *Id.* § 804(c), 82 Stat. at 83 (current version at 42 U.S.C. § 3604).

<sup>240</sup> *See* 42 U.S.C. § 3604(c) (using the term “handicap”).

<sup>241</sup> *See Fair and Equal Housing Act*, HUM. RTS. CAMPAIGN (Oct. 8, 2021), <https://www.hrc.org/resources/fair-and-equal-housing-act> [<https://perma.cc/6XER-HW6B>] (“As of September 2021, only 28 states and the District of Columbia prohibit discrimination in housing based on both sexual orientation and gender identity. Another state, Wisconsin, bans discrimination in housing based on sexual orientation only.”); *see also Equality Maps: Nondiscrimination Laws*, MOVEMENT ADVANCEMENT PROJECT (Jan. 30, 2023), [https://www.lgbtmap.org/equality-maps/non\\_discrimination\\_laws](https://www.lgbtmap.org/equality-maps/non_discrimination_laws) [<https://perma.cc/5AXG-RAE6>].

<sup>242</sup> 140 S. Ct. 1731 (2020).

<sup>243</sup> 42 U.S.C. § 2000e-2(a)(1).

<sup>244</sup> *Bostock*, 140 S. Ct. at 1737.

<sup>245</sup> Exec. Order No. 13,988, 86 Fed. Reg. 7023 (Jan. 25, 2021).

<sup>246</sup> Memorandum from Jeanine M. Worden, Acting Sec’y, U.S. Dep’t of Hous. & Urb.



The protections identified in the preceding paragraph were not yet available at any level of government when the Supreme Court began to shape the contours of the Takings Gloss. Restrictive covenants routinely targeted racial and religious minorities in the decades before, and even after, the Court in 1948's *Shelley v. Kraemer*<sup>247</sup> held that judicial enforcement of those restrictions would violate the Equal Protection Clause.<sup>248</sup> Legal<sup>249</sup> and extralegal means, such as mob violence,<sup>250</sup> were routinely employed to prevent African Americans from moving into predominantly white neighborhoods. However, because the model discrimination case involved *preventing* minorities from owning or renting property, the sine qua non of regulatory and true physical occupation takings—having one's property *taken* away by the government—typically did not come into play. This is not to say that the sovereign power of eminent domain was not wielded like a truncheon against African Americans and other minorities, particularly, but not only, when government officials coveted their property for interstate highway construction and urban renewal programs.<sup>251</sup> In addition, there is evidence that African Americans were

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Dev., to Off. of Fair Hous. & Equal Opportunity et al., (Feb. 11, 2021), [https://www.hud.gov/sites/dfiles/PA/documents/HUD\\_Memo\\_EO13988.pdf](https://www.hud.gov/sites/dfiles/PA/documents/HUD_Memo_EO13988.pdf) [<https://perma.cc/7B88-8ZS3>].

<sup>247</sup> 334 U.S. 1 (1948).

<sup>248</sup> *Id.* at 20–21. Despite the Court's holding, though, *Shelley* did not prove to be the death knell of racially restrictive covenants:

Homeowners and homebuilders also continued to establish covenants on new properties after 1948. . . . A study of the Kansas City metropolitan area revealed that developers and property owners recorded hundreds of new restrictions in the years following *Shelley*. Between 1949 and 1951, an observer in the nation's capital noted that 10–15 percent of deeds in a random sample of new subdivisions contained covenants.

JEFFREY D. GONDA, *UNJUST DEEDS: THE RESTRICTIVE COVENANT CASES AND THE MAKING OF THE CIVIL RIGHTS MOVEMENT 200–01* (2015).

<sup>249</sup> See RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA*, at xii (2017) (“Racial segregation in housing was not merely a project of southerners in the former slaveholding Confederacy. It was a nationwide project of the federal government in the twentieth century, designed and implemented by its most liberal leaders. . . . [S]cores of racially explicit laws, regulations, and government practices combined to create a nationwide system of urban ghettos, surrounded by white suburbs. . . . [T]he truth of *de jure* segregation was well known . . .”).

<sup>250</sup> *Id.* at 143 (“During much of the twentieth century, police tolerance and promotion of cross burnings, vandalism, arson, and other violent acts to maintain residential segregation was systematic and nationwide.”).

<sup>251</sup> *Id.* at 127 (“In many cases, state and local governments, with federal acquiescence, designed interstate highway routes to destroy urban African American communities.”). For a careful and nuanced study of one urban renewal icon, see LIZABETH COHEN, *SAVING AMERICA'S CITIES: ED LOGUE AND THE STRUGGLE TO RENEW URBAN AMERICA IN THE SUBURBAN AGE* (2019).

undercompensated when their property was taken for actual and alleged public uses.<sup>252</sup>

The most intriguing proxy for the protections afforded by the Takings Gloss is a federal statute that provides protection in the form of elevated scrutiny for a discrete class of property owners and occupants: RLUIPA.<sup>253</sup> The Act, which Congress passed with bipartisan support in 2000, was an attempt by federal lawmakers to correct what they believed to be two unfortunate Supreme Court rulings. First, in 1990, in *Employment Division, Department of Human Resources v. Smith*,<sup>254</sup> the majority held that a requirement that “governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest”<sup>255</sup> did not apply to “generally applicable criminal law[s],” such as laws outlawing hallucinogenic drugs.<sup>256</sup> Congress and President Clinton responded by passing and signing the Religious Freedom Restoration Act of 1993 (“RFRA”),<sup>257</sup> which directly addressed *Smith* by clarifying that the government (federal, state, and local) “may substantially burden a person’s [free] exercise of religion only if it demonstrates” that it used the “least restrictive means” to further “a compelling governmental interest.”<sup>258</sup> This strict scrutiny standard would apply “even if the burden results from a rule of general applicability.”<sup>259</sup>

The Supreme Court delivered the second bit of bad news only three years later, in *City of Boerne v. Flores*,<sup>260</sup> when the majority found that Congress had exceeded its power under Section 5 (the enforcement provision) of the Fourteenth Amendment by specifying a level of judicial scrutiny to be applied in instances of state and local

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<sup>252</sup> For an egregious case that garnered national attention recently, see Rosanna Xia, *Forced Out, Welcomed Back; Newsom Authorizes Return of Manhattan Beach Land to Former Owners’ Descendants*, L.A. TIMES, Oct. 1, 2021, at A1 (“Senate Bill 796, signed into law Thursday by Newsom before an excited crowd that had gathered on the property, confirms that the city’s taking of this shorefront land—on which the Bruces ran a thriving resort for Black beachgoers—was racially motivated and done under false and unlawful pretenses.”); and see also *United States v. Timmons*, 672 F.2d 1373 (11th Cir. 1982).

<sup>253</sup> 42 U.S.C. §§ 2000cc to 2000cc-5.

<sup>254</sup> 494 U.S. 872 (1990).

<sup>255</sup> *Id.* at 883 (citing *Sherbert v. Verner*, 374 U.S. 398, 402–03).

<sup>256</sup> *Id.* at 884. Recently, several Justices have expressed discomfort with the ruling in *Smith*. See, e.g., *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1883 (2021) (Alito, J., concurring in the judgment) (writing for himself and Justices Thomas and Gorsuch, Justice Alito opined that *Smith*’s “severe holding is ripe for reexamination.”).

<sup>257</sup> 42 U.S.C. §§ 2000bb to 2000bb-4.

<sup>258</sup> *Id.* § 2000bb-1(b).

<sup>259</sup> *Id.* § 2000bb-1(a).

<sup>260</sup> 521 U.S. 507 (1997).

government abuse.<sup>261</sup> The case involved a historic landmark preservation ordinance that had spoiled the San Antonio Archbishop's plans to enlarge a church for the needs of the parishioners in Boerne, Texas.<sup>262</sup> In the Court's view, RFRA, when applied to states and localities, "contradicts vital principles necessary to maintain separation of powers and the federal balance."<sup>263</sup>

Undaunted, Congress responded by crafting and passing RLUIPA,<sup>264</sup> a targeted version of RFRA that restored the strict scrutiny standard for state and local government regulations affecting the free exercise rights in two settings—land use regulation<sup>265</sup> and state and local institutions and facilities confining or housing prisoners, juvenile offenders, those charged with crimes being held in custody, mentally ill and disabled persons, and others.<sup>266</sup> As a result of RLUIPA, many religious individuals and groups have been successful in convincing courts to grant injunctive relief and damages when state and local governments have placed a substantial burden on free exercise rights through land use regulations without demonstrating that the challenged regulation is the least restrictive means for furthering a compelling governmental interest, or when the state or local government has "impose[d] or implement[ed] a land use regulation in a manner that treat[ed] a religious assembly or institution on less than equal terms with a nonreligious assembly or institution,"<sup>267</sup> "impose[d] or implement[ed] a land use regulation that discriminate[d] against any assembly or institution on the basis of religion or religious denomination,"<sup>268</sup> or "impose[ed] or implement[ed] a land use regulation . . . totally exclud[ing] religious assemblies from a jurisdiction or . . . unreasonably limit[ing] religious assemblies, institutions, or structures within a jurisdiction."<sup>269</sup>

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<sup>261</sup> *Id.* at 511.

<sup>262</sup> *Id.* at 512.

<sup>263</sup> *Id.* at 536.

<sup>264</sup> See *Ramirez v. Collier*, 142 S. Ct. 1264, 1277 (2022).

<sup>265</sup> See 42 U.S.C. § 2000cc-5(5) ("The term 'land use regulation' means a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.").

<sup>266</sup> See *id.* § 1997(1) (defining "institution").

<sup>267</sup> *Id.* § 2000cc(b)(1).

<sup>268</sup> *Id.* § 2000cc(b)(2).

<sup>269</sup> *Id.* § 2000cc(b)(3). For a recent analysis of RLUIPA's effectiveness, see Lucien J. Dhooge, *A Case Law Survey of the Impact of RLUIPA on Land Use Regulation*, 102 MARQ. L. REV. 985, 985 (2019) ([A]lthough RLUIPA has not lived up to the hopes of proponents or fears

This is not to say that all cases in which plaintiffs allege this form of government abuse are successful, but of course the same could be said about regulatory and physical occupation takings challenges. The point is that, owing to RLUIPA, the Takings Gloss is superfluous for DMC and other similarly situated religious institutions that are property owners.

There is one more Supreme Court precedent that is highly relevant to the issue of discrimination by government land use regulators. In *City of Cleburne v. Cleburne Living Center, Inc.*,<sup>270</sup> the Justices struck down a provision of the city's zoning ordinance that required a group home for intellectually disabled persons to apply annually for a special use permit.<sup>271</sup> The Court ruled that the plaintiffs had successfully made an as-applied challenge based on the Equal Protection Clause.<sup>272</sup> Whereas the Fifth Circuit, viewing the intellectually disabled as belonging to a quasi-suspect classification, had elevated scrutiny to the intermediate level, the Supreme Court applied the rational basis test, finding (1) that "the record does not reveal any rational basis for believing that the Featherston home would pose any special threat to the city's legitimate interests"<sup>273</sup> and (2) that "requiring the permit in this case appears to us to rest on an irrational prejudice against the" intellectually disabled persons occupying the facility.<sup>274</sup>

The bottom line in many, if not most, landowner challenges to land use regulation (indeed in many, if not most, private property owners' challenges to any form of property regulation or restriction) is that the owner is being unfairly singled out for negative treatment under the auspices of a law that is irrational, either on its face or as applied to the owner. If the negative treatment is based on some forms of discrimination—especially, but not limited to, race, sex, and religion—the Equal Protection Clause, FHA, and RLUIPA (and their state analogues) provide avenues to relief that are more direct, and likely more effective, than the extratextual Takings Gloss. *Cleburne* reminds us that even the rational basis test itself can, if the irrationality is apparent, lead to a satisfactory challenge as well.

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of critics, it has had a significant impact upon land use regulation and is ignored by local governments at their peril.”).

<sup>270</sup> 473 U.S. 432 (1985).

<sup>271</sup> *Id.* at 450.

<sup>272</sup> *See id.* at 447-50.

<sup>273</sup> *Id.* at 448.

<sup>274</sup> *Id.* at 450.

### E. *A Progression of Advantageous Alternatives*

The jurisprudential exigencies that inspired and justified the re-writing and redirection of the Takings Clause are no longer present, thanks in large part to the four sets of legal developments outlined above. But the circumstances that gave rise to the judicial urge to contribute to the Takings Gloss did not dissolve overnight. Instead, lawmakers and judges have introduced new wrinkles in constitutional, statutory, and common law over the course of the twentieth century that have made different aspects of the Takings Gloss redundant.

For example, when the Supreme Court recognized physical occupation takings in *Pumpelly* in the late nineteenth century, sovereign and governmental immunity were still strong. But the latter half of the twentieth century saw the widespread weakening of blanket immunity, symbolized best by the passage of the original Federal Tort Claims Act<sup>275</sup> in 1946. The legal bar preventing recovery of damages by *Pumpelly* no longer exists. Similarly, the facts of *Pennsylvania Coal* prompted Holmes to articulate the “too far” test to protect private property owners from legislative overreaching.<sup>276</sup> Yet a few years later, Holmes’s fellow Justices basically ignored his “too far” test in cases involving regulations on land use. They relied instead on the version of substantive due process introduced by *Village of Euclid v. Ambler Realty Co.*<sup>277</sup> in 1926 and amplified by *Nectow v. City of Cambridge*<sup>278</sup> in 1928. The Court’s *Euclid* framework is still used to protect landowners against arbitrary land use restrictions nearly a century later.

Although in the 1970s, in *Penn Central Transportation Co. v. New York City*,<sup>279</sup> the Court showed renewed interest in regulatory takings of real property after nearly a half-century of apathy,<sup>280</sup> other contemporary judicial decisions opened new avenues for property owners’

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<sup>275</sup> 28 U.S.C. § 1346.

<sup>276</sup> *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 412 (1922) (“The bill sets out a deed executed by the Coal Company in 1878, under which the plaintiffs claim. The deed conveys the surface, but in express terms reserves the right to remove all the coal under the same, and the grantee takes the premises with the risk, and waives all claim for damages that may arise from mining out the coal.”).

<sup>277</sup> See *supra* notes 156–57 and accompanying text.

<sup>278</sup> See *supra* notes 158–60 and accompanying text.

<sup>279</sup> 438 U.S. 104 (1978).

<sup>280</sup> The Court did grant review in *Goldblatt v. Hempstead*, 369 U.S. 590, 591 (1962), but ruled unanimously that the town ordinance prohibiting mining below the water table was not an unconstitutional taking and explained: “If this ordinance is otherwise a valid exercise of the town’s police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional.” *Id.* at 592.

claims against the government. Only three weeks before his opinion for the Court in *Penn Central* was released, in *Monell v. Department of Social Services*,<sup>281</sup> Justice Brennan, writing for the majority, found that local governments that infringed upon constitutional rights could be sued for damages as “persons” under § 1983.<sup>282</sup> Soon, the period of desuetude for federal due process and equal protection challenges to land use regulation was over, as lower federal courts entertained a growing number of landowner challenges seeking damages as compensation for lost value, and for attorneys’ fees should the lawsuits succeed.<sup>283</sup> By the end of the twentieth century, the Court had protected real property owner rights ostensibly by using the rational basis test to counter irrational prejudice and to shield even a class of one from retributive behavior by local officials. Additionally, lower federal courts allowed federal lawsuits under the ever-expanding FHA to proceed without the showing of discriminatory intent needed to move forward under the Fourteenth Amendment.<sup>284</sup> On the state front, lawmakers and judges provided more robust protections for vested rights, once again obviating the need to rely on a takings challenge in many situations involving the imposition of new restrictions on the use of land.

With all of these non-takings developments, the interests of justice and fairness would be better served if the Court redirected litigants to alternative means of redress and eschewed veneering the Takings Clause to accommodate factual and legal situations outside the four corners of the Fifth Amendment in the process, thereby making takings jurisprudence even more complicated and internally inconsistent. If the Justices instead choose to depart even farther from the text and original understanding of the Takings Clause, noncynical observers will question whether the Justices are motivated by antipathy toward certain types of regulation—designed to preserve the dwindling supply of affordable housing or to allow union organizers access

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<sup>281</sup> 436 U.S. 658 (1978).

<sup>282</sup> *Id.* at 690 (“Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies.”).

<sup>283</sup> *See* 42 U.S.C. § 1988(b).

<sup>284</sup> Congress and the courts have played active roles in expanding the reach of the FHA. *See, e.g.*, Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619; *Tex. Dep’t of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 535 (2015) (“[I]t is of crucial importance that the existence of disparate-impact liability is supported by amendments to the FHA that Congress enacted in 1988. By that time, all nine Courts of Appeals to have addressed the question had concluded the Fair Housing Act encompassed disparate-impact claims.”).

to agricultural workers—or by sympathy toward certain economic interests—such as energy companies that extract, distribute, and monetize fossil fuels.

Table 1 depicts how different kinds of property owner complaints gave rise to the Takings Gloss. Table 2 identifies an alternative avenue of relief for each category of complaints. Lest the author be accused of puffing or, much worse, misrepresentation, it must be emphasized that there is no guarantee that pursuing any of these alternatives will result in a property owner victory. Tort defendants are allowed to raise defenses (such as the running of a statute of limitations<sup>285</sup>), and recovery against the government may require compliance with special requirements or may be limited in terms of amounts and kinds of damages.<sup>286</sup> Most plaintiffs alleging a substantive due process violation will continue to lose because they are not able to demonstrate that they have an existing property right entitled to protection,<sup>287</sup> or, even if they do, that government officials have acted so arbitrarily as to “shock the conscience.”<sup>288</sup> While landowners with a building or zoning permit in hand stand on firm ground in many jurisdictions, others will need to convince the court that their expenditures in reliance on extant regulations justify finding a vested right worth protecting. Because courts will not typically elevate scrutiny in the run-of-the-mill property regulation setting, most equal protection challenges will fail, unless plaintiffs can demonstrate that they were victimized by vindictive regulators. Moreover, federal and state statutory fair housing and religious freedom statutes all have thresholds—such as discriminatory

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<sup>285</sup> See RESTATEMENT (SECOND) OF TORTS § 899 (AM. L. INST. 1979) (“A cause of action for a tort may be barred through lapse of time because of the provisions of a statute of limitations.”).

<sup>286</sup> See DOBBS ET AL., *supra* note 205, § 342 (“Statutes almost always impose some special procedural rules for claims against the state, for example, a requirement of notice before suit. Many states cap recovery for compensatory damages and punitive damages are denied altogether.”) (footnotes omitted).

<sup>287</sup> See *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972) (“To have a property interest in a benefit, a person clearly must have *more than an abstract need or desire for it*. He must have more than a unilateral expectation of it. He must, instead, have a *legitimate claim of entitlement to it*.”) (emphasis added); Wolf, *supra* note 162, at 479 (“A significant barrier facing landowners claiming that they have been deprived of their property by local governments without due process of law (that is, by arbitrary, capricious, and unreasonable regulation) is the ‘entitlement rule,’ derived from Justice Stewart’s statement in *Roth* . . . ) (citing *Roth*, 408 U.S. at 577).

<sup>288</sup> See Daniel R. Mandelker, *Litigating Land Use Cases in Federal Court: A Substantive Due Process Primer*, 55 REAL PROP. TR. & EST. L.J. 69, 76, 103 (2020) (“Part V discusses the judicial review standards federal courts apply to substantive due process claims in land use cases. These standards protect government conduct, especially the highly protective ‘shocks the conscience’ standard, which the Supreme Court adopted in [*Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998)].”).

impact<sup>289</sup> or substantial burden<sup>290</sup>—that must be met before judicial relief is forthcoming.

Does this mean that the alternatives outlined in Table 2 are not real proxies but instead weak substitutes? The answer is a definitive “no.” Any attorney familiar with regulatory, physical occupation, and exactions takings knows that prevailing in court is a very long shot.<sup>291</sup> Indeed, it is quite common for attorneys to plead the trio of alleged due process, equal protection, and takings violations when representing a disgruntled property owner, and still come up short.<sup>292</sup> So, are there reasons beyond textual fidelity for abandoning the Takings Gloss? In fact, there are two reasons.

First, the uncertainty so often associated with the jurisprudential<sup>293</sup> and jurisdictional<sup>294</sup> contours of the Takings Clause, combined with the severity of the penalty—monetary compensation to the plaintiff—create the perfect disincentive for government officials to defend regulations in court and the perfect incentive to settle (which often means repealing the offending law). Courts at all levels continue to expand the Takings Gloss as a sort of jazz improvisation on the original twelve-note melody found in the Fifth Amendment. As a result, government attorneys are not able to give solid assurances to their clients that the lawsuit will be summarily dismissed by a trial court (and that the dismissal will be affirmed by a higher tribunal).

Second, there are three crucial settings in which the courts have already expanded, are being asked to expand, or will likely be asked to expand the reach of the Takings Clause: climate change, pandemic response, and social justice. As Part III shows, the societal stakes are

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<sup>289</sup> See, e.g., 42 U.S.C. § 3601.

<sup>290</sup> See, e.g., *id.* § 2000cc.

<sup>291</sup> This is true even in jurisdictions with takings statutes designed to make it easier to challenge confiscatory land use regulations. See Echeverria & Hansen-Young, *supra* note 148, at 516 (noting that “[s]o-called takings ‘compensation’ laws have hardly ever resulted in actual monetary payments”).

<sup>292</sup> For example, see COVID-19 takings cases cited *supra* note 49, many of which include due process and equal protection challenges as well.

<sup>293</sup> See, e.g., Nestor M. Davidson & Timothy M. Mulvaney, *Takings Localism*, 121 COLUM. L. REV. 215, 223 (2021) (“The entire panoply of takings doctrine—not just regulatory takings, but related questions about the scope of eminent domain and the procedures that govern in takings cases—has long been decried as a muddle.”).

<sup>294</sup> See, e.g., *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2167 (2019) (“We now conclude that the state-litigation requirement imposes an unjustifiable burden on takings plaintiffs, conflicts with the rest of our takings jurisprudence, and must be overruled.”); *San Remo Hotel, L.P. v. City of San Francisco*, 545 U.S. 323, 326 (2005) (declining to “craft an exception to the full faith and credit statute, 28 U.S.C. § 1738, for claims brought under the Takings Clause of the Fifth Amendment”).



as high as they can be for the growing number of cases alleging the applicability, and hoping to augment the terms, of the Takings Gloss.

TABLE 1.

<i>Basis of Property Owner's Complaint</i>	<i>Operative Takings Gloss Language</i>
Government physically occupies property without permission	<u>including rights in property such as the right to exclude, . . . or be physically occupied even temporarily</u>
Government allows others to physically occupy property permanently or temporarily	<u>including rights in property such as the right to exclude, . . . or be physically occupied even temporarily, . . . by private parties delegated by the government</u>
Government or its designee permanently or temporarily floods, or otherwise damages, property by physical invasion	<u>including rights in property such as the right to exclude, . . . or be physically occupied even temporarily, . . . by the government or by private parties delegated by the government</u>
Government regulation reduces existing value/use of property	<u>or subjected to regulation that goes too far</u>
Government regulation prevents owner from making more productive (i.e., lucrative) use of property	<u>or subjected to regulation that goes too far</u>
Government treats owner worse than others similarly situated	<u>or subjected to regulation that goes too far</u>
Government passes regulation that does not further legitimate governmental interest	<u>or subjected to regulation that goes too far</u>
Government enforces regulation in an arbitrary or irrational manner	<u>or subjected to regulation that goes too far</u>
Government uses regulation of property to discriminate against owner	<u>or subjected to regulation that goes too far</u>

TABLE 2.

<i>Basis of Property Owner's Complaint</i>	<i>Alternative Source of Relief</i>
<b>Government physically occupies property without permission</b>	Trespass
<b>Government allows others to physically occupy property permanently or temporarily</b>	Trespass
<b>Government or its designee permanently or temporarily floods, or otherwise damages, property by physical invasion</b>	Trespass
<b>Government regulation reduces existing value/use of property</b>	Substantive Due Process, Vested Rights Protection
<b>Government regulation prevents owner from making more productive (i.e., lucrative) use of property</b>	Substantive Due Process, Vested Rights Protection
<b>Government treats owner worse than others similarly situated</b>	Equal Protection
<b>Government passes regulation that does not further legitimate governmental interest</b>	Substantive Due Process
<b>Government enforces regulation in an arbitrary or irrational manner</b>	Substantive Due Process, Equal Protection
<b>Government uses regulation of property to discriminate against owner</b>	Equal Protection, FHA, RLUIPA

### III. MATTERS OF LIFE AND DEATH: CLIMATE CHANGE, PANDEMICS, AND AFFORDABLE HOUSING

It is hard to deny the centrality of property rights in the intellectual and political history of the United States, from Lockean statements made by founders and framers during the revolutionary and early constitutional periods,<sup>295</sup> to the herculean struggle in the courts and battlefields in the nineteenth century over the notion that human beings were property,<sup>296</sup> to current political rhetoric in which any addi-

<sup>295</sup> For a skeptical view of the supposed classical liberalism underlying the Constitution, see Herbert Hovenkamp, *Inventing the Classical Constitution*, 101 IOWA L. REV. 1, 2 (2015) (“The foundational sources claimed for the classical Constitution include: Locke’s writings on government; the political thought of Hobbes, Hume, and Montesquieu; the *Federalist*, in particular James Madison’s *Federalist No. 10*; and the *Anti-Federalist*.”); and see also Richard A. Epstein, *Rediscovering the Classical Liberal Constitution: A Reply to Professor Hovenkamp*, 101 IOWA L. REV. 55, 55–56 (2015) (“There is a powerful difference between a ‘classical Constitution’ that has no clear linkage to political theory and a classical liberal Constitution, which speaks not only of the time of its adoption but also to the structure of its argument.”).

<sup>296</sup> See generally SEAN WILENTZ, *NO PROPERTY in Man: Slavery and Antislavery in the Nation’s Founding* (2018). Professor Wilentz writes that “the framers left room for political ef-

tional steps in the direction of social welfare by state and national politicians is labeled socialistic silliness at best, communist evil at worst.<sup>297</sup> The phrase “The right of property . . . is the guardian of every other right”<sup>298</sup> sums up the notion of fundamentality nicely, but even the staunchest believers know that no rights, not even this one, is absolute. For example, the doctrine of necessity instructs us that an owner whose property is doomed to destruction by the forces of nature or by the acts of an armed enemy is not entitled to compensation should the state destroy that property for a higher purpose.<sup>299</sup>

On the current Court, dissatisfaction with the Takings Gloss spans the ideological spectrum. No fewer than six current Justices disagreed with some (though certainly not all) judge-made aspects of takings law as expressed in the majority opinions in *PennEast*, *Cedar Point*, or both. The *PennEast* dissenters (Justices Barrett, Kagan, Gorsuch, and Thomas) were not shy about disputing the majority’s assertion that a private party could take state property using the federal government’s assigned power of eminent domain.<sup>300</sup> Justices Breyer, Kagan, and Sotomayor, dissenting in *Cedar Point*, noted that the California access regulation “only awkwardly fits the terms ‘physical taking’ and ‘physical appropriation,’”<sup>301</sup> disputed the proposition that “a regulation that *temporarily* limits an owner’s right to exclude others from property *automatically* amounts to a Fifth Amendment taking,”<sup>302</sup> and asserted that, contrary to the position of the majority, “a taking is not inevitably found just because the interference with property can be characterized as a physical invasion by the government, or,

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forts aimed at slavery’s restriction and, eventually, its destruction, even under a Constitution that safeguarded slavery.” *Id.* at xiv.

<sup>297</sup> See, e.g., Peter Dreier, *How Democrats Should Respond to the GOP’s Red-Baiting*, NATION (May 28, 2019), <https://www.thenation.com/article/archive/gop-red-baiting-2020/> [<https://perma.cc/WEV3-C9VU>] (“After Representative Alexandria Ocasio-Cortez announced in February that she was redistributing her office budget in order to raise the salaries of her lowest-level staffers to \$52,000, Fox News host Pete Hegseth described her action as ‘communism and socialism.’”).

<sup>298</sup> JAMES W. ELY JR., *THE GUARDIAN OF EVERY OTHER RIGHT* 26 (3d ed. 2008) (quoting ARTHUR LEE, *AN APPEAL TO THE JUSTICE AND INTERESTS OF THE PEOPLE OF GREAT BRITAIN, IN THE PRESENT DISPUTE WITH AMERICA* 19 (4th ed. 1775)).

<sup>299</sup> The classic Supreme Court case is *Bowditch v. Boston*, 101 U.S. 16, 18 (1879) (“At the common law every one had the right to destroy real and personal property, in cases of actual necessity, to prevent the spreading of a fire, and there was no responsibility on the part of such destroyer, and no remedy for the owner.”).

<sup>300</sup> *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244, 2268 (2021) (Barrett, J., dissenting) (“[I]t strains credulity to say that history unequivocally establishes that States surrendered their immunity to private condemnation suits in the plan of the Convention.”).

<sup>301</sup> *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2082 (2021) (Breyer, J., dissenting).

<sup>302</sup> *Id.* at 2083.

in other words, when it affects the right to exclude.”<sup>303</sup> And, in a sentence that may qualify as the understatement of the century (at least when it comes to takings jurisprudence), Justice Breyer observed: “I recognize that the Court’s prior cases in this area are not easy to apply.”<sup>304</sup> “Moreover,” he continued, “words such as ‘temporary,’ ‘permanent,’ or ‘too far’ do not define themselves.”<sup>305</sup> Nor, as it should by now be obvious to the reader, do any of these words appear in the Takings Clause.

### A. *Climate Change*

Looking back on the evolution of the Takings Gloss, one is struck by how often the cases that gave birth to legal doctrine involved fossil fuel extraction, regulation of environmentally sensitive lands or water bodies, or the impact of development on our fragile coastline that is battered by high-intensity storms and depleted by sea-level rise.<sup>306</sup> Of course, our glance backward is informed by our current knowledge regarding the dire hazards to life on the planet posed by anthropogenic climate change.<sup>307</sup>

The original regulation that went “too far” was a Pennsylvania statute regulating the mining of anthracite coal.<sup>308</sup> One of the first successful “right to exclude” takings challenges took place on a pond that opened into Maunalua Bay and the Pacific Ocean.<sup>309</sup> The state statute jeopardized by the Court’s recognition of a *per se* taking for a total deprivation of “economically beneficial use” was a South Carolina beachfront management statute that was a legislative response to sea level rise.<sup>310</sup> The Supreme Court’s three exactions takings cases involved access to a Pacific Ocean beach,<sup>311</sup> floodplain regulations,<sup>312</sup>

<sup>303</sup> *Id.* at 2085.

<sup>304</sup> *Id.* at 2089.

<sup>305</sup> *Id.*

<sup>306</sup> *See* Wolf, *supra* note 48.

<sup>307</sup> *See* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2021: THE PHYSICAL SCIENCE BASIS 202, 676–77 (Valérie Masson-Delmotte et al. eds., 2021), [https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC\\_AR6\\_WGI\\_FullReport.pdf](https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_FullReport.pdf) [<https://perma.cc/P898-4MBT>].

<sup>308</sup> *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 412–13 (1922) (“The statute forbids the mining of anthracite coal in such way as to cause the subsidence of, among other things, any structure used as a human habitation, with certain exceptions, including among them land where the surface is owned by the owner of the underlying coal and is distant more than one hundred and fifty feet from any improved property belonging to any other person.”).

<sup>309</sup> *See* *Kaiser Aetna v. United States*, 444 U.S. 164, 165, 179–80 (1979).

<sup>310</sup> *See* *Lucas v. S.C. Coastal Council*, 505 U.S. 1007, 1018 (1992) (citing S.C. CODE ANN. §§ 48-39-250 to -360 (2018)).

<sup>311</sup> *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 827 (1987).

and wetlands preservation and restoration.<sup>313</sup> The case that first established the rule that even temporary regulations can effect compensatory takings involved county floodplain restrictions following an unusual rain event.<sup>314</sup>

Even cases in which the Court refused to add further judicial gloss—over the strong objections of Justices concerned with the protection of private property rights—involved similar factual and regulatory elements: a Pennsylvania statute regulating extraction of bituminous coal,<sup>315</sup> a Gulf of Mexico beach renourishment project necessitated by storm-caused erosion,<sup>316</sup> a landowner’s attempts to fill and develop a Rhode Island salt marsh that was subject to coastal flooding,<sup>317</sup> a development moratorium designed to protect Lake Tahoe’s water quality,<sup>318</sup> and a provision regarding lot mergers that was part of an effort to protect sensitive lands on the shore of the Saint Croix River in Wisconsin.<sup>319</sup> Litigation that at the time appeared to be part of the familiar tension between private right and public need can now be appreciated as part of a life-and-death struggle over the causes and effects of climate change.

### B. *Pandemics*

The COVID-19 pandemic has shown us that greenhouse gas emissions are not the only agents posing a real, catastrophic risk to humans.<sup>320</sup> Because state and local orders closing and strongly restricting the operation of nonessential businesses, and imposing moratoria on evictions and foreclosures—such as environmental and land use regulations—impinge on private property rights, it was perhaps inevitable that property owners’ counsel would include takings claims in their legal challenges to pandemic restrictions. Since the spring of

<sup>312</sup> *Dolan v. City of Tigard*, 512 U.S. 374, 377 (1994).

<sup>313</sup> *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 600–01 (2013).

<sup>314</sup> *First Eng. Evangelical Lutheran Church v. Cnty. of Los Angeles*, 482 U.S. 304, 307–08 (1987).

<sup>315</sup> *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 474 (1987) (“Based on detailed findings, the legislature enacted the Bituminous Mine Subsidence and Land Conservation Act . . .”).

<sup>316</sup> *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’t Prot.*, 560 U.S. 702, 711 (2010) (plurality opinion) (“In 2003, the city of Destin and Walton County applied for the necessary permits to restore 6.9 miles of beach within their jurisdictions that had been eroded by several hurricanes.”).

<sup>317</sup> *Palazzolo v. Rhode Island*, 533 U.S. 606, 613–14 (2001).

<sup>318</sup> *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Plan. Agency*, 535 U.S. 302, 306 (2002).

<sup>319</sup> *Murr v. Wisconsin*, 137 S. Ct. 1933, 1940 (2017).

<sup>320</sup> See Michael Allan Wolf, *Zoning Reformed*, 70 U. KAN. L. REV. 171, 174–75 (2021).

2020, dozens of federal and state courts have considered and discussed the takings implications of COVID-19 restrictions.<sup>321</sup>

While in the overwhelming majority of these early-stage cases, the business and property owners were denied relief by trial courts (not only on the takings claims but also on the accompanying due process, equal protection, and related constitutional claims), there was at least one example of initial success. Five months before the Court's summer takings splurge, in *Bols v. Newsom*, U.S. District Judge Roger T. Benitez denied the motion to dismiss made by California Governor Gavin Newsom and other state and local government defendants.<sup>322</sup> The plaintiffs—a commercial landlord and three business owners and operators—challenged stay-at-home orders that closed nonessential businesses, alleging violations of the Due Process (procedural and substantive), Equal Protection, Contracts, and Takings Clauses (alleging a total regulatory taking and a physical taking), along with violations of the California Constitution's takings clause.<sup>323</sup> Judge Benitez, no slacker when it comes to the protection of certain individual rights,<sup>324</sup> denied each and every motion to dismiss.<sup>325</sup> This lawsuit, like almost all of the other pandemic-related cases, indicates that the Takings Clause claims are superfluous and redundant.

While Judge Benitez's opinion in *Bols* is decidedly an outlier, an existing or future takings case could make its way to the Supreme Court which, in the midst of a pandemic, struck down regulations that the majority perceived as endangering individual rights.<sup>326</sup> In fact, on April 5, 2022, all three judges on an Eighth Circuit panel allowed claims under the Takings and Contracts Clauses to proceed against "Minnesota Governor Tim Walz [who] signed an executive order mandating a statewide residential eviction moratorium."<sup>327</sup> The court

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<sup>321</sup> See *supra* note 49 and accompanying text.

<sup>322</sup> 515 F. Supp. 3d 1120, 1129 (S.D. Cal. 2021).

<sup>323</sup> *Id.* at 1124–35.

<sup>324</sup> See, e.g., *Miller v. Bonta*, 542 F. Supp. 3d 1009, 1014 (S.D. Cal. 2021) ("Good for both home and battle, the AR-15 is the kind of versatile gun that lies at the intersection of the kinds of firearms protected under *District of Columbia v. Heller*, and *United States v. Miller*. Yet, the State of California makes it a crime to have an AR-15 type rifle. Therefore, this Court declares the California statutes to be unconstitutional.") (citations omitted).

<sup>325</sup> *Bols*, 515 F. Supp. 3d at 1135.

<sup>326</sup> See, e.g., *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020) (per curiam) ("[E]ven in a pandemic, the Constitution cannot be put away and forgotten. The restrictions at issue here, by effectively barring many from attending religious services, strike at the very heart of the First Amendment's guarantee of religious liberty.").

<sup>327</sup> *Heights Apartments, LLC v. Walz*, 30 F.4th 720, 723–24 (8th Cir. 2022), *reh'g denied*, 39 F.4th 479 (8th Cir. 2022).

relied on one of the Supreme Court’s most recent takings decisions: “Heights [the owner of rental units] has sufficiently alleged that the Walz Defendants deprived Heights of its right to exclude existing tenants without compensation. The well-pleaded allegations are sufficient to give rise to a plausible *per se* physical takings claim under *Cedar Point Nursery*.”<sup>328</sup> The stakes are as high as they can conceivably be in this area, as anecdotal evidence and at least one study indicate that eviction often translates into serious illness or death for those who lose their shelter.<sup>329</sup>

### C. Affordable Housing

There is a third area of deep concern that could well intersect with efforts to apply and extend the Takings Gloss. The COVID-19 pandemic has heightened our awareness of the severe shortage of affordable housing in the United States and exacerbated the problem considerably.<sup>330</sup> The reinvigorated social and racial justice activism during the summer of 2020—after a police officer horrendously murdered George Floyd and the public became more aware of the shameful extent of police violence victimizing persons of color<sup>331</sup>—has inspired critics of zoning and other land use controls that facilitate and maintain racial and socioeconomic segregation to revisit existing programs and explore new regulatory approaches.<sup>332</sup> Renewed attention

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<sup>328</sup> *Id.* at 733. The court also allowed “a non-categorical regulatory takings claim” to proceed. *Id.* at 733–35. One Eighth Circuit judge dissented from the denial of a petition for an en banc hearing, asserting that the panel had misinterpreted and misapplied takings precedents. *Heights Apartments*, 39 F.4th at 480 (“[T]he panel decision on the Takings Clause misreads the most analogous decision of the Supreme Court on the matter of *per se* takings. . . . [T]he panel decision’s analysis of regulatory takings runs counter to governing precedent and the decisions of other federal courts during the pandemic.”) (Colloton, J., dissenting).

<sup>329</sup> Kathryn M. Leifheit, Sabriya L. Linton, Julia Raifman, Gabriel L. Schwartz, Emily A. Benfer, Frederick J. Zimmerman & Craig Evan Pollack, *Expiring Eviction Moratoriums and COVID-19 Incidence and Mortality*, 190 AM. J. EPIDEMIOLOGY 2563, 2568 (2021) (“The expiration of eviction moratoriums was associated with increased COVID-19 incidence and mortality in US states, supporting the public-health rationale for use of eviction moratoriums to prevent the spread of COVID-19.”).

<sup>330</sup> See JOINT CTR. FOR HOUS. STUDS. OF HARVARD UNIV., *THE STATE OF THE NATION’S HOUSING 2020*, at 1 (2020) (“The economic fallout from the COVID-19 pandemic has amplified the rental affordability crisis.”).

<sup>331</sup> See, e.g., David G. Maxted, *The Qualified Immunity Litigation Machine: Eviscerating the Anti-racist Heart of § 1983, Weaponizing Interlocutory Appeal, and the Routine of Police Violence Against Black Lives*, 98 DENV. L. REV. 629, 636 (2021) (“The national movement against police violence in 2020 following the police killings of George Floyd, Breonna Taylor, Elijah McClain, and too many others, has led the way toward a vision of law which values lives. Black activists and their allies rose up to demand an end to police violence and the laws that allow it.”).

<sup>332</sup> See Wolf, *supra* note 320, at 212–17.

to inclusionary zoning efforts, in which developers are required to set aside affordable units in exchange for permission to develop residential and commercial properties, promises to give rise to exactions takings challenges.<sup>333</sup> So far, the Supreme Court has dodged this issue, although Justice Thomas has voiced some concerns.<sup>334</sup> It is unclear how the realigned Supreme Court would respond to a similar challenge in the future.

Relatively new local and statewide efforts to prevent the exclusion of accessory dwelling units and missing middle housing in neighborhoods currently zoned for single-family detached dwellings<sup>335</sup> could easily inspire litigation by existing homeowners alleging that these new measures reduce the value of their property and thus effect regulatory takings. In 2019, Oregon passed statewide rent control legislation,<sup>336</sup> and there have been similar moves in other settings.<sup>337</sup> There have been several unsuccessful efforts to convince the Supreme Court to rule that rent control is unconstitutional, dating back to controls imposed during the First World War.<sup>338</sup> A majority of Justices have yet to rule that rent control effects a per se physical occupation taking, despite efforts by landlords' counsel.<sup>339</sup> The *Cedar Point*

<sup>333</sup> See, e.g., *Cal. Bldg. Indus. Ass'n v. City of San Jose*, 351 P.3d 974, 996 (Cal. 2015) (“[T]he affordable housing requirement of the San Jose ordinance as a whole—including the voluntary off-site options and in lieu fee that the ordinance makes available to a developer—does not impose an unconstitutional condition in violation of the takings clause.”).

<sup>334</sup> See *Cal. Bldg. Indus. Ass'n v. City of San Jose*, 577 U.S. 1179, 1181 (2016) (Thomas, J., concurring in denial of certiorari) (“I continue to doubt that ‘the existence of a taking should turn on the type of governmental entity responsible for the taking.’”) (quoting *Parking Ass'n of Ga., Inc. v. Atlanta*, 515 U.S. 1116, 1117–18 (1995) (Thomas, J., dissenting from denial of certiorari)).

<sup>335</sup> See, e.g., Wolf, *supra* note 320, at 193–95.

<sup>336</sup> OR. REV. STAT. § 90.323(3) (2021) (“During any tenancy other than week-to-week, the landlord may not increase the rent: . . . (c) During any 12-month period, in an amount greater than seven percent plus the consumer price index above the existing rent except as permitted under subsection (7) of this section.”).

<sup>337</sup> See, e.g., Faiza Mahamud, *Incoming Minneapolis Council Sounds Note of Caution on Rent Control*, STAR TRIB. (Dec. 19, 2021, 4:56 PM), <https://www.startribune.com/incoming-minneapolis-council-sounds-note-of-caution-on-rent-control/600128679/> [<https://perma.cc/QQ34-WSPK>] (“With rising rents and a looming eviction crisis, Minneapolis voters told the City Council last month that the city should adopt a rent control policy.”).

<sup>338</sup> See *Block v. Hirsh*, 256 U.S. 135, 156 (1921) (“The space in Washington is necessarily monopolized in comparatively few hands, and letting portions of it is as much a business as any other. Housing is a necessary of life.”).

<sup>339</sup> See *Pennell v. City of San Jose*, 485 U.S. 1, 9 (1988) (deeming it premature to consider the takings challenge to hardship provisions of a rent control ordinance); *Yee v. City of Escondido*, 503 U.S. 519, 532 (1992) (“The Escondido rent control ordinance, even considered against the backdrop of California’s Mobilehome Residency Law, does not authorize an unwanted physical occupation of petitioners’ property.”).



Court's relaxation of the physical occupation rules<sup>340</sup> and the green light given to the challenge in *Pakdel* to San Francisco's tenant protection provision<sup>341</sup> bode well for future challenges in this area. An expansion of the Takings Gloss is the last thing vulnerable populations need with homelessness continuing to rise nationally,<sup>342</sup> rents moving sharply higher in many parts of the nation,<sup>343</sup> and the devastation wrought by the Delta and Omicron variants.<sup>344</sup>

### CONCLUSION

This Article has established two points. First, the judicial opinions that have transformed the logically cabined Takings Clause into the wide-ranging, octopus-like Takings Gloss is the *only* reason why counsel have the opportunity to make takings arguments that pose real challenges to life-and-death regulations, in settings significantly removed from the affirmative exercise of eminent domain or the actual, permanent physical occupation or confiscation of private property by the government itself. Second, given twentieth-century developments in constitutional, statutory, and common law, today's private property owners, unlike their counterparts at the time of the framing of the Fifth and Fourteenth Amendments, have adequate and effective legal means for protecting and vindicating their rights against confiscatory, arbitrary, discriminatory, and unreasonable federal, state, and local laws. Stated otherwise, the hundred-year effort to bolster property rights by rewriting the Takings Clause is an example of judicial activism that simultaneous and subsequent legal developments have rendered largely superfluous.

Having exposed the extensive rewriting and repurposing of the Takings Clause, the author's hope is that the takings trio from the summer of 2021, particularly the sharp disputes in *Cedar Point* and *PennEast*, might inspire Justices to reconsider the wisdom, efficacy,

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<sup>340</sup> See *supra* Section I.A.

<sup>341</sup> See *supra* Section I.C.

<sup>342</sup> See generally MEGHAN HENRY, TANYA DE SOUSA, CAROLINE RODDEY, SWATI GAYEN, THOMAS JOE BEDNAR & ABT ASSOCS., U.S. DEP'T OF HOUS. & URB. DEV., THE 2020 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS PART 1 (2021), <https://www.huduser.gov/portal/sites/default/files/pdf/2020-AHAR-Part-1.pdf> [<https://perma.cc/F4ML-YPLK>].

<sup>343</sup> Coral Murphy Marcos, Jeanna Smialek & Jim Tankersley, *Rising Rents Threaten to Prop Up Inflation*, N.Y. TIMES, (July 26, 2021), <https://www.nytimes.com/2021/07/22/business/economy/rising-rents-inflation.html> [<https://perma.cc/HBF3-Z3H5>].

<sup>344</sup> See *Variants of the Virus*, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 11, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/variants/omicron-variant.html> [<https://perma.cc/WXM7-6ME5>].

and very serious consequences of relying on the Takings Gloss. To think twice about this problematic judicial overlay would not just further the goals of jurists—representing a wide range of ideological positions—who begin with the constitutional text and its original meaning. More important, it would end the weaponization of the Takings Clause to achieve political agendas (such as reining in environmental regulation, supporting climate change skepticism, checking the power of labor unions, stifling efforts to integrate neighborhoods by race and class, and opposing pandemic restrictions in the name of freedom) in areas of government activity that are far afield from eminent domain—the longstanding practice of government condemnation of private property for roads, highways, schools, parks, and other traditional public uses while ensuring that owners are fairly and fully compensated.