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**THEFT, EXTORTION, AND THE CONSTITUTION: LAND USE
PRACTICE NEEDS AN ETHICAL INFUSION**

*Michael M. Berger**

ABSTRACT

There are many ways in which property owners/developers interact with regulators. To the extent that texts and articles deal with the ethical duties of the regulators, they tend to focus on things like conflicts of interest. But there is more. This article will examine numerous other ways in which regulators may run afoul of ethical practice in dealing with those whom they regulate.

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I. INTRODUCTION

When Socrates and his two great disciples composed a system of rational ethics they were hardly proposing practical legislation for mankind They were merely writing an eloquent epitaph for their country.¹

I will leave it to the philosophers to decide whether there can ever be congruence between ethics and practical legislation. For those of us who toil in the land use vineyards, the theory is irrelevant; we are required to act ethically and achieve practical legislation—whatever that means and however it is accomplished.

The concept of “ethics” cuts a broad swath. In the land use field, ethics is typically viewed as dealing with the kind of conflicts of interest that can arise between lawyers and their clients; between multiple clients of a single lawyer; or about how intimately planners and/or government officials can get involved with a project that will come before them for some sort of review.²

That's all well and good. But the general texts and continuing education courses on ethics are filled with illustrations of how to act in those situations³ (that is, for those who need education beyond the kind of stuff contained in Robert Fulghum's classic work).⁴ There may be more to the issue than how to act in narrow circumstances. For one thing, there is the idea that government and the governed need to deal with each other on a level playing field. As one court put it:

¹ GEORGE SANTAYANA, *Reason in Society*, in *THE LIFE OF REASON*, Vol. V, 262 (1905-06).

² For example, at the most recent American Bar Association Land Use Institute, the panel on ethics dealt with “the problems of conflict of interest, bias, ex parte communication, social media, and other situations that attorneys and planners may have to confront.” Same for the latest American Law Institute Continuing Legal Education program on Eminent Domain and Land Valuation Litigation. Spoiler alert: although the materials are excellent, and the speakers worth listening to via recordings after the fact, none of the speakers dealt with the ethical issues discussed in this article, with the exception of a couple of references to biased councilmembers as discussed *post*, text accompanying note 51 *et seq.*

³ A good illustration is PATRICIA E. SALKIN, *Legal Ethics and Land Use Planning*, in *HOT TOPICS IN LAND USE LAW CONTROL*, 116 (2019).

⁴ ROBERT FULGHUM, *ALL I REALLY NEED TO KNOW I LEARNED IN KINDERGARTEN* (1986).

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It has been aptly said: “If we say with Mr. Justice Holmes, ‘Men must turn square corners when they deal with the Government,’ it is hard to see why the government should not be held to a like standard of rectangular rectitude when dealing with its citizens.”⁵

Moreover, there are some peculiarly land use related questions that have a core of ethical content and that receive too little attention as ethical issues. For example, as the U.S. Supreme Court once put it, in explaining the need for just compensation when private property is taken for public use:

[t]he political ethics reflected in the Fifth Amendment reject confiscation as a measure of justice.⁶

So, there is at least one parameter: ethics is a part of the Fifth Amendment, and it prohibits “confiscation” of private property. That seems a good place to start. This article will highlight a few of the larger ethical issues stemming from that beginning.

II. THE CONSTITUTIONAL BACKDROP

Let’s start with the Constitution. It contains a clear command that private property shall not be taken for public use without just compensation.⁷ And courts frequently have noted the need to temper otherwise rigid rules with concepts of fairness and equity in order to comply with the proper treatment of property owners.

The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness, as it does from technical concepts of property law.⁸

⁵ *Crumpler v. Bd. of Admin. Emp. Ret. Sys.*, 32 Cal. App. 3d 567, 579-80 (1973).

⁶ *United States v. Cors*, 337 U.S. 325, 332 (1949). For a classic law review discussion of this topic, see generally Frank I. Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165 (1967).

⁷ U.S. CONST. amend. V.

⁸ *United States v. Fuller*, 409 U.S. 488, 490 (1973) (citations omitted); *Almota Farmers E. & W. Co. v. United States*, 409 U.S. 470, 478 (1973) (same); *Olson v. United States*, 292 U.S. 246, 255 (1934) (principle of indemnification underlies just compensation guarantee); *United States v. Commodities Trading Corp.*, 339 U.S. 121, 124 (1950) (“the word ‘just’ in the Fifth Amendment evokes ideas of ‘fairness’ and ‘equity’”); *Holtz v. Superior Court*, 3 Cal. 3d 296, 303 (1970) (just compensation

As an ethical issue, of course, the proscription of unfair takings of private property pre-dates any of our constitutions. Multiple parts of the Ten Commandments, for example, preclude both stealing and coveting⁹—the latter presumably including a Jimmy Carter-esque lusting in the heart after things that do not belong to the lustful.¹⁰ In light of that command, how far is it ethical for government officials to go in their dealings with property owners? The Constitution provides a clue. The idea of the Constitution “was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.”¹¹ This is why “fundamental

guarantee designed to “socialize the burden” of public projects); *S. Cal. Edison Co. v. Bourgerie*, 9 Cal. 3d 169, 175 (1975) (applying the *Fuller* holding and calling it a “salutary principle”); *Cnty. San Diego v. Miller*, 13 Cal. 3d 684, 691 (1975) (quoting *Fuller* and changing California law to reflect a more equitable result); *City of Los Angeles v. Decker*, 18 Cal. 3d 860, 871 (1976) (condemnor acts in a “quasi-judicial” capacity and owes duty of fairness to property owners. *See also* *Koontz v. St. Johns River Water Management. Dist.*, 570 U.S. 595, 596 (2013) (“Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause”). *But see* *Tahoe-Sierra Pres. Council v. Tahoe Reg. Plan. Agency*, 535 U.S. 302, 333 (2002) in which the Supreme Court noted that any of seven aspects of “fairness and justice” might have caused the Court to rule in the property owners’ favor, but it decided not to employ any of them. For extended discussion, see Michael M. Berger, *Tahoe-Sierra: Much Ado About—What?* 25 HAWAII L. REV. 295, 312-20 (2003). For an analysis of judicial opinions paying no more than lip service to the “fairness” rubric, see Gideon Kanner, “Fairness and Equity,” or *Judicial Bait-and-Switch*, 4 ALBANY GOVT. L. REV. 38 (2011).

⁹ *See* Deuteronomy 5:12-17 for the anti-coveting list.

¹⁰ If you doubt the application of this admonition to governmental property seizures, see *Ahab ex rel. Jezebel v. Naboth*, 1 Kings 21:1-29, where regal theft received what one might call Biblical retribution. For the proper way to handle things, compare *David v. Ornan*, 1 Chronicles 21:22-25, where King David insisted on paying fair compensation for property even though the owner offered to give it to the King, along with animals for sacrifice. The underlying precedent for *David* appears in Genesis 23:16, where Abraham accepted the terms of Ephron the Hittite and paid for land “at the going merchants’ rate.” Sounds like the concept of paying fair market value in public land acquisitions goes back quite far.

¹¹ *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). At a constitutional level, of course, it is good to remember that the Bill of Rights was adopted to protect individuals against the government—the few against the many—not the other way around. *Id.* As a former Chief Justice of California put it, “[t]he provisions of [the Constitution] set forth a system of ‘enduring general values’, and perhaps we can describe judicial review as ‘institutionalized self-control.’” Donald

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rights may not be submitted to a vote; they depend on the outcome of no elections.”¹² As the Supreme Court recently concluded, “[t]he freedom secured by the Constitution consists, in one of its essential dimensions, of the right of the individual not to be injured by the unlawful exercise of governmental power.”¹³

The interaction of ethics, morals, and law was aptly summarized thus:

The Federal Constitution is not a set of neutral pronouncements. It is [a] structure of law implicit with values: moral values, civic values, social values. It takes sides—usually the side of the individual, guarding his security, his dignity, his claims to equal and fair treatment, against the ponderous demands of the collective state.¹⁴

This issue comes up regularly. Most people, I suspect, tend to think of these issues in terms of “law,” rather than “ethics,” but bear with me. As Justice William O. Douglas put it, “The Constitution and the Bill of Rights were designed to get Government off the backs of the people”¹⁵ I think Justice Douglas had something more than dry legal maxims in mind.

For example, think about “dedication” of property as a condition to the issuance of a permit. Even though the Supreme Court held thirty-five years ago in a case involving the California Coastal Commission that some efforts to convince property owners to “dedicate” land are nothing less than “extortion,”¹⁶ that harsh condemnation of a standard government practice did not end matters. Is extortion unethical? Should it be countenanced? If we all should have learned at our mothers’ knees that extortion was beyond the pale, shouldn’t there at least have been a slowdown in its regulatory practice after the Nation’s highest court pointed out the emperor’s lack of clothing? If this ethical blast had any effect, why did the Supreme

Wright, *The Role of the Judiciary: From Marbury to Anderson*, 60 CAL. L. REV. 1262, 1266 (1972).

¹² *Barnette*, 319 U.S. at 638.

¹³ *Obergefell v. Hodges*, 576 U.S. 644, 677 (2015) (quoting with approval).

¹⁴ Leonard M. Friedman, *The Courts and Social Policy*, 47 CAL. ST. B.J. 558, 563 (1972).

¹⁵ NAT HENTOFF, *LIVING THE BILL OF RIGHTS 2* (1998) (quoting William O. Douglas, Letter to the Young Lawyers Section of the Washington State Bar Association.).

¹⁶ *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 (1987).

Court have to take up the issue again a few years later in *Dolan v. City of Tigard*¹⁷ and further expand on governmental obligations?¹⁸

And what about the earlier victims of the California Coastal Commission's "extortion" who did not have the good fortune to have the Supreme Court grant review in their cases and call out the Commission for the extortionist it was finally labelled in *Nollan*? Did it occur to the Commission to contact its earlier victims and offer to return their property, or at least pay for it? Of course not. Having been tarred with that criminal brush, it evidently never occurred to the Commission to revoke any of the extortionate "gifts" it had extracted over the years. Nor did it stop the Commission from seeking to enforce those donations from property owners who, unlike the Nollans, lacked the foresight or stamina to challenge them. They were met with the standard defense ploy that the requests for judicial assistance came too late.¹⁹ Morality, anyone? Ethical practice? The biggest role model around is the government. When it acts morally, it sends a message. Likewise, when it throws its weight around, bullying private citizens, it also sends a message. The latter message is that brute power is the key to proper action. Is that really the ethical thing to teach?

At the margin, of course, is a gray area that shifts back and forth between bribery and extortion. Here's what I mean. When government has a developer in the classic fish-in-the-barrel posture of needing permits to complete a project so that lenders don't foreclose, and then demands the financing of pet municipal projects as a condition of permit approval (popular, but unfunded or underfunded projects like

¹⁷ *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

¹⁸ Aside from the obvious fact that the Court may have been enamored of the rhyming possibilities of a *Nollan/Dolan* rule. If you will forgive a personal memory, see Michael M. Berger, *Nollan Meets Dolan Rollin' Down the Bikepath*, 46 LAND USE L. & ZONING DIG., 1, 3 (1994).

¹⁹ *E.g.*, *Rosco Holdings, Inc. v. State of Cal.*, 212 Cal. App. 3d 642, 656 (1989); *Serra Canyon Co., Ltd. v. Cal. Coastal Comm'n*, 120 Cal. App. 4th 663, 669 (2004). Whether a statute of limitations should ever be available to legalize governmental theft is a different question for a different article. For an ethical lapse that shows how far the federal government once tried to push the passage of time as a defense, see *Preseault v. United States*, 100 F.3d 1525, 1530 (Fed. Cir. 1996). There, in a "rails-to-trails" suit, where the owner of property underlying an abandoned railroad easement tried to reclaim full title to the land (or at least obtain compensation therefor), the government argued (presumably with a straight face) that the statute of limitations had run out decades earlier in 1926, on the theory that all such claims arose when Congress passed the Interstate Commerce Act in 1920, regardless of when the easements were created. Fortunately, that ploy didn't work.

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child-care, low-cost housing, public art, jogging tracks, job training, bookmobiles, public transit, community symphonies, and the like), the demand approaches the extortionate end of the scale.²⁰

In contrast, when municipalities severely restrict the number of building permits they will issue, and then invite prospective developers to participate in a “beauty contest” in which points are awarded for various items of good (or, at least, desired) planning (including bonus points for providing funding for those pet municipal projects, with permits going to the projects with the highest bonus point totals), the matter gets a bit hazy. One such contest was described as follows:

City Council evaluates competing projects and awards points based upon its consideration of nine primary criteria and fifteen secondary criteria. Some of the criteria are: affordability, low-density, preservation of natural terrain, provision of open space, proximity of the project to public transportation and shopping centers, mitigation of traffic problems, and construction of infrastructure. The projects are then placed in a queue that is based upon their ranking under a point system. Only those projects placed into the queue are eligible for building permits.²¹

²⁰ This is not my first rodeo. I’ve been on this particular ethical rant for years. See, e.g., Michael M. Berger, *Real Estate Developers’ Linkage Fees: Reasonable Requirement or Extortion?*, 1 PROB. & PROP. 9, 9 (1987), which posed the question, “[d]oes it set a good example for government—our omnipresent teacher by example—to act in this fashion?” See generally Michael M. Berger, *Nice Guys Finish Last—At Least They Lose Their Property: Gion v. City of Santa Cruz*, 8 CAL. WEST L. REV. 75 (1971); Michael M. Berger, *The California Supreme Court—A Shield Against Governmental Overreaching: Nestle v. City of Santa Monica*, 9 CAL. WEST. L. REV. 199 (1973); Michael M. Berger, *Gion v. City of Santa Cruz: A License To Steal?*, 49 CAL. ST. BAR J. 24 (1974); Michael M. Berger, *Airport Noise in the 1980s: It’s Time for Airport Operators to Acknowledge the Injury They Inflict on Neighbors*, in THE SOUTHWESTERN LEGAL FOUNDATION PROCEEDINGS OF THE INST. ON PLAN., ZONING, & EMINENT DOMAIN, 10-4 (1987); Michael M. Berger, *Governmental Arrogance Gets the High Court’s Attention*, 24 ENV’T L. 2 (1994); Michael M. Berger, *Do Planners Really Chafe at Being Fair?*, 41 LAND USE L. & ZONING DIG. 3 (1989); Michael M. Berger, *The State’s Police Power Is Not (Yet) the Power of a Police State: A Reply to Professor Girard*, 35 LAND USE L. & ZONING DIG 4 (1983).

²¹ *Griffin Homes Inc. v. Superior Court (City of Simi Valley)*, 280 Cal. Rptr. 792, 795 (1991).

Depending on the developer's natural bent or financial condition, this one could shade in some cases toward the bribery side of the scale (albeit the bribery is invited by the regulator). Or is it still extortionate? Or a bit of each? Or is it just wordplay?²² Does it run afoul of Justice Frankfurter's admonition that the Constitution proscribes "sophisticated as well as simple-minded" schemes for the invasion of protected rights?²³ In any event, where is the ethical answer? Former American Planning Association president Fred Bosselman once derided this mode of planning as ". . . 'wait and see' land-use regulation in which restrictive regulations are adopted but then waived or varied when a prospective developer makes an attractive offer unrelated to the regulation."²⁴

Some people think this sort of police power leveraging is just fine. They pretty it up by calling it "incentive zoning," and describe it this way:

Faced with mounting social needs and continuing fiscal constraints, more and more cities 'mint' money through their zoning codes to finance a wide array of public amenities. Through the land use regulatory technique formally known as 'incentive zoning,' cities grant private real estate developers *the legal right to disregard zoning restrictions* in return for their voluntary agreement to provide urban design features such as plazas, atriums, and parks, and social facilities and services such as affordable housing, day care centers, and job training.²⁵

²² Speaking of wordplay, see the California Supreme Court's decision in *Cal. Bldg. Indus. Ass'n v. City of San Jose*, 61 Cal. 4th 435 (2015). In that court's view, the requirement of either building or setting aside or otherwise financing low-income housing as a condition to obtaining development permission was not an "exaction," so the California Supreme Court could simply ignore the United States Supreme Court's analysis in *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987), *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013), saying they did not apply because the High Court's analysis in those three cases dealt only with "exactions" while this was merely a "land use regulation." 61 Cal. 4th at 994.

²³ *Lane v. Wilson*, 307 U.S. 268, 275 (1939).

²⁴ Fred Bosselman & Nancy Stroud, *The Current Status of Development Exactions*, 14 FLA. ENV'T & URB. ISSUES 8, 9 (1987).

²⁵ See generally Jerold S. Kayden, *Zoning for Dollars: New Rules for an Old Game? Comments on the Municipal Art Society and Nollan Cases*, 39 Wash. U.J. URB. &

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Justice Scalia (along with four of his colleagues) expressed doubt about the wisdom of allowing municipalities such power, noting the ease with which it could be abused:

One would expect that a regime in which this kind of leveraging of the police power is allowed would produce stringent land-use regulations which the State then waives to accomplish other purposes, leading to lesser realization of the land-use goals purportedly sought to be served that would result from more lenient (but nontradeable) development restrictions. Thus, the importance of the purpose underlying the prohibition not only does not justify the imposition of unrelated conditions for eliminating the prohibition, but positively militates against the practice.²⁶

Need an illustration of how this can get out of hand? The City of Patterson, California required builders of homes to assist lower income families to buy homes by including some “affordable housing” in their projects.²⁷ As with many such regulations, this one allowed each developer to buy out of the requirement for a fee (some might call it ransom) of \$734 per house (that the city promised to use to build affordable housing elsewhere).²⁸ That fee could be raised, but only if the increase was “reasonably justified.”²⁹ Three years later, the city increased the fee—to \$20,946 per house.³⁰ With a straight face, the city claimed that monstrous increase was “reasonably justified.”³¹

CONTEMP. L. 3 (1991) (emphasis added). *See also* Anthony Guardino, *Incentive Zoning Can Help Alleviate Municipal Budget Woes*, 264 N.Y. L.J. 102 (Nov. 24, 2020).

²⁶ *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 n.5 (1987).

²⁷ *Bldg. Indus. Assn. v. City of Patterson*, 171 Cal. App. 4th 886, 899 (2009), disapproved on other grounds in *California Bldg. Indus. Assn. v. City of San Jose*, 61 Cal. 4th 435, 479 (2015).

²⁸ *Id.* at 893.

²⁹ *Id.* at 894.

³⁰ *Id.* at 893.

³¹ *Id.* at 895-96.

Even in California (and California courts have not been notably sympathetic toward land developers³²) that wouldn't fly.³³

In fact, the term “incentive zoning” has a decidedly Orwellian feel to it. It takes words that have a recognized (and neutral) meaning and sets them up as something to justify more menacing governmental action. The Supreme Court discussed this concept again in *Koontz v. St. Johns River Water Mgmt. Dist.*³⁴ Relying on the “unconstitutional conditions doctrine,” which forbids government from granting a benefit on condition of giving up a constitutional right, the Court explained that *Nollan* and *Dolan* protect property owners' Fifth Amendment rights against over-zealous permit authorities:

[L]and-use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than property it would like to take. By conditioning a building permit on the owner's deeding over a public right-of-way, for example, the government can pressure an owner into voluntarily

³² Calling California a “bizarre jurisdiction” in which a property owner would have to be a “madman” to litigate, two nationally known land use experts concluded in mock (or was it real?) sarcasm, rather than wasting time litigating, “it would cost a lot less and save much time if [a developer] simply slit his throat.” RICHARD BABCOCK & CHARLES SIEMON, *THE ZONING GAME REVISITED* 253-257, 293 (1985). For a collection of similar conclusions by commentators from around the country, see Gideon Kanner & Michael M. Berger, *The Nasty, Brutish, and Short Life of Agins v. City of Tiburon*, 50 URB. L. 1, 16-18 (2019).

³³ *Bldg. Indus. Assn. v. City of Patterson*, 171 Cal. App. 4th 886, 899 (2009). For more extended analysis of the case, see Michael M. Berger, *Appellate Advice on What is NOT a “Reasonable In-Lieu Fee,”* REAL EST. FIN. J. 114 (Winter 2010). See also *All for Responsible Plan. v. Taylor*, 63 Cal. App. 5th 1072 (2021), where an initiative measure sought to make any new development responsible for bringing all nearby roads up to snuff, as a pre-condition even to filing an application and regardless of how much the new development might contribute to road use problems. Invoking *Nollan*, *Dolan*, and *Koontz*, the court held that such a requirement was invalid. *Id.* at 1085. As the court concluded, “judicial deference to the electoral process does not compel judicial apathy towards patently invalid legislative acts.” *Id.* at 1084.

³⁴ *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604-05 (2013).

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giving up property for which the Fifth Amendment would otherwise require just compensation.³⁵

In short, “[e]xtortionate demands of this sort frustrate the Fifth Amendment right to just compensation, and the unconstitutional conditions doctrine prohibits them.”³⁶ Building on *Nollan*, the Court concluded that it could not permit the improper “leveraging” of the police power in this fashion³⁷ because the Court remained “[m]indful of the special vulnerability of land use permit applicants to extortionate demands for money”³⁸

This sort of misuse of ordinary English words, corrupting them to mean something plainly different from what they appear to mean, ought not be countenanced.³⁹ As Justice Holmes memorably put it, “fiction always is a poor ground for changing substantial rights.”⁴⁰

³⁵ *Id.* In recent years, municipal governments have considered imposing linkage fees for such things as jogging tracks, public transportation, low-income housing, day care centers, and public art. Some courts have viewed the relationship as so tenuous between the project for which a permit is sought and the fees demanded that they have described the governmental conduct as “grand theft” (*Collis v. City of Bloomington*, 246 N.W.2d 19, 26 (Minn. 1976) and “extortion” (*J.E.D. Assocs., Inc. v. Town of Atkinson*, 432 A.2d 12, 14 (N.H. 1981)).

³⁶ *Koontz*, 570 U.S. at 605. To emphasize its concern over the government’s conduct, the opinion uses some form of the word “extort” five times.

³⁷ *Id.*

³⁸ *Id.* at 619.

³⁹ *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 841 (1987) (discussing that the rights of property owners need to be protected by the judiciary against the “cleverness and imagination” of governmental word games.); *see also* *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1025 n.12 (1992) (*aff’g* as the Supreme Court put it a few years later, any government agency that cannot come up with a rational sounding explanation for what it wants to do simply has “a stupid staff.”); *see* Michael M. Berger, *Is An ‘Innovative Scheme’ A New Label For Confiscating Private Property?*, 51 L.A. B.J. 222 (1975) (showing how words have meaning and that using them correctly is important goes back many centuries); *see* RICHARD WILHELM, *CONFUCIUS AND CONFUCIANISM* 50-51 (Routledge & Kegan Paul Ltd. 1972 ed., George H. Danton at al. trans., 2005) (1931) (responding to a question from the Prince of Wei, Confucius proclaimed that the most important function of government is to see that things are called by their proper names, because otherwise chaos and anarchy rule).

⁴⁰ *Haddock v. Haddock*, 201 U.S. 562, 630 (1906) (The quote is from a dissenting opinion that was eventually vindicated when *Haddock* was overruled.). As California’s acclaimed Chief Justice Roger Traynor put it, sometimes even judicial opinions contain ideas that have never been “cleaned and pressed and might disintegrate if they were.” Roger Traynor, *No Magic Words Could Do It Justice*, 49 CAL. L. REV. 615, 621 (1961).

A nationally prominent planner/lawyer provided his own personal recollections of such events:

[P]lanners . . . have provided regulatory incentives for voluntary dedication, or, as most highly effective planners do, they have taken the developers aside and cajoled the ‘voluntary’ dedication out of them. I remember one particularly effective planner who, fifteen years ago, before affordable housing programs became popular, would take condominium developers aside and tell them if they wanted their project approved, they should offer to provide some affordable units in their projects. Am I condoning random extortion? Of course not, but much good can come from a little backroom bartering.⁴¹

But might it not merely be petty theft? Something to pay little attention to? In some instances, the value of what is taken from each individual might be said to be *de minimis*.⁴² Is that OK? Do we need to invoke the majesty of the Constitution to deal with petty issues? As iconic a figure as Justice Oliver Wendell Holmes, Jr. once referred to minor governmental incursions as “the petty larceny of the police power” (as opposed to grander larceny that calls for different treatment) in the draft of an opinion for the Supreme Court, but others convinced him to delete the phrase from the final version. He was fond enough of the concept, however, to reprise it in his celebrated correspondence with Harold Laski.⁴³ More recently, Justice Stevens commented that “The Fifth Amendment draws no distinction between grand larceny and

⁴¹ DWIGHT MERRIAM, A PLANNER’S VIEW OF DOLAN, IN *TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER DOLAN AND LUCAS* 214 (David Callies ed., 1996).

⁴² See Jason L. Riley, *San Francisco Has Become a Shoplifter’s Paradise*, WALL ST. J., Oct. 19, 2021, <https://www.wsj.com/articles/san-francisco-shoplifters-theft-walgreens-decriminalized-11634678239> (discussing how, in the argot of our times, shoplifting less than \$1,000 of merchandise has been reduced in places like San Francisco to less than a misdemeanor. Indeed, store clerks and law enforcement officials don’t even bother stopping such minor criminal activity. This has led a significant number of chain stores to simply close some of their more sensitive locations.).

⁴³ See Letter from Oliver W. Holmes to Harold Laski (Oct. 22, 1922), in 1 *HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI, 1916-1935*, 457 (Mark DeWolf Howe ed., 1953).

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petty larceny.”⁴⁴ Does that change matters either legally or ethically? Consider, in this light, *Loretto v. Teleprompter Manhattan CATV Corp.*⁴⁵ There, the New York legislature sought to compel apartment owners to accept cable TV equipment to service their tenants. The State thought the invasion was minimal and the presumed compensation could be set at a single, paltry dollar. The Supreme Court wouldn't bite. In a unanimous opinion by Justice Marshall, the Court said it didn't matter “. . . whether the installation is . . . bigger than a breadbox,”⁴⁶ because “constitutional protection for the rights of private property cannot be made to depend on . . . size”⁴⁷ The Supreme Court had to return to this issue recently in a case involving what some saw as minimal intrusion on farm property by labor union organizers who wanted to communicate with unrepresented workers. The Court was unconcerned about the value of the intrusion or the length of the union organizers' intrusion,⁴⁸ concluding flatly that the constitution bars all takings, regardless of size or extent.⁴⁹

Is theft ethical? No. Is it constitutional? No. Does it continue? Of course. Do government officials like being reminded that they are engaging in theft? Don't be absurd.⁵⁰

⁴⁴ *Hodel v. Irving*, 481 U.S. 704, 727 (1987) (Stevens, J., concurring).

⁴⁵ 458 U.S. at 419.

⁴⁶ *Id.* at 438 n.16 (Younger readers can ask their parents about the origin of this phrase and why the older Supreme Court justices would have been familiar with it.).

⁴⁷ *Id.* at 436 (showing how, in a similar vein, the Supreme Court has repeatedly refused to permit Congress to eliminate and escheat Native American land titles, even though the individual values involved were as little as \$12.30); *see generally* *Babbitt v. Youpee*, 519 U.S. 234, 234 (1997); *see also Hodel*, 481 U.S. at 723.

⁴⁸ The Ninth Circuit found no taking because the occupation was not total. *See Cedar Point Nursery v. Shiroma*, 923 F.3d 524, 532 (9th Cir. 2019) (holding as the State defendant had urged, that there could not be a taking in these circumstances unless the regulation allowed intrusion 24 hours a day, 7 days a week, 365 days a year).

⁴⁹ *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2074 (2021).

⁵⁰ *Contra* Steven Greenhut, *Bruce's Beach Spotlights Importance of Property Rights*, PRESS ENTER. (Oct. 21, 2021, 3:19 PM), <https://www.pe.com/2021/10/21/bruces-beach-spotlights-importance-of-property-rights/> (discussing the misuse of eminent domain to remove a Black family from a California beach community, which latter-day officials have acknowledged as theft and returned the property to the former owners' heirs); *see* Clara Harter, *City opens applications for Right to Return program*, SANTA MONICA DAILY PRESS (Jan. 18, 2022, 6:00 AM), <https://www.smdp.com/city-opens-applications-for-right-to-return-pilot-program/212430> (discussing how Santa Monica, CA announced a somewhat more modest program. Although referred to as a “form of reparations,” it is quite a bit less. For the estimated 2,000 to 2,500 families displaced from the city's downtown for freeway expansion and a new city hall, the city proposes to allow 100 families

III. "BOYS WILL BE BOYS"—AND SOMETIMES THEY CREATE HAVOC

Bias has always seemed a strange duck in the land use field. Here's the root cause of the problem (to use the favored nomenclature of today's Washington insiders): the field is inherently political; it is run by elected officials. And they often run for office on platforms directly related to land use issues that will come before them for decision once the heat of electioneering is done with.

I'm using "bias" in its broadest sense, as connoting a feeling toward or against a particular property owner or particular land uses or use of some specific land. Sometimes, people who are biased think they are merely being virtuous, as they are trying to do the "right" thing. But that is not the issue:

[T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and of the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may

who can prove displacement to have access to below market homes); Liam Dillon, *Santa Monica's Message to People Evicted Long Ago for the 10 Freeway: Come Home*, L.A. TIMES (Dec. 26, 2021, 5:00 AM), <https://www.latimes.com/homeless-housing/story/2021-12-26/santa-monica-to-people-long-evicted-by-freeway-come-back-home> ("civic penance"); see Erica Werner & Troy McMullen, *Advocates Push Nationwide Movement for Land Return to Blacks After Victory in California*, WASH. POST (Dec. 6, 2021, 12:45 PM), <https://www.washingtonpost.com/business/2021/12/06/return-black-owned-land-movement/> (discussing an updated effort to expand this sort of land return nationwide. They are hardly the only family abused by eminent domain, nor is the abuse limited by race.); see generally DANA BERLINER, PUBLIC POWER, PRIVATE GAIN: A FIVE-YEAR STATE-BY-STATE REPORT EXAMINING THE ABUSE OF EMINENT DOMAIN (2003) (providing numerous examples of families abused by eminent domain); DANA BERLINER, OPENING THE FLOODGATES: EMINENT DOMAIN ABUSE IN THE POST-KELO WORLD (2006); Henry W. McGee, Jr., *Urban Renewal in the Crucible of Judicial Review*, 56 VA. L. REV. 826 (1970); Chester W. Hartman, *Relocation: Illusory Promises and No Relief*, 57 VA. L. REV. 745 (1971); Charles M. Sevilla, *Asphalt Through the Model Cities: A Study of Highways and the Urban Poor*, 49 URB. L. 297 (1971); Eric Felten, *Kiss Your House Good-Bye*, READER'S DIGEST, 135 (Mar. 2001).

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characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.⁵¹

Thus, decisions are sometimes the result of the demands of well-meaning but politically-motivated and result-oriented officials who, lest we forget, sometimes pursue the demands of influential private interests, not necessarily the public good—a situation that has become all too common.⁵² But when government actions are being influenced by personal feelings, where is the ethical line drawn?

A. Case Study #1: Political Campaign Against a Particular Project

This is one of the country's classic, landmark cases: *City of Fairfield v. Superior Court*.⁵³ By a 3-2 vote, the city council turned down a development application for a shopping center. So far, nothing unusual. It happens all the time.

Before the city council meeting, however (i.e., before evidence was produced and the matter argued), the Mayor had announced his opposition to the project. Another member of the council had appeared before the planning commission to oppose the project and had made opposition to the project part of his campaign for election to the city council. Both refused to disqualify themselves and both were part of the 3-person majority. The developer sued, claiming that bias had been the root of his defeat.

The issue before the California Supreme Court arose in the context of discovery. The developer set depositions of both biased councilmembers at which he sought to inquire about when they made up their minds how they were going to vote, whether they discussed the matter with other individuals before the vote, whether they promised any group that they would vote against the project and whether they told anyone that they had closed minds about the project before the final city council hearing. Not surprisingly, they refused to

⁵¹ *Stanley v. Illinois*, 405 U.S. 645, 656 (1972); *see also Loretto*, 458 U.S. at 425 (“It is a separate question, however, whether an otherwise valid regulation so frustrates property rights that compensation must be paid”); *see Lingle v. Chevron, Inc.*, 544 U.S. 528, 543 (2005) (“[T]he Takings Clause presupposes that the government has acted pursuant to a valid public purpose.”).

⁵² *See generally* RICHARD F. BABCOCK, *THE ZONING GAME: MUNICIPAL PRACTICES AND POLICIES* (1966); BERNARD J. FRIEDEN, *THE ENVIRONMENTAL PROTECTION HUSTLE* (1979).

⁵³ *City of Fairfield v. Superior Court*, 14 Cal. 3d 768, 768 (1975).

answer. In refusing to allow the questioning to go forward, the Supreme Court's response was direct:

[E]ven if Commercial could prove that Campos and Jenkins had stated their views before the hearing, that fact would not disqualify them from voting on the application.⁵⁴

Another way of stating the court's response is it's just the political process.⁵⁵ So it's legal. However, as one planning expert expressed it "the real culprit in the quagmire of modern land use regulatory law is the 'anything goes' standard of judicial review behind which local governments that do not adhere to the minimal constraints of the Constitution can hide . . ."⁵⁶ But, if ethics exists on a different plane than law, is it ethical for those who make the decisions to make up their minds in advance or to seek office on the basis of opposition to a specific project?

B. Case Study #2: City Council as Litigant and Judge

*Cohan v. City of Thousand Oaks*⁵⁷ presented facts that were hard for even a pro-government court to countenance. After 15 years of trying, the property owners finally obtained permission from the city planning commission to develop their 47 acres into residential units.⁵⁸ It was subject to 500 (not a typo, five hundred) conditions but, nonetheless, the stamp on the application said "approved." Under the city's ordinances, that decision was final unless someone appealed it to the city council.⁵⁹ No one appealed. But a number of citizens complained *ex parte* to city council members about the project and its impacts—so the city council appealed the permit to itself and then

⁵⁴ *Id.* at 779.

⁵⁵ See generally Emily Crane, *Biden: Sen. Sinema Harassment Over Infrastructure Vote is 'Part of the Process'*, N.Y. POST (Oct. 4, 2021, 2:19 PM), <https://nypost.com/2021/10/04/biden-says-harassment-of-sen-kyrsten-sinema-is-part-of-the-process/> (discussing President Biden's comment that, when protesters followed a United States Senator into the ladies' room and berated her while she was occupied in one of the stalls, it was just part of the political "process").

⁵⁶ Charles L. Siemon, *The Paradox of "In Accordance with a Comprehensive Plan" and Post Hoc Rationalizations: The Need for Efficient and Effective Judicial Review of Land Use Regulations*, 16 STETSON L. REV. 603, 605-06 (1987).

⁵⁷ *Cohan v. City of Thousand Oaks*, 30 Cal. App. 4th 547, 547 (1994).

⁵⁸ *Id.* at 552.

⁵⁹ *Id.*

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purported to hold a hearing on its own appeal after which it agreed (as judge) with its position (as appellant)!

Peeved, the property owners sued. The trial court found that the city council had violated its own rules in hearing the “appeal” because there was no written notice of appeal by anyone, there was no urgency that would have permitted the city council to waive any applicable rules, and the city council was not a “person” (within the meaning of the city's code) that could file an appeal. Nonetheless, the trial court upheld the city. Through some creative gymnastics, the trial court decided that, *if* the city council had not appealed to itself, one of the irritated citizens in the audience *would* have done so. And *if* such a person had done so, the city council *would* have reached the same decision on his hypothetical appeal.⁶⁰ “Harmless” errors, so to speak—even though not one of the hypotheses was true.

The Court of Appeal reversed. Acknowledging the *Fairfield* rule discussed above, the court nonetheless concluded that property owners are entitled to some modicum of fairness, something that did not happen here. When “the ‘appellant’ (Council) at the hearing did not specify exactly what action it was asking the Council (as decisionmaker) to take . . . the hearing became somewhat of a free-for-all”⁶¹ Thus:

The problem which respondents refuse to accept is that the Council acted in an arbitrary and high-handed manner. The Council ignored procedural due process and claims ‘no harm, no foul’ because there was a hearing. True, a councilperson has a right to state views or concerns on matters of community policy without having his vote impeached. Additionally, opposition of neighbors to a development project is a legitimate factor in legislative decisionmaking. . . . We agree that a trier of fact does not have to be completely indifferent to the general subject matter of the claim presented to be impartial. Nonetheless, a fair trial in a fair tribunal is a basic requirement of due process. A biased

⁶⁰ Rather like Lord Dundreary’s conundrum in *Our American Cousin*, the play President Lincoln was watching on the last day of his life: “if you had a brother do you think he’d like cheese?”. See TOM TAYLOR, *OUR AMERICAN COUSIN* (Project Gutenberg eds., July 5, 2021), <https://www.gutenberg.org/files/3158/3158-h/3158-h.htm>.

⁶¹ *Cohan*, 30 Cal. App. 4th at 557.

decisionmaker is constitutionally unacceptable. The right to a fair procedure includes the right to impartial adjudicators.⁶²

A more recent decision also berated government officials for use of their personal animus in deciding matters before them. In *Woody's Group, Inc. v. City of Newport Beach*,⁶³ a restaurant owner sought to overturn the city council's reversal of a planning commission decision in his favor. The Court of Appeal held that the city council "violated at least two basic principles of fairness" in its action: first, the precept that "you cannot be a judge in your own case" and second, that "you cannot change the rules in the middle of the game."⁶⁴ How did they violate such rudimentary precepts that they should have learned on the playground in elementary school?

One of the councilmembers had previously announced his "strong opposition" to the project and then he took advantage of a quirk in city law that allowed him to appeal the planning commission's decision to the very body on which he sat.⁶⁵ When the matter came before the city council, the "appellant" councilmember delivered a long speech that he conceded had been written out before the hearing,⁶⁶ belying (as the court of appeal later noted)⁶⁷ his claim that he had no bias. His preconceptions presented an unacceptable level of bias and he should not have participated.

At bottom, the "appellant" ran afoul of the plain words of the city's own ordinance. The ordinance provided that an appeal from the planning commission could be taken by any "interested" party. But, by definition, the city council, when sitting as an appellate body, must be populated by *disinterested* members. The appellant/councilmember

⁶² *Id.* at 558-59 (citations omitted) (supporting the premise that when a city council acts in a quasi-judicial capacity, its members lose some of the flexibility they might have when enacting general legislation. They are acting as judges and should be held to a higher standard); *see generally* *BreakZone Billiards v. City of Torrance*, 81 Cal. App. 4th 1205, 1234 (2000); *Petrovich Dev. Co., LLC v. City of Sacramento*, 48 Cal. App. 5th 963, 963 (2020) ("in such matters council members must be neutral and unbiased."); *see also* *Dellinger v. Lincoln County*, 266 N.C. App. 275, 275 (2019).

⁶³ *Woody's Group, Inc. v. City of Newport Beach*, 233 Cal. App. 4th 1012 (2015).

⁶⁴ *Id.* at 1016.

⁶⁵ *Id.*

⁶⁶ *Id.* at 1019.

⁶⁷ *Id.* at 1022-23.

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could not be both interested and disinterested.⁶⁸ His “appeal” could not stand.⁶⁹

The Third Circuit also became wrath with councilmembers acting in such a biased fashion:

[P]laintiffs are asserting that defendants, acting in their capacity as officers of the Township, deliberately and improperly interfered with the process by which the Township issued permits, in order to block or delay the issuance of plaintiffs' permits, and that defendants did so for reasons unrelated to the merits of the application for the permits. Such actions, if proven, are sufficient to establish a substantive due process violation⁷⁰

Recently, the United States Supreme Court expressed similar thoughts. In reviewing a New York statute that allowed tenants to claim deferral of rent payment because of the current health/economic crisis—based solely on an affidavit filed by the tenant making such a claim—the Court responded simply, but sharply, “[t]his scheme violates the Court’s longstanding teaching that ordinarily ‘no man can be a judge in his own case,’ consistent with the Due Process Clause.”⁷¹ The tenant’s own self-serving statement could not be the end of the matter.

C. Case Study #3: Delay as a Municipal Tool

Elihu Root once observed that the mark of a good lawyer was the ability to tell an overreaching client that he was a damned fool and to cut it out.⁷² Of course, it helps if you have a client who is willing to listen. When the City Attorney of Spokane, Washington told his

⁶⁸ *Id.* at 1017-18.

⁶⁹ The California Coastal Commission carries the interested appellant concept even further. Not only are members of the Commission entitled to appeal matters to themselves (Cal. Pub. Res. Code §30625), the Commission has a “longstanding” practice of having the Commissioners sign blank appeal forms that the staff fills out on their behalf in order to “save the need to travel” to the Commissioners’ homes to have the forms timely filled out. *See generally* Ronald A. Zumbrun, *California Coastal Commission’s Preapproved Appeals: Convenience or Constitutional Concern?*, THE SACRAMENTO DAILY RECORDER (Oct. 8, 2007). *See also* California Senate Committee on Natural Resources and Water, staff report on SB 1295, 2 (“according to data obtained from the CCC, that practice is long-standing.”).

⁷⁰ *Blanche Road Corp. v. Bensalem Township*, 57 F.3d 253, 267-68 (3d Cir. 1995).

⁷¹ *Chrysafis v. Marks*, 141 S. Ct. 2482, 2482 (2021).

⁷² WISEFAMOUSQUOTES, <http://wisefamousquotes.com> (last visited Aug. 2, 2022).

municipal client to “cut it out,” the council members should have listened. The upshot is reported in *Mission Springs, Inc. v. City of Spokane*.⁷³

Mission Springs wanted to develop a large apartment complex on land it owned.⁷⁴ Its proposed 790 units in 33 buildings was the largest planned unit development in Spokane at the time, and it generated its predictable share of controversy.⁷⁵ One of the problems was vehicular access and the known increase in traffic that a project of this size would generate.⁷⁶ Notwithstanding any potential problems, the city approved the project in 1992, after public hearings at which the issues were fully aired.⁷⁷ Under Washington law, that approval gave Mission Springs a five-year vested right to build its project unless the city council found that changed conditions presented a serious threat to the public health or safety.⁷⁸ No such finding was ever made.⁷⁹

For reasons undisclosed in the opinion, grading for the project was delayed, and Mission Springs applied for a new grading permit in 1994.⁸⁰ Both the planning and legal staffs reviewed the application and concluded that permit issuance would be routine, as all requirements were met. But others were evidently at work behind the scenes.⁸¹ The city council held a critical hearing on June 22, 1995.⁸² Opponents of the project had been in contact with council members and let it be known that they wanted to do something about the project.⁸³ They were at the meeting in force. Mission Springs, by contrast, received no notice that anything of consequence would take place and did not even attend the meeting.⁸⁴

At that fateful city council meeting, project opponents expressed their concerns in tones that obviously got the attention of their elected representatives.⁸⁵ When one of the council members

⁷³ *Mission Springs, Inc. v. City of Spokane*, 134 Wash. 2d 947 (1998).

⁷⁴ *Id.* at 952.

⁷⁵ *Id.* at 972.

⁷⁶ *Id.* at 953.

⁷⁷ *Id.* at 952.

⁷⁸ *Id.* at 953.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 954.

⁸² *Id.*

⁸³ *Id.* at 954-55.

⁸⁴ *Id.* at 954.

⁸⁵ *Id.* at 955.

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asked the city attorney “what would happen” if they simply stalled issuance of the grading permits pending further study of the access issue, the city attorney sought politely to turn the council from that path.⁸⁶ Not only was he correct in this case but, as he reminded the council members, they had done this sort of thing to another property owner recently, and he took them to court.⁸⁷ Here's the advice: “[w]hat would happen is that it would be the genesis of a cause of action by the developer against the city for unlawfully interfering with the issuance of a building permit and that is essentially the same basis that we're presently in federal court on, a civil rights violation.”⁸⁸

Notwithstanding the city attorney's repetition of his concerns and reminders of past problems caused by this same kind of interference in the permit issuing process, council members announced that they thought it was a “great” idea to undermine the process.⁸⁹ As for Mission Springs, “let's just see what happens. Let's see how confident they are.”⁹⁰ As though no harm could be caused by delaying the project, one councilman opined, “we can always turn around and issue the permit”⁹¹ The motion to stall the developer passed unanimously.⁹²

They had to have known better. Delay is almost always harmful to developers.⁹³ They are on tight, often interlocking,

⁸⁶ *Id.* at 955-56.

⁸⁷ *Id.* at 955.

⁸⁸ *Id.* at 955.

⁸⁹ *Id.* at 956.

⁹⁰ *Id.*

⁹¹ *Id.* at 956.

⁹² There are many ways that government entities can insert delay into the process, all to the detriment of property owners. *See, e.g.*, *Foster v. City of Detroit*, 254 F. Supp. 655 (E.D. Mich. 1966) (denying repair or improvement permits); *City of Detroit v. Cassese*, 136 N.W.2d 896 (Mich. 1965) (encouraging tenants to leave); *Klopping v. City of Whittier*, 8 Cal. 3d 39 (1972) (city dismissed condemnation action but announced that it would re-institute it after it concluded some pending litigation concerning a land acquisition bond issue).

⁹³ *See* Gregory Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 VAND. L. REV. 1, 98 (1995) (“[M]unicipalities may have an incentive to exacerbate this problem [of the delay inherent in “ripening” a case], as stalling is often the functional equivalent of winning on the merits”); JAMES V. DELONG, PROPERTY MATTERS: HOW PROPERTY RIGHTS ARE UNDER ASSAULT – AND WHY YOU SHOULD CARE 296-98 (1997) (“The name of this game is transaction costs [s]ubstantive legal doctrines mean little if you cannot get into court in the first place.”). *See, e.g.*, *Klopping v. City of Whittier*, 8 Cal. 3d 39 (1972) (rent loss and foreclosure); *Drakes Bay Land Co. v. United States*, 424 F.2d 574 (9th Cir. 1970) (use restriction); *Luber*

schedules involving contractors, sub-contractors, lenders, tenants, and the like.⁹⁴ For a city to jump in unexpectedly and inject unknown delay into the construction schedule is something that could not go unchallenged.

An urban planner, professor, and one-time member of the Los Angeles City Planning Commission put it this way:

City planners also act irresponsibly, if not unethically, when they recommend legislation or base city planning decisions on ordinances which they favor, but which they know will likely be overturned if appealed to the courts. It is not uncommon for city and county planners, with characteristic certainty that their ends justify the means, to take advantage of the fact that it is almost always too time-consuming and expensive for private land developers to challenge laws and administrative decisions in court, even if they are of dubious legality.⁹⁵

So Mission Springs sued, seeking relief under both state law and the federal Civil Rights Act.⁹⁶ The latter, which provides a federal cause of action for rights guaranteed by the federal constitution or federal statutes, can be brought in either state or federal court and is becoming a more frequently-used remedy by property owners.⁹⁷ It established

v. Milwaukee County, 177 N.W.2d 380 (Wis. 1970) (tenant loss); Richmond Elks Hall Assn. v. Richmond Redev. Agency, 561 F.2d 1327 (9th Cir. 1977) (customer loss); Jones v. People, 22 Cal. 3d 144 (1978) (access impairment); Conroy-Prugh Glass Co. v. Commonwealth Dept. of Transp., 456 Pa. 384 (1974) (mortgage foreclosure and tax sale).

⁹⁴ Sadly, litigation over land use permits seems to go on forever, the modern-day equivalent of Charles Dickens' Bleak House. See, e.g., City of Monterey v. Del Monte Dunes, 526 U.S. 687 (1999) (5 years, 5 planning submissions, 19 site plans—all rejected; 18 years of litigation); Agins v. City of Tiburon, 447 U.S. 255 (1980) (It took Mrs. Agins 30 years to finally receive permission to build four homes on her 5-acre parcel); Charles Gallardo, *After 29 Years, Tiburon House Going Up: Home OK'd But Not For Original Owner*, MARIN INDEP. J., B-6, (1997).

⁹⁵ Melville Branch, *Sins of City Planners*, 42 PUB. AD. REV. 1, 4 (1982).

⁹⁶ 42 U.S.C. § 1983.

⁹⁷ See Michael M. Berger, *The Civil Rights Act: An Alternative Remedy for Property Owners Which Avoids Some of the Procedural Traps and Pitfalls in Traditional "Takings" Litigation*, 12 ZONING & PLANNING L. REP. 121-22 (1989).

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what the Supreme Court calls a “constitutional tort,”⁹⁸ intended to provide “broad and sweeping protection”⁹⁹ to all citizens—including property owners.

Although the trial court entered summary judgment for the city, the Supreme Court reversed.¹⁰⁰ The first step was to determine whether Mission Springs had a property right that the city violated.¹⁰¹ That part was easy. As noted earlier, once the city council had approved the project in 1992, the developer had a five-year vested right to complete its project.¹⁰² The issuance of a grading permit was merely a ministerial act that the city had no discretion to refuse.

Citing earlier decisions condemning municipal “stalling” and “administrative procrastination,” the Court summed it up this way: “Simply put, neither a grading permit, building permit, nor any other ministerial permit may be withheld at the discretion of a local official to allow time to undertake further study. The Spokane City Council received well-founded legal advice from its City Attorney which it chose to disregard.”¹⁰³

The consequence of disregarding that advice was to render the city liable for a civil rights violation. It is plain from reading the Supreme Court's analysis that the only open issue the Court saw on remand would be the amount of damage suffered by Mission Springs.¹⁰⁴ The cause of action was firmly established, because persons acting under color of state law (i.e., the city council members purporting to exercise municipal police power) denied Mission Springs rights (i.e., the issuance of a permit to which it was entitled) protected by federal law (i.e., the part of the Fifth Amendment that precludes the deprivation of property without due process of law).¹⁰⁵

⁹⁸ *Monell v. Dep't of Soc. Services*, 436 U.S. 658, 691 (1978).

⁹⁹ *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 543 (1972).

¹⁰⁰ 134 Wash. 2d at 972.

¹⁰¹ *Id.* at 960.

¹⁰² *Id.* at 953.

¹⁰³ *See Mission Springs*, 954 P.2d at 256. As one court classically put it, “[i]t is not for nothing that most of the provisions of the Bill of Rights have to do with matters of procedure. Procedure is the fair, orderly, and deliberate method by which matters are litigated.” *Estate of Buchman*, 123 Cal. App. 2d 546, 560 (1954). *See also* *Pokoik v. Silsdorf*, 358 N.E.2d 874, 876 (N.Y. 1976) (dilatatory governmental tactics were “supportable neither by law nor by sound and ethical practice.”).

¹⁰⁴ *Id.* at 972.

¹⁰⁵ *Id.* at 964-65.

The facts also might have supported a claim that the property had been temporarily taken while the permit was withheld.¹⁰⁶ After all, what the city did was to take property (the ability to develop without delay) that belonged to Mission Springs and freeze it in time. While the city held that development right in limbo, it was plainly taken from the property owner. Mission Springs, however, did not plead a temporary taking.¹⁰⁷

Thus, the Court distinguished a takings claim from the due process claim before it. “The talisman of a taking is government action which forces some private persons alone to shoulder affirmative public burdens, ‘which, in all fairness and justice, should be borne by the public as a whole.’”¹⁰⁸ This philosophy of fairness, balance, and proportionality—a measurement of means against ends—has long been at the core of takings jurisprudence. The U.S. Supreme Court and other appellate courts have frequently analyzed property owners’ constitutional claims against that template. As expressed by the federal appellate court most in tune with takings law (as it reviews all takings judgments against the federal government): “[i]n short, has the Government acted in a responsible way, limiting the constraints on property ownership to those necessary to achieve the public purpose, and not allocating to some number of individuals, less than all, a burden that should be borne by all?”¹⁰⁹

Due process, contrasted with takings, deals with “deprivation of property through arbitrary interference with that process lawfully due.”¹¹⁰ Arbitrariness can be measured by the clarity of the duties subverted by the government, or the inappropriateness of the conditions attached to obtaining its favor.¹¹¹

Turning to the due process issue, the Court first noted that it was “ripe” for litigation.¹¹² In property rights litigation, ripeness is the first—and often the most difficult—hurdle for property owners. The courts have created myriad tests that must be satisfied before such

¹⁰⁶ See *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 320-21 (1987).

¹⁰⁷ 930 Wash. 2d at 971.

¹⁰⁸ See *Mission Springs*, 954 P.2d at 258.

¹⁰⁹ *Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1571 (Fed. Cir. 1994).

¹¹⁰ See *Mission Springs*, 954 P.2d at 258.

¹¹¹ *E.g.*, *Bateson v. Geisse*, 857 F.2d 1300, 1303-04 (9th Cir. 1988).

¹¹² 134 Wash. 2d at 962.

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claims can be litigated.¹¹³ Here, however, the Court followed a substantial decisional line holding that due process denials are ripe immediately, because the constitutional harm occurs at the moment the violation occurs.¹¹⁴ In other words, once the city council prevented issuance of the grading permit, that action could not be undone; the only questions were the length of time it would remain in effect and the amount of damage it would cause before it was withdrawn.

The Court then had no trouble finding a constitutional violation.¹¹⁵ State planning law provides no time for city council members to delay projects while they rethink approvals given years earlier.¹¹⁶ Thus, the council's decision to interject itself into the process was wholly arbitrary and without legal foundation. It was a purposeful abrogation of a mandatory process that—but for the council's interference—would have resulted in immediate permit issuance.

Moreover, the action was not the sort of broad-based legislative action that city councils have the discretion and authority to enact and to which courts generally defer. This was specific action directed at only one property and one citizen. Such action is subjected to a higher degree of scrutiny to determine whether it passes constitutional muster. In the end, although basing its holding on the objectively observable actions of the city council and their impact on Mission Springs, the Court could not help but return to the city attorney's role and note that “the irrationality is further dramatized by the overt rejection of advice from the City's own attorney in favor of a defiant course of action”¹¹⁷

¹¹³ For extended discussion see Michael M. Berger, *The Ripeness Game: Why Are We Still Forced to Play?* 30 *TOURO L. REV.* 297 (2014). Since that summary was written, the Supreme Court seemed to get the message. In *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019), the Court eliminated the worst prong of the doctrine, i.e., the rule that a property owner had to sue—and lose—in state court before a federal claim was ripe. *Id.* at 2167-68. Then, in *Pakdel v. City & County of San Francisco*, 141 S. Ct. 2226 (2021), the Court weakened the finality prong by holding that it presented only a “low threshold” that could be satisfied by showing that the regulatory body had reached an authoritative decision. *Id.*

¹¹⁴ 134 Wash. 2d at 962-63.

¹¹⁵ *Id.* at 964-65.

¹¹⁶ *Id.* at 965.

¹¹⁷ *Mission Springs*, 954 P.2d at 261. See also *South Grande View Dev. Co., Inc. v. City of Alabaster*, 1 F.4th 1299 (11th Cir. 2021) (discussing ordinance that unfairly targeted one property owner).

D. Case Study #4: Animus Run Rampant

In *Stubblefield Construction Co. v. City of San Bernardino*,¹¹⁸ the jury was offended by the treatment meted out by the city. It found the city's actions were without legitimate basis and found damages in excess of \$11,500,000.¹¹⁹ Then the judges took over. The trial judge granted the city's motion for new trial on the issue of the amount of the damages, and the Court of Appeal took away even that prospect by concluding—as a matter of law, evidently—that the city had done no wrong.¹²⁰ If (*arguendo*) what they did was legal, was it an ethical way to treat this property owner? The jury surely thought not.

The case involved 29.3 acres of an initial holding of 600 acres.¹²¹ That property was not inside the city when Stubblefield bought it and began building homes on it in the 1960s.¹²² The city wanted to annex the property.¹²³ Based on the city's promise of zoning that would permit the continuation of construction in accordance with the existing plans, Stubblefield agreed.¹²⁴ The evidence showed that the city knew Stubblefield would rely on its assurances and intended that he do so.¹²⁵

The city's policy was to review development proposals according to the local rules, ordinances, and procedures in effect at the time the plans were submitted.¹²⁶ This policy was explained to Stubblefield a number of times.¹²⁷ At some point, the city councilman representing the district including the Stubblefield property became what the Court of Appeal called a “powerful opponent” of Stubblefield's development plans.¹²⁸ Much of the case was based on the actions of this councilman (both publicly and behind the scenes) to scuttle the project.

¹¹⁸ *Stubblefield Construction Co. v. City of San Bernardino*, 32 Cal. App. 4th 687 (1995).

¹¹⁹ *Id.* at 695.

¹²⁰ *Id.* at 715.

¹²¹ *Id.* at 693, 696.

¹²² *Id.* at 696.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 697.

¹²⁷ *Id.*

¹²⁸ *Id.*

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The first thing done was to amend the zoning ordinance applicable to the Stubblefield property.¹²⁹ If the new zoning applied, it would shrink the height of permitted buildings and subject Stubblefield to the additional requirement of obtaining a conditional use permit—a discretionary determination by the city, in contrast to the ministerial issuance of building permits. Mr. Stubblefield was assured that the new zoning would not apply to his project, as it was already in process.¹³⁰ But the “powerful opponent” on the city council had other ideas. He proposed an urgency ordinance (which was adopted) to change city policy, making the new zoning applicable.¹³¹ The only “urgency” suggested for adopting this measure was to block approval of the Stubblefield project.¹³²

Then the environmental review process—a sure creator of delay—was invoked.¹³³ Because the pending project was a continuation of plans long known by and acquiesced in by the city, the planning commission believed that a negative declaration (i.e., a determination that no significant environmental impact would be caused by the project) could be used in place of a full-blown environmental impact report (EIR).¹³⁴ The city council, however, prodded by the “powerful opponent” in its midst, voted 4-3 to require

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 697-98.

¹³² *Id.* at 698.

¹³³ For any who doubt the relationship between environmental review and project delay, consider that the California Legislature, in an effort to increase the supply of housing (especially low-income housing), agreed to simplify and speed up the environmental review process for new housing developments. *See* Press Release, *In San Jose, Governor Newsom Signs Legislation to Fast-Track Key Housing, Economic Development Projects in California*, CALIFORNIA GOVERNOR (May 20, 2021), <https://www.gov.ca.gov/2021/05/20/in-san-jose-governor-newsom-signs-legislation-to-fast-track-key-housing-economic-development-projects-in-california/>. In a perverse twist on the environmental issue, some statutes are used to protect “endangered” species which are in no danger whatever. Indeed, certain times of the year are set aside during which the State sells licenses to kill these species whose habitats are protected during the rest of the year. For illustrative litigation involving such species, see, e.g., *Southview Associates, Ltd. v. Bongartz*, 980 F.2d 83 (2d Cir. 1992) (deer); *Moerman v. State*, 17 Cal. App. 4th 452 (tule elk); *Killington Ltd. v. State of Vermont*, 668 A.2d 1278 (Vt. 1995) (brown bear).

¹³⁴ 32 Cal. App. 4th at 698.

an EIR.¹³⁵ The effect of the EIR requirement was to delay approval of the project until after the new zoning took effect.¹³⁶

Stubblefield then asked that his project be “grandfathered” so that it could proceed under the terms of the earlier ordinances.¹³⁷ The city delayed action on that request.¹³⁸ Additional roadblocks and delays accumulated. As noted, the jury was offended.¹³⁹ It could find no justification for the city’s actions and found significant damage had been inflicted on Stubblefield.¹⁴⁰

The Court of Appeal reversed.¹⁴¹ It apparently saw nothing more than politics as usual, a sort of “boys will be boys” attitude. In the court's words:

In our view, plaintiffs have not, *as a matter of law*, shown arbitrary or irrational government action. Rather, the record demonstrates actions . . . that responded to concerns of constituents . . . and other political concerns. . . It is not uncommon or unusual for a legislator to oppose a project and to use all means within his or her power to defeat it. After all, a legislator is supposed to respond to the concerns of his or her constituents Whether their concerns were proper or justified is not the issue here. The point is that their elected representative decided to oppose the project, and did so vigorously.¹⁴²

With respect, that is a startling statement. Indeed, it is little less than endorsement of a state of nature: government by knife fight, or tooth

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 699.

¹³⁸ *Id.*

¹³⁹ This is simply an illustration of my personal observation that property owners are generally better off trying their cases to juries rather than judges. Nothing personal, but judges tend to get hardened by all of the various matters they listen to, day after day. Juries, comprised of ordinary people who do not live their lives in courtrooms, tend to have a more empathetic outlook. For a discussion of the importance of juries in these matters, see Michael M. Berger, *Whither Regulatory Takings*, 51 URB. L. 171, 197-200 (2021).

¹⁴⁰ 32 Cal. App. 4th at 695.

¹⁴¹ *Id.* at 714.

¹⁴² *Stubblefield*, 32 Cal. App. 4th. at 710-11 (emphasis added).

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and claw.¹⁴³ Isn't one of the purposes of organized government to restrain irrational decision-making by mob rule (or making the protection of anyone's individual rights subject to popular vote), rather than to encourage it? Indeed, as noted above, another Court of Appeal chastised a city council for "simply submitting to the roar of the crowd" when it wrongly denied development permission.¹⁴⁴ Yet another Court of Appeal drew this "boys will be boys" politics argument to its logical conclusion when it said, "[i]f public opinion *by itself* could justify the denial of constitutional rights, then those rights would be meaningless."¹⁴⁵

After that, things really went downhill. When it decided that there was nothing more involved here than good ol' politics, the court had to disregard the evidence and the jury's evaluation of it (along with the trial judge's evaluation of the liability evidence). Even the Court of Appeal had to concede that Stubblefield's case "was apparently accepted by the jury" and that the evidence showed "the City officials arbitrarily acted to prevent plaintiff from developing its property."¹⁴⁶ Neither state nor federal law permits a city to arbitrarily target an individual property owner for abuse, as the jury found happened here.¹⁴⁷ Indeed, a federal appeals court felt so strongly about this kind of biased activity that it refused to allow similarly affected councilmembers to invoke immunity for their actions:

If defendants, for reasons unrelated to an appropriate governmental purpose, intentionally conspired to impede the development of the Blanche Road project, by ordering that Blanche Road's applications be reviewed with greater scrutiny in order to slow down the development and by ordering that efforts be taken to shut down the development, such an arbitrary abuse

¹⁴³ There is a famous scene in *Butch Cassidy and the Sundance Kid* where one of the gang members challenges Butch to a knife fight. Butch replies that they first need to agree on the rules. As the challenger stood stupefied, wondering what that might mean and complaining that "there are no rules in a knife fight!" Butch kicked him in the groin, knocked him out, and the fight was over. Transcript of Film at 26, "Butch Cassidy and the Sundance Kid."

¹⁴⁴ *Cohan v. City of Thousand Oaks*, 30 Cal. App. 4th 547, 561 (1994).

¹⁴⁵ *Ross v. City of Yorba Linda*, 1 Cal. App. 4th 954, 964 (1991) (emphasis added).

¹⁴⁶ *Stubblefield*, 32 Cal. App. 4th at 696.

¹⁴⁷ *E.g., Arnel Dev. Co. v. City of Costa Mesa*, 126 Cal. App. 3d 330, 335 (1981).

of governmental power would clearly exceed the scope of qualified immunity.¹⁴⁸

Many years ago, the United States Supreme Court made it clear that mob rule does not comport with the Constitution:

It must be conceded that there are such rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism.¹⁴⁹

So, the city's actions passed legal muster. But were they ethical?

IV. “RUB-A-DUB-DUB, THREE MEN IN A TUB”

In the general realm of municipal mistreatment of property owners, it is hard to beat the facts in the *Lozman* case.¹⁵⁰ Mr. Lozman has his counterparts in many cities. He is the kind of person who drives city council members nuts. He appears at most city council meetings and asks to be heard during the open discussion period.¹⁵¹ Then he takes

¹⁴⁸ *Blanche Road Corp. v. Bensalem Township*, 57 F.3d 253, 269 (3d Cir. 1995).

¹⁴⁹ *Loan Assn. v. Topeka*, 87 U.S. 655, 662 (1875). All clauses of the Fifth Amendment were designed to “limit the power of government, and particularly the power of majorities.” Tonja Jacobi et al., *Creating a Self-Stabilizing Constitution: The Role of the Takings Clause*, 109 NW. U. L. REV. 601, 616 (2015). As Professor Chemerinsky eloquently put it, “The primary reason for having a Supreme Court then, is to enforce the Constitution against the will of the majority.” ERWIN CHEMERINSKY, *THE CASE AGAINST THE SUPREME COURT* 9 (2014).

¹⁵⁰ *Lozman v. City of Riviera Beach*, 568 U.S. 115 (2013). See its sequel, *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945 (2018).

¹⁵¹ See Jeffrey Toobin, *Fane Lozman Goes to the Supreme Court, Again*, THE NEW YORKER (Mar. 2, 2018) (<https://www.newyorker.com/news/daily-comment/fane-lozman-goes-to-the-supreme-court-again>), describing how, during one of these open discussion sessions, a Council member had police arrest, handcuff and take him to a holding cell at the police station. For history, see the Wikipedia entry for *Fane Lozman*. WIKIPEDIA, https://en.wikipedia.org/wiki/Fane_Lozman (last visited Aug. 7, 2022). (“The Council members were in agreement that Lozman should be ‘intimidated’ and made to feel ‘unwarranted heat’”) See also Heidi Kitrosser, *Opinion analysis: With facts like these*, (June 19, 2018, 10:38 AM) <https://www.scotusblog.com/2018/06/opinion-analysis-with-facts-like-these/> (“The

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off on his pet peeve *du jour*.¹⁵² This particular citizen’s problem got compounded because the city council was not only tired of listening to him, but the city was also his landlord.¹⁵³ He had a floating home in its harbor, but do not call it a “houseboat.” There is a photo of Mr. Lozman’s home attached to the Court’s opinion.¹⁵⁴ It doesn’t look very boat-like. First, it is a boxy affair that actually looks like a house, rather than a boat, with picture windows and French doors instead of portholes. It has no raked (pointed) bow (to ease its way through the water if one wanted it to move), no engine, no bilge pumps, no navigation gear and more (or less, actually). When he fell behind in his rent, some bright folks at city hall decided it would be a good idea to evict him¹⁵⁵ (and possibly get rid of him for good?). They took him to state court via an unlawful detainer action¹⁵⁶—and lost when the jury concluded that the city was engaging in improper retaliation rather than a legitimate landlord/tenant dispute.¹⁵⁷ Stung by its loss, the city got even craftier, deciding that, because the home was floating in its harbor, the case actually involved a “vessel” and could be brought in Federal Admiralty Court.¹⁵⁸

The city thus invoked the federal admiralty jurisdiction that is in rem (i.e., the property, not the property owner, is the named

city council held a closed-door meeting to discuss the lawsuit, and the meeting transcript reflects the councilmembers’ frustrations with Lozman. At one point, councilmember Elizabeth Wade proposed that the members “intimidate” him’.”

¹⁵² *Id.* See also *City of Riviera Beach v. That Certain Unnamed Gray, Two Story Vessel Approximately Fifty-Seven Feet in Length*, 649 F.3d 1259, 1263 (11th Cir. 2011), *rev’d*, 568 U.S. 115 (2013) (noting that city lost eviction case because jury believed that “Lozman’s protected speech was a substantial or motivating factor in the City’s attempt to terminate the lease”). *Lozman v. City of Riviera Beach*, 39 F. Supp. 3d 1392, 1400 (S.D. Fl. 2014) (Lozman “routinely voiced those criticisms at public meetings of the Riviera Beach City Council and the Riviera Beach Community Redevelopment Agency (CRA) between the years 2006–2013.” This opinion describes numerous instances of City efforts to silence and intimidate Mr. Lozman).

¹⁵³ 568 U.S. at 118.

¹⁵⁴ *Id.* at 132.

¹⁵⁵ *Id.* at 118.

¹⁵⁶ See the Wikipedia entry for *Fane Lozman*. WIKIPEDIA, https://en.wikipedia.org/wiki/Fane_Lozman (last visited Aug. 7, 2022).

¹⁵⁷ See *supra* note 143.

¹⁵⁸ 568 U.S. at 118-19.

defendant).¹⁵⁹ The court had the defendant (i.e., the floating home) “arrested” and towed.¹⁶⁰ It took three U.S. marshals to “arrest” the structure and tow it away. They towed this unseaworthy structure to Miami—eighty miles away—losing pieces of it along the way. Judgment eventually was entered for the city, which bought the defendant at an execution sale.¹⁶¹ And then destroyed it.¹⁶² The lower courts held that this intentionally unseaworthy floating home was a “vessel” and ruled for the city.¹⁶³

However, the Supreme Court saw through the city’s ploy, decided it did not want to open this can of worms for future exploitation and held that there was no admiralty jurisdiction.¹⁶⁴ The opinion makes for interesting reading, as the Court struggles to explain why it is rejecting admiralty jurisdiction here. Among other things, it reverted to nursery rhymes to demonstrate the absurdity of expanding admiralty jurisdiction.¹⁶⁵ Remember “rub-a-dub-dub, three men in a tub”? The Court did, wanting no part of such a journey.¹⁶⁶

So, how does *Lozman* fit here? It was a warning by the Court—a shot across the bow, as it were—warning that the Court was getting tired of government gamesmanship that treated property owners without respect while clogging the courts in the process.¹⁶⁷ The

¹⁵⁹ See, e.g., *City of Riviera Beach v. That Certain Unnamed Gray, Two Story Vessel Approximately Fifty-Seven Feet in Length*, 649 F.3d 1259, 1263 (11th Cir. 2011), *rev’d*, 568 U.S. 115 (2013).

¹⁶⁰ 649 F.3d at 1264.

¹⁶¹ *Id.* at 1265.

¹⁶² 568 U.S. at 120.

¹⁶³ Bearing witness to the truism that some courts will buy any argument proffered by the government. See *City of Riviera Beach v. That Certain Unnamed Gray, Two-Story Vessel Approximately Fifty-Seven Feet in Length*, 649 F.3d 1259, 1262 (11th Cir. 2011).

¹⁶⁴ 568 U.S. at 130.

¹⁶⁵ *Id.* at 120.

¹⁶⁶ Had the city’s ingenuous theory survived judicial scrutiny, every houseboat in the land would have become subject to regulation and inspection by the U.S. Coast Guard—followed by federal court litigation. Just what the Coast Guard and the judiciary needed!

¹⁶⁷ Games continue, nonetheless. How about an agency of the federal government urging in serious mien that a property owner should not even be allowed to appear in court to challenge the government’s action without first paying a fine of \$686,443.53 (plus interest)? No one—except a panel of the Ninth Circuit Court of Appeals (the most often reversed court in the country)—could swallow that. The United States Supreme Court unanimously reversed. *Horne v. Dept. of Agriculture*, 569 U.S. 513, 529 (2013).

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conservative Justices were joined by Justices Ginsburg, Breyer, and Kagan. Plainly, the opinion contained a message that needs to be heeded.

V. BALANCING BUDGETS ON THE BACKS OF PROPERTY OWNERS

In case you thought the federal government was immune from the kind of excesses we have been examining, here is a decision from the U.S. Supreme Court to disabuse you.

We must significantly increase production to reach our budget target,” read the memo from the Attorney General of the United States: “Failure to achieve the \$470 million projection would expose the Department’s forfeiture program to criticism and undermine confidence in our budget projections. Every effort must be made to increase forfeiture income¹⁶⁸

Increase the production of forfeiture income to meet a budget target? Believe it or not, that is not the dialogue in some grade B movie. In a sad commentary on law enforcement, that memo from the Attorney General (hereinafter “AG”) probably played a determinative role in both the genesis of the case and in the U.S. Supreme Court’s decision in *Good Real Property*.

What the AG’s memo did was to demonstrate how a good idea can be taken to its extremes and trashed by well-intentioned folks who convince themselves they are doing good and upholding the law. Although suspicions have been growing in other quarters, it has taken quite a bit for the message to seep through to the rarified atmosphere in which the Supreme Court operates. (Even with the memo—and its confirmation of the abuse of the forfeiture law being made by the government—the result in *Good Real Property* was only 5 to 4 against the government.)¹⁶⁹

The background facts are fairly simple. James Daniel Good was the subject of a 1985 drug bust.¹⁷⁰ He was arrested at his home in possession of controlled substances.¹⁷¹ Upon his plea of guilty, he

¹⁶⁸ United States v. James Daniel Good Real Prop., 510 U.S. 43, 43 n.2 (1993).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 46.

¹⁷¹ *Id.*

received jail time and probation.¹⁷² He was also compelled to forfeit the cash found on the premises when he was arrested.¹⁷³ Time passed. Four and a half years, actually.¹⁷⁴ During that time, Mr. Good paid his debt to society.¹⁷⁵ He also left the country, leasing the house to others during his absence.¹⁷⁶ Then the Government decided it wanted his house too.¹⁷⁷ The law subjects to forfeiture all real property used in the commission or facilitation of a federal drug offense.¹⁷⁸

The law authorizing forfeiture of property used to facilitate drug offenses is draconian by design. After all, it is directed at obvious bad guys: people who, by definition, have violated federal drug laws. Thus, it adds property forfeiture to whatever the regular penalty is for violating whatever federal drug law got the property owner in trouble in the first place—at the option of the Feds (although usually with a bit more promptness than four and a half years after the bust).¹⁷⁹ Regardless of any other facts, in the *Good Real Property* case, the Feds decided they could obtain their forfeiture *ex parte*.¹⁸⁰ After all, the property owner had already been convicted of violating federal drug laws years earlier and the forfeiture was an automatic add-on. A slam-dunk, they thought. A gimme. And there was that matter of making good on the AG's budget projections.

The Supreme Court had some concerns. Acknowledging everything the Government said, and even acknowledging that Mr. Good may very well lose when he tries his case on its merits (“[t]he question before us is the legality of the seizure, not the strength of the Government's case”),¹⁸¹ the moderate-to-liberal wing of the Supreme Court took this opportunity to expound on the importance of the rights of property owners and the protection afforded them by the Constitution. First, asked the Court, what was the deal with the *ex parte* seizure of property four-and-a-half years after the criminal conviction?¹⁸² After all, the property was no longer occupied by the

¹⁷² *Id.*

¹⁷³ *Id.* at 46.

¹⁷⁴ *Id.* at 47.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ 21 U.S.C. § 881(a)(7) (2002).

¹⁷⁹ 19 U.S.C. §§ 1602, 1604.

¹⁸⁰ 510 U.S. at 47.

¹⁸¹ *Id.* at 62.

¹⁸² *Id.* at 53.

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criminal (or any criminals, as far as the record showed) and the property owner was thousands of miles away doing no more than collecting \$900 a month in rent.¹⁸³

“[R]eal property” wrote Justice Kennedy for the Court, with just a dash of understatement and a soupcon of scorn, “cannot abscond”¹⁸⁴ Thus, there was no urgency to justify even thinking about dispensing with a modicum of due process and providing the property owner with notice and an opportunity to be heard before seizure. Plainly, the Government had no particular need for the property itself. The *ex parte* order did not order the government into possession.¹⁸⁵ It merely told the tenant to make rent payments to the U.S. Marshal instead of to Mr. Good.¹⁸⁶ Part of that making good on budget projections, I guess.

The intriguing thing about the case is that it gave Justice Kennedy and those philosophically arrayed on his portside the opportunity to explain the essential relationship between protecting the rights of property owners (often viewed as a right-wing affectation) and protecting the essential rights to life and liberty (the usual province of the more politically woke). The subject is hardly new. As the Court bluntly put it more than two decades earlier:

The dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other.¹⁸⁷

The idea that it is the rights of the property owner which are protected by the Constitution (rather than the more antiseptic idea of “property rights”) is one that needs periodic repetition. Twenty years after *Lynch*, it was time to do so again. “Good’s right to maintain control over his home,” said the Court, “and to be free from governmental interference, is a private interest of historic and continuing importance.”¹⁸⁸ This philosophy of freedom from governmental interference in the use of property permeates the opinion.

¹⁸³ *Id.* at 54.

¹⁸⁴ *Id.* at 57.

¹⁸⁵ *Id.* at 49.

¹⁸⁶ *Id.*

¹⁸⁷ *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972).

¹⁸⁸ 510 U.S. at 53-54.

The government, in essence, argued that what was at stake was not Mr. Good's right to maintain control over his home or, indeed, any of the kinds of possessory interests that tend to raise one's blood pressure when subjected to bureaucratic duress. All that was at stake was money. In the Government's view, all that it denied him by its forfeiture order was \$900 per month in rent—not his property.¹⁸⁹ How soon they forget. Every lawyer who ever took a first-year property course should remember his or her professor explaining that property is not a thing, but a group of rights.¹⁹⁰ Among them is the right to exploit the physical entity which we loosely label “property.”¹⁹¹ The Supreme Court remembered. In granting protection to the right to receive rent, the Court noted that the rent represented the “exploitable economic value” of the home.¹⁹²

Nor did the Court want to leave it open for argument that only property used as a home was entitled to this level of protection. One's home may be the modern legal equivalent of a castle,¹⁹³ but the Constitution's reach is broader: “[t]he constitutional limitations we enforce in this case apply to real property in general, not simply to residences. That said, the case before us well illustrates an essential principle: Individual freedom finds tangible expression in property rights.”¹⁹⁴ The nature of a truism is that its essence is so obvious that it could be found embroidered on a sampler. The Supreme Court's “essential principle” partakes of that reality. There has never existed

¹⁸⁹ *Id.* at 47.

¹⁹⁰ The Supreme Court routinely resorts to this metaphor. *See, e.g.*, *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982); *United States v. Security Indus. Bank*, 459 U.S. 70, 76 (1982); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1011 (1984); *Hodel v. Irving*, 481 U.S. 704, 716 (1987); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831 (1987); *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2076 (2021). It behooves lawyers to adopt the Supreme Court's mode of analysis.

¹⁹¹ *See, e.g.*, *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021).

¹⁹² Not to mention that “mere” money is property that is constitutionally protected. *Eastern Enterprises v. Apfel*, 524 U.S. 498, 555 (1998). *See also* *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 155 (1980); *Brown v. Legal Foundation of Wash.*, 538 U.S. 216, 235 (2003); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 613-14 (2013) (collecting cases).

¹⁹³ *See* Michael M. Berger, *Property, Democracy & the Constitution*, 5 BRIGHAM-KANNER PROP. RTS. CONF. J. 45, 60 n.78 (2016).

¹⁹⁴ *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 61 (1993). Moreover, as Justice Holmes expressed it, “[p]roperty is protected because such protection answers a demand of human nature, and therefore takes the place of a fight.” *Davis v. Mills*, 194 U.S. 451, 457 (1904).

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on this planet a society in which individual freedom was highly valued and protected but private property rights were not.¹⁹⁵ Although undeniably true, such sentiments about protecting the rights of property owners have recently been identified as politically incorrect.¹⁹⁶ It was refreshing to see the Supreme Court again elevating them to the status of “essential principle.”¹⁹⁷

And speaking of balancing the governmental budget on the backs of random property owners, do not miss *Althaus v. United States*.¹⁹⁸ There, the Chief Land Acquisition Officer for the Voyageurs National Park in Minnesota addressed a large group of landowners in the acquisition area.¹⁹⁹ He explained the acquisition process to them and urged them to cooperate with the government.²⁰⁰ So far, so good. Then it went downhill, as he explained the incentive for cooperation.

Even though we know what your lands are worth, we are going to try and get them for 30 cents on every dollar that we feel they are worth. Of course, you don't have to accept this 30 cents on the dollar. We will let you wait for a couple of years. If you don't take 30 cents on the dollar right now, you wait for a couple of years. After a couple of years if you won't take 30 cents on the dollar, we are going to condemn it. We will

¹⁹⁵ See James W. Ely, Jr., *THE GUARDIAN OF EVERY OTHER RIGHT* (2008); Tom Bethel, *The Mother of All Rights*, REASON (Apr. 1994), <https://reason.com/1994/04/01/the-mother-of-all-rights> (persuasively demonstrating that the lack of freedom and the violence pervasive in parts of the Middle East are causally connected to an absence of reliably enforced property rules); Gideon Kanner, *Do We Need to Impair or Strengthen Property Rights in Order to Fulfill Their Unique Role?*, 31 U. HAW. L. REV. 423, 434 n.4 (2009).

¹⁹⁶ See, e.g., the following examples of what is referred to as “progressive” property, a theory that appears to be devoted to upending property concepts as we have known them for generations: Gregory S. Alexander, Eduardo M. Peñalver, Joseph William Singer & Laura S. Underkuffler, *A Statement of Progressive Property*, 94 CORNELL L. REV. 743 (2009); Joseph William Singer, *Justifying Regulatory Takings*, 41 OHIO N.U. L. REV. 601 (2015); JOSEPH WILLIAM SINGER, ENTITLEMENT 6 (2000) (“If property means ownership, and if ownership means power without obligation, then we have created a framework for thinking about property that privileges a certain form of life—the life of the owner.”); Timothy M. Mulvaney, *Legislative Exactions and Progressive Property*, 40 HARV. ENVTL. L. REV. 137, 162 (2016); Joseph William Singer, *Property as the Law of Democracy*, 63 DUKE L.J. 1287, 1299 (2014).
¹⁹⁷ 510 U.S. at 61.

¹⁹⁸ *Althaus v. United States*, 7 Cl. Ct. 688 (1985).

¹⁹⁹ *Id.* at 691.

²⁰⁰ *Id.*

condemn your property. You know what that is going to mean? That means that you are going to have to hire an expensive lawyer from the city and he is going to take one-third of what you get. Plus, you know who is going to have to pay the court costs. You are. That is in addition to these expensive lawyers.²⁰¹

Let's just say that the court was not amused.²⁰²

More recently, the Supreme Court resurrected the bundle of sticks to find a taking when the California Agricultural Labor Relations Board enacted a regulation allowing union organizers to trespass (as it would have been in the absence of the regulation) on farms so they could seek to persuade workers to join their union.²⁰³ Finding that the right to exclude is one of the most treasured sticks in the property owner's bundle, the Court held the regulation to be a taking.²⁰⁴

Which brings us back to the other principle involved in this case: the AG's budget and the ethics of it all. This is hardly the first property-confiscation-cum-drug-bust to make headlines. A bit earlier, for example, a veritable army of evident ineptitude, recruited from the ranks of the Los Angeles County Sheriff, the LAPD, the National Guard, the Drug Enforcement Administration, and even some of Smoky the Bear's confidants in the National Park Service, descended

²⁰¹ *Id.* at 691-92 (emphasis added). Perhaps familiarity breeds disregard, but there is an inscription on a wall in the Justice Department in Washington, D.C. which reads: "[t]he United States wins its point whenever justice is done its citizens in the courts." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Government lawyers are mandated to seek justice, not necessarily victory. That is an ethical mandate as well. Sometimes some of them acknowledge it. See Jonathan Brightbill & Peter McVeigh, *Support Grounded in Litigation Experience for Using the Fair Market Value Measure of Just Compensation in Cases Involving the United States*, 10 BRIGHAM-KANNER PROP. RTS. CONF. J. 417, 419-20 (2021) ("The United States does not 'game' its valuations. . . . [L]aws enacted by Congress . . . serve in part to ensure fair treatment of landowners.").

²⁰² See also *Alliance for Responsible Planning v. Taylor*, 63 Cal. App. 5th 1072 (2021), where a citizens' initiative measure demanded that any new development upgrade all streets in the general vicinity, regardless of the proposed project's impact on traffic. The measure was invalidated.

²⁰³ *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021).

²⁰⁴ *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021). For representative illustrations of the concept, see, e.g., *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1011 (1984); *Aetna v. U.S.*, 444 U.S. 164, 174 (1979); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982); *Andrus v. Allard*, 444 U.S. 51, 66 (1979). For a critical analysis of some applications of this concept, see Michael M. Berger, *Anarchy Reigns Supreme*, 29 J. URB. & CONTEMP. L. 39, 48 (1985).

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on the 200-acre Malibu ranch of a reclusive soul named Donald Scott. Believing Mr. Scott to be the proprietor of some sort of pot plantation (allegedly espied by the naked eyes of a federal agent flying 1000 feet above the ranch), this polyglot force stormed Mr. Scott's home in the dead of night. Their stated purpose was to serve a search warrant. Only in addition to the warrant, these commandoes had an appraisal report on the Scott property showing it to be worth \$5 million, complete with marginal notations about comparable sales.²⁰⁵ Whatever equipment SWAT teams and the like generally carry with them, appraisal reports on the surrounding real estate probably are not part of the standard-issue kit for drug busts. Or serving search warrants. But the forfeiture statutes—which permit the enforcement agency to keep the confiscated property—have altered the equation.²⁰⁶

Thus, by the time the *Good Real Property* case reached the Supreme Court, many of the concerns about this statutory scheme had already surfaced. And then someone found that memo from the AG about the necessity of increasing the “production” of forfeitures to “reach our budget target.”²⁰⁷ That one obviously struck a nervous chord. The Court quoted the AG’s admonition and then noted that particularly careful judicial scrutiny is mandated “where the Government has a direct pecuniary interest in the outcome of the [case].”²⁰⁸ The idea of heightened scrutiny in cases when a government agency puts its corporate hand into a property owner’s pocket is a theme on which the Court has remarked before.²⁰⁹

²⁰⁵ For the full story of the Scott tragedy, see Ron Soble, *Death of a Tycoon: Killed in Raid, Rancher Don Scott was a Man of Legends*, L.A. TIMES (Oct. 11, 1992, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1992-10-11-me-257-story.html>.

²⁰⁶ Others have remarked on the potential for evil in the abuse of these forfeiture provisions. (E.g., Gideon Kanner, *Life and Property: King Ahab Meets the United States Constitution*, LOS ANGELES DAILY J., Apr. 13, 1963, A6).

²⁰⁷ See *supra* note 159.

²⁰⁸ *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 56 (1993).

²⁰⁹ *U.S. Tr. Co. v. N.J.*, 431 U.S. 1, 26 (1977) (deference to government not appropriate where “the State’s self-interest is at stake. A governmental entity can always find a use for extra money”); *United States v. Winstar Corp.*, 518 U.S. 839, 896 (1996) (“statutes tainted by a governmental object of self-relief . . . [by] shift[ing] the costs of meeting its legitimate public responsibilities to private parties”); *Harmelin v. Mich.*, 501 U.S. 957, 1029 n.9 (1991) (“it makes sense to scrutinize governmental action more closely when the State stands to benefit”); *Nollan v. Cal. Coastal Commn.*, 483 U.S. 825, 841 (1987) (“We are inclined to be particularly careful . . . where the actual conveyance of property is made a condition to the lifting of a land use restriction . . .”). In this context, it seems appropriate to note that Professor James Buchanan received the Nobel Prize in Economics for demonstrating

Viewing life on a cosmic plane, Donald Scott may not have died in vain. One of the amicus briefs brought his story to the Supreme Court's attention as part of the demonstration of how government agents can run amok when massive dollar signs dangle tantalizingly before their eyes. Professor Kanner's comments also appeared in *The Wall Street Journal*²¹⁰ and may have provided additional, albeit indirect, information to the Court.

Everyone understands budget crises. But they cannot serve as convenient excuses for ignoring constitutional protections of individuals—even individuals who own property. Cavalier treatment of such rights undermines the basis of our society. As Justice Brandeis put it, “[t]he goose that lays golden eggs has been considered a most valuable possession. But even more profitable is the privilege of taking the golden eggs laid by somebody else’s goose.”²¹¹

VI. MEN IN BLACK OR BEWARE OF G-MEN “BORROWING” YOUR PROPERTY

So, you are sitting there minding your own business (a vending machine business, actually) when a couple of guys in dark suits and shades walk in flashing FBI badges. They look around furtively and then tell you that you are “number 8 on somebody's hit list.”²¹² They suggest that you “be careful and keep your head down.”²¹³ They also tell you they'd like to take over your business for a while and use it as the base for a sting operation. Fanciful? Bad fiction? If so, life once again imitates art.²¹⁴

After their initial meeting in 1984, the FBI agents asked Timothy Janowsky to abandon his legitimate business activities.²¹⁵ Instead, he would purchase gambling equipment, bribe corrupt officials, record incriminating conversations, and engage in other

that, for all the familiar platitudes about public interest, government officials act in pursuit of their own self-interest, the same as private parties. *See generally* James Buchanan & Gordon Tullock, *THE CALCULUS OF CONSENT* (1962).

²¹⁰ Gideon Kanner, *Never Mind, ‘Only’ Property Rights Were Violated*, WALL STREET J., Aug. 25, 1993, A9.

²¹¹ Louis D. Brandeis, *OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT* (1914).

²¹² *Janowsky v. United States*, 133 F.3d 888, 889 (Fed. Cir. 1998).

²¹³ *Id.*

²¹⁴ *See Janowsky v. United States*, 133 F.3d 888 (Fed. Cir. 1998).

²¹⁵ *Id.* at 889.

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crime-busting activities.²¹⁶ How could any junior G-man resist? Janowsky agreed,²¹⁷ but he wasn't a complete fool. He recognized that this conversion of his business from licit to illicit might leave him holding a very empty bag when the Feds pulled out. He feared that his heretofore legitimate business would be bankrupt, and he would be compelled to begin his business life anew, having alienated all of his former customers.

He wasn't that patriotic. Or gullible. He got the FBI agents to agree to indemnify him for any loss.²¹⁸ And then he went to see his lawyer, who drafted a contract to memorialize the indemnity agreement.²¹⁹ The contract recited that the value of the business had been independently appraised at \$643,200.²²⁰ It then capped the government's liability at \$300,000 if Janowsky was unable to realize even that much from a sale of his assets.²²¹

The FBI agents passed the contract on to the U.S. Attorney, with the notation that it had been drafted with FBI input and that FBI headquarters had final authority over contracts.²²² Although some government functionaries were busy rewriting the contract (to remove any governmental indemnity responsibility), the covert operation commenced. And it evidently worked. Mr. Janowsky obtained useful information for the FBI. Unfortunately, the FBI blew his cover while trying to convince one of the higher-ranking targets of the investigation to cooperate. They revealed information that could only have come from Janowsky.

At about that time, the government showed Mr. Janowsky its revised contract—one that provided him with no economic safety net. And then they told him about blowing his cover. They also told him that one person had already been killed as a result of their investigation and the only way the FBI could continue to protect him and his family was if he continued to work with them—regardless of the terms of the contract. The FBI apparently chose well in recruiting Mr. Janowsky. During the four years they worked with him, they arrested several miscreants, recovered \$47,000 in back taxes, and seized \$650,000 in forfeited property (shades of the old AG budget balancing memo from

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.* at 889-90.

²¹⁹ *Id.*

²²⁰ *Id.* at 889.

²²¹ *Id.* at 890.

²²² *Id.*

a few years earlier). Janowsky and his family survived, but the promised indemnity for the use of his property in pursuit of the public's interest never materialized.

So, Janowsky sued, claiming breach of an implied contract, and a taking of property without compensation.²²³ And the same government that had frightened, cajoled, and coerced him into cooperating now turned on him, claiming he was entitled to nothing. The trial court agreed, entering summary judgment for the defense, but the Court of Appeals vacated and remanded.²²⁴ The government hid behind two defenses, neither of which held much water on this record. First defense: there cannot have been a contract, because no one with contracting authority on behalf of the government agreed to anything.²²⁵ Second defense: the government could not have "taken" anything because Mr. Janowsky voluntarily worked with the FBI to nab the bad guys.²²⁶ Apparently both defenses were raised with a straight face. Let's look at each in turn.

The "lack of authority" defense is a bit of a shell game that the federal government likes to play. In fact, the government convinced the Supreme Court to establish the rule that "anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority."²²⁷ And in a breach of contract action against the United States, the private contracting parties bear the burden of proving that they dealt with an agent who was authorized to bind the Government.²²⁸

But it is not that bleak. Even if the agents acting for the government lack the actual authority to bind it, the government can ratify their acts afterward.²²⁹ Here, there were at least enough facts to have a trial on ratification. The government was well aware of Janowsky's financial concerns. In fact, according to the record, he was "adamant" that he be indemnified before risking his business in government service. After all, it wasn't a simple situation where the government sought to take over an on-going business and continue to

²²³ *Id.* at 889.

²²⁴ *Id.* at 892.

²²⁵ *Id.* at 891.

²²⁶ *Id.* at 892.

²²⁷ *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947).

²²⁸ *Hous. Corp. of Am. v. U. S.*, 199 Ct. Cl. 705, 711 (1972).

²²⁹ *Silverman v. United States*, 230 Ct. Cl. 701, 710 (1982).

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operate it.²³⁰ Here, the government ended Janowsky's legitimate business and replaced it with a phony criminal operation.²³¹ Knowing Janowsky's concerns and proceeding with the project in the absence of a formal contract raised, said the Court, at least a triable issue of fact.²³²

The "volunteer" or "gift" ploy is also beloved by bureaucrats. In the regulatory context, for example, when a government agency exacts property or money from a property owner as a condition to the issuance of a permit, the government likes to call that a "dedication," making it sound like a pleasant, voluntary act of civic charity. In actuality, as the U.S. Supreme Court noted, such coerced donations can be "out-and-out . . . extortion."²³³

Where the trial judge saw voluntary cooperation by Janowsky, the appellate panel saw coercion—or at least enough of it to go to trial. Remember: this whole game began when FBI agents told Janowsky to "keep his head down" because he was on a "hit list." But if he would help them, they would protect him.²³⁴ Hardly the stuff of voluntariness. Later, when it became apparent that no formal contract would be forthcoming, the feds told Janowsky that they would withdraw their protection from his family unless he continued to run his business their way.²³⁵ Nice guys. That little ploy also undercut the notion of any voluntariness.

Moreover, even though he may have had no constitutional right to FBI protection, the FBI had no right to coerce the "donation" of his property—i.e., the sacrifice of his constitutional right to just compensation—as the price of retaining the discretionary benefit of protection from mobsters.²³⁶ Thus, concluded the court, "[b]y threatening to withhold protection, especially after informing Timothy Janowsky that he was on a hit list and compromising his cover, the FBI coercively interfered with the Janowskys' property right."²³⁷

Even men in black are bound by the Constitution. When their actions take private property, they must make compensation.

²³⁰ 133 F.3d at 889.

²³¹ *Id.*

²³² *Id.* at 892.

²³³ *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987). *See supra* notes 15-18 and accompanying text.

²³⁴ *Id.* at 890.

²³⁵ *Id.*

²³⁶ *See Perry v. Sinderman*, 408 U.S. 593, 597 (1972); *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994).

²³⁷ *Janowsky*, 133 F.3d at 892.

VII. DEFINITIONAL THEFT AS GOVERNMENT POLICY?

It is hard to improve on the United States Supreme Court's words in *United States Trust Co. v. New Jersey*:²³⁸ “. . . complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake. A governmental entity can always find a use for extra money.” Thus, it should have come as no surprise when the Ninth U.S. Circuit Court of Appeals looked askance at a definitional game played by the State of Washington. The State simply “skimmed”—to use the vernacular—daily interest that should have been earned by members of the State's teacher retirement fund.²³⁹ No problem, according to the State. As a matter of state law, the teachers had no right to daily interest and therefore had no complaint when the state simply took that interest for its own use.²⁴⁰

Not so fast, said the appellate court. It is settled law that interest follows the principal.²⁴¹ That is, whoever owns the principal is entitled to interest on it.²⁴² And that would be the teachers whose contributions made up the fund. Interest, said the court, accrues from day to day, regardless of how a fund may be set up to make it payable.²⁴³ As such, that interest was not the State's to “redefine” into something other than the private property of the teachers.²⁴⁴ The idea is so deeply ingrained in our general precepts that it is entitled to constitutional protection and not subject to confiscation at the whim of a government entity.

The State's position was based on the idea that states have the right and the ability to define (and redefine) property interests.²⁴⁵ The underlying concept is true enough, but that does not give states the power to run roughshod over private property rights by exercising sleight-of-hand in purporting to redefine existing rights. The U.S. Constitution in general, and the Fifth and Fourteenth Amendments in particular, stand as a bulwark providing protection against

²³⁸ *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977).

²³⁹ *Fowler v. Guerin*, 899 F.3d 1112, 1115 (9th Cir. 2018).

²⁴⁰ *Id.* at 1118.

²⁴¹ *Id.*

²⁴² *See, e.g., Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980).

²⁴³ 899 F.3d at 1118.

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 1118-19.

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confiscation.²⁴⁶ In short, the ability to define—or even re-define—property rights does not mean that such wordplay may be done without compliance with the Fifth Amendment’s just compensation guarantee.²⁴⁷ The power to define is not the power to confiscate.²⁴⁸

In this case, the State decided that the funds did not earn interest on a daily basis and thus nothing could have been taken from the teachers when the daily interest was placed into the State’s own treasury.²⁴⁹ Wrong. As the appellate court put it, “a State may not sidestep the Takings clause by disavowing traditional property interests long recognized under state law.”²⁵⁰ In other words, redefinition in order to enrich the State ran afoul of the U.S. Constitution. In the court’s words, “there is a core notion of constitutionally protected property into which state regulation simply may not intrude without prompting Takings Clause scrutiny.”²⁵¹ The opinion had no difficulty in concluding that interest on funds was the constitutional property of those who owned the funds, regardless of what some state statute might say.²⁵² The appellate opinion is on solid

²⁴⁶ *E.g.*, Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (“a shorter cut than the constitutional way of paying . . .”); Phillips v. Wash. Legal Foundation, 524 U.S. 156, 167 (1998) (“a State may not sidestep the Takings Clause by disavowing traditional property interests long recognized under state law”); First Eng. Evangelical Lutheran Church v. Cnty. of Los Angeles, 482 U.S. 304, 315 (1987) (“[G]overnment action that works a taking of property rights necessarily implicates the constitutional obligation to pay just compensation”) (emphasis added); Ark. Game & Fish Commn. v. United States, 568 U.S. 23, 33 (2012) (any sort of taking places on the government a “categorical duty” to compensate).

²⁴⁷ *E.g.*, Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1029 (1992) (“Any limitation so severe cannot be newly legislated or decreed (without compensation) . . .”); *Palazzolo*, 533 U.S. 606, 626 (“States do not have the unfettered authority to ‘shape and define property rights and reasonable investment-backed expectations, leaving landowners without recourse against unreasonable regulations.’”).

²⁴⁸ Professor Tribe noted this truth in the early days of modern takings law. Analyzing *Aetna v. United States*, 444 U.S. 164 (1979), he queried, “Did the government effect a taking by saying to the general public, ‘Come on in, the water’s fine.’” (Laurence H. Tribe, *CONSTITUTIONAL CHOICES* 176 (Harvard University Press 1985)). The Court had answered the question by voiding the government action. In Tribe’s words, the owners possessed “investment-backed expectations rising to the status of property rights for which the government must pay when it effectively nationalizes them.” *Id.* at 176-77.

²⁴⁹ 899 F.3d at 1115.

²⁵⁰ Phillips v. Washington Legal Foundation, 524 U.S. 156, 167 (1998).

²⁵¹ Guerin v. Fowler, 899 F.3d 1112, 1118 (9th Cir. 2018).

²⁵² *Id.*

ground.²⁵³ Is there any doubt that balancing a state's budget by theft of property from teachers' retirement funds is off limits? And that should have been the end of that. But the State pressed on. It filed a petition for writ of certiorari, asking the Supreme Court to validate its right to steal (one gropes for a better word, but none occurs) funds from private citizens to help the State cover its own bills. Certiorari was denied.²⁵⁴

In a nutshell, the State's position was that a state has the absolute right to decide what constitutes "property" within its borders, and it is free both to define and to redefine that concept at will.²⁵⁵ More than that, the State claimed that the Eleventh Amendment to the United States Constitution, which precludes suing a state for damages, also immunizes states from injunctive relief when the state's actions violate the constitutional rights of its citizens.²⁵⁶ Fortunately, there are courts willing to stand in the path of such assertions.

VII. CHICANERY IN THE PRESS

A bit of dark humor to end this article. We might have entitled this section "Chicken Little Goes to the Airport," but that seemed a little too flip for a scholarly journal.

In 1972, the California Supreme Court decided *Nestle v. City of Santa Monica*.²⁵⁷ The key holding was that airport operators could be liable to their neighbors under settled theories of nuisance law for the noxious by-products of aircraft using their facilities.²⁵⁸ The City of Los Angeles, which was not a party to the litigation, went into panic mode (or at least some parts of its internal apparatus did). Its City Attorney prepared a "confidential" letter (said to be covered by the attorney-client privilege) to the Los Angeles City Council, the Mayor, and the Board of Airport Commissioners analyzing the *Nestle* opinion and projecting its impact on the much greater operations under the control of Los Angeles—primarily Los Angeles International Airport

²⁵³ See cases discussed *supra* notes 102-03.

²⁵⁴ *Guerin v. Fowler*, No. 18-1545 (2019).

²⁵⁵ This pushes the concept of federalism beyond the bounds. See generally Michael M. Berger, *What's Federalism Got to do With Regulatory Takings?* 8 BRIGHAM-KANNER PROP. RTS. CONF. J. 1 (2019).

²⁵⁶ That defense has been moribund at least since *Ex Parte Young*, 209 U.S. 123 (1908).

²⁵⁷ *Nestle v. City of Santa Monica*, 6 Cal. 3d 920 (1972).

²⁵⁸ *Id.* at 931-37.

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(LAX). In that letter, the City Attorney purported to “advise” his client that the impact of nuisance liability at LAX would be so massive that the airport needed to close. In his words:

It would therefore appear that the only prudent course for the city to follow is to advise all the airlines using Los Angeles International Airport and the Federal Aviation Administration that in 30 days the airport will suspend operations.²⁵⁹

Notwithstanding the “confidential” nature of this communication, a copy of the letter was instantly “leaked” to the Los Angeles Herald-Examiner which, believing that it had a real scoop on its hands, put out an “Extra” edition of that evening’s paper with this double banner headline, in letters two inches high:²⁶⁰



L.A. AIRPORT FACES SHUTDOWN IN 30 DAYS

This type of publicity continued at a fever pitch for two weeks, with hearings by the City Council and the Airport Commissioners and extensive lobbying at the State Legislature in an effort to obtain legislation that would at least put such potential liability on hold for a while. The City Attorney continued to say publicly that he was “deadly serious” and attempting to prevent “catastrophic liability” that could

²⁵⁹ Quoted in Los Angeles Herald-Examiner, May 2, 1972, A8.

²⁶⁰ *Id.*

raise Los Angeles taxes by \$10,000 for “every man, woman and child.”²⁶¹

After weeks of hearings and press conferences, the Los Angeles City Attorney conceded that it had all been a “ploy”—an attempt to stampede the Supreme Court into reconsidering *Nestle*.²⁶² It didn’t work, although it spooked a lot of ordinary folk (not to mention the editors at the Herald-Examiner). In case you hadn’t noticed, LAX is thriving—a half-century after *Nestle* unnerved some municipal lawyers.

So, question: was the City Attorney’s little publicity stunt appropriate? Was it ethical? Are these difficult questions? Should they be?

IX. CONCLUSION

These thoughts might be summed up by the idea that ethics in land use goes quite a bit beyond questions of whether a developer can take the mayor to lunch, or what can be discussed on the golf course, or whether developers and environmentalists are entitled to equal access to planning staffs. There is an overriding ethical content to land use practice. It is grounded in what the Supreme Court keeps calling fundamental issues of fairness.²⁶³ And it is backed by a constitutional guarantee. As the Ninth Circuit put it:

[G]overnmental power is a double-edged sword; if wielded in an abusive, irrational or malicious fashion it can cause grave harm.²⁶⁴

....

We have recognized that the due process clause includes a substantive component which guards against

²⁶¹ Van Nuys News and Green Sheet (May 4, 1972); Los Angeles Herald-Examiner (May 4, 1972). Remember, he was talking about 1972 dollars. You can ratchet that number up a bit to get a more contemporary feel some fifty years later.

²⁶² See *Nuisance Suits and Our Airports*, LOS ANGELES TIMES, May 8, 1972, A1. For more extensive discussion of the machinations, see Michael M. Berger, *The California Supreme Court – A Shield Against Governmental Overreaching: Nestle v. City of Santa Monica*, 9 CAL. WEST. L. REV. 199, 244-52 (1973).

²⁶³ Authorities cited *supra* note 7.

²⁶⁴ *Sinaloa Lake Owners Assn. v. City of Simi Valley*, 864 F.2d 1475, 1484 (9th Cir. 1989).

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arbitrary and capricious government action, even when the decision to take that action is made through procedures that are in themselves constitutionally adequate. [Citation.]²⁶⁵

I am not alone in being concerned about the tactics described in this article. As noted even by knowledgeable commentators who are sympathetic to the regulators, such unfortunate behavior patterns have become all too common.²⁶⁶ It is time that ethical discussions about land use reach for a higher level: “[t]he government should be an example to its citizens, and by that is meant a good example and not a bad one.”²⁶⁷

²⁶⁵ *Id.* at 1483.

²⁶⁶ See Rodney Cobb, *Land Use Law: Marred by Public Agency Abuse*, 3 WASH. U.J.L. & POLICY 195 (2000); Orlando Delogu, *The Misuse of Land Use Control Powers Must End: Suggestions for Legislative and Judicial Responses*, 32 ME. L. REV. 29 (1980); Melville Branch, *The Sins of City Planners*, 42 PUB. AD. REV. 1 (1982).

²⁶⁷ *Cruise v. City & County of San Francisco*, 101 Cal. App. 2d 558, 565 (1951).