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# BACKWARDS FEDERALISM: THE WITHERING IMPORTANCE OF STATE PROPERTY LAW IN MODERN TAKINGS JURISPRUDENCE

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ABSTRACT

*Many of the U.S. Supreme Court's recent decisions have embraced federalism—except in one notable area. Modern Supreme Court Fifth Amendment takings cases have paradoxically diminished the role and importance of state law. Doing so creates uncertainty and unpredictability in determining where private property rights begin and where government's authority ends. The parameters of a property interest, the applicable venue, and the definition of "background principles" that limit takings claims are all subject to judicially created factors that are outside the realm of state law. Property interests are historically defined by state laws, and takings law is arguably the archetypal realm of state law. But contemporary takings cases contrast with other recent cases where the Court has enthusiastically embraced federalism. The Court has furthered federalism in access to the right of abortion and in the reach of climate change regulation, but not in the core area of property law, which is a traditional bastion of state authority under the Tenth Amendment.*

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## INTRODUCTION

Many commentators have justifiably criticized the U.S. Supreme Court's apparent selective shift toward federalism in recent decisions.[1] In *Dobbs v. Jackson Women's Health Organization*, the Court held there is no constitutional right to an abortion, and directed individual states to set their own independent abortion laws.[2] In *West Virginia v. EPA*, the

1. For instance, the current Supreme Court has been called "the most 'federalism'-friendly court in at least a century." Sanford V. Levinson, *Is the Supreme Court Moving Us Backwards, or Back Toward Federalism?*, DALL. MORNING NEWS (July 29, 2022 7:00 AM), https://www.dallasnews.com/opinion/commentary/2022/07/31/is-the-supreme-court-moving-us-backward-or-back-toward-federalism/. *See, e.g.*, Alexandra B. Klass, *Common Law and Federalism in the Age of the Regulatory State*, 92 IOWA L. REV. 545, 547 (2007) ("Moreover, in this current age of the 'new federalism,' where the Supreme Court has cut back on Congress's ability to regulate broadly in the areas of health, safety, and the environment, such progressive common law development at the state level is particularly timely."); *A Court for the Constitution*, WALL ST. J. (July 1, 2022, 6:45 PM), https://www.wsj.com/articles/a-supreme-court-for-the-constitution-originalism-dobbs-abortion-religious-liberty-11656711597 ("The Court majority in *Dobbs* has invigorated democracy and federalism."); Jonathan Weisman, *Spurred by the Supreme Court, a Nation Divides Along a Red-Blue Axis*, N.Y. TIMES (July 2, 2022), https://www.nytimes.com/2022/07/02/us/politics/us-divided-political-party.html.

2. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2277–79 (2022) ("Our decision returns the issue of abortion to those legislative bodies, and it allows women on both sides of the abortion issue to seek to affect the legislative process by influencing public opinion, lobbying legislators, voting, and running for office.").

Court limited the Federal Environmental Protection Agency ("EPA")'s powers to regulate existing coal power plants under the Clean Air Act, which was (and now is again) a traditional area of state control.[3]

One area that has peculiarly bucked this trend is the Fifth Amendment Takings Clause[4] and particularly inverse condemnation actions.[5] Generally, matters concerning property interests, including the parameters of ownership, land uses, and zoning restrictions, for example, are within the realm of state and local jurisdiction under the Tenth Amendment.[6]

The Court is paradoxically moving toward federalism to justify positions that are matters of national societal importance—like abortion and climate change—and moving away from federalism in matters of traditional state and local concern—like the laws that define an individual's real property interests.

## I. FEDERALISM

Federalism is part of the framework of the Constitution[7] under which powers not held by the federal government are relegated to the states

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3. West Virginia v. EPA, 142 S. Ct. 2587, 2599, 2616 (2022) ("[Standards of performance] may be different for new and existing plants, [although] . . . each . . . must reflect the 'best system of emission reduction' [for its type] . . . . For existing plants, the States then implement that requirement by issuing rules restricting emissions from sources within their borders." (quoting 42 U.S.C. § 7411)); Valerie Hudson, *Perspective: The Supreme Court's EPA Decision Is as Revolutionary as* Dobbs, DESERET NEWS (July 1, 2022, 11:00 PM), https://www.deseret.com/2022/7/1/23191607/perspective-the-supreme-courts-epa-decision-is-as-revolutionary-as-roe-west-virginia-coal-climate ("[A]s with the *Dobbs* decision, [*West Virginia v. EPA*] would punt all 'major questions' to the states.").

4. U.S. CONST. amends. V; *id.* XIV, § 1; *see also* Chicago, B. & Q.R. Co. v. City of Chicago, 166 U.S. 226, 235 (1897) ("If compensation for private property taken for public use is an essential element of due process of law as ordained by the fourteenth amendment, then the final judgment of a state court, under the authority of which the property is in fact taken, is to be deemed the act of the state, within the meaning of that amendment.").

5. *See* United States v. Clarke, 445 U.S. 253, 257 (1980) ("[I]nverse condemnation is 'a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant . . . .'" (quoting DONALD G. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 328 (1971))). In contrast, "formal condemnation" is when the government initiates proceedings to acquire property via its express eminent domain authority. *Id.* at 257–58.

6. *See* Torres v. Tex. Dep't of Pub. Safety, 142 S. Ct. 2455, 2465 (2022) ("[E]state and property law are areas 'normally left to the States' . . . ." (citing United States v. Oregon, 366 U.S. 643, 648–49 (1961))); New York v. United States, 505 U.S. 144, 157 (1992); U.S. CONST. amend. X.

7. *See, e.g.*, *New York*, 505 U.S. at 157 (stating that federalism is part of "the framework set forth in the Constitution"); U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) (noting that the Constitution established for Americans "two political capacities, one state and one federal").

under the Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[8]

The concept of federalism is getting renewed attention. During the COVID-19 pandemic, individual state's regulations varied, with some exercising tighter control over isolation, masking, and quarantines than others.[9] States differ in their regulation of marijuana, with some legalizing purchase for recreational purposes, some limiting access to medical uses, while others outlaw in accord with federal law.[10] Capital punishment policies vary by state, as do right-to work laws and criminal penalties.[11] Examples abound.[12]

The Supreme Court generally speaks in favor of federalism, declaring in the unanimous 2011 opinion *Bond v. United States*:

> Federalism secures the freedom of the individual. It allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power.[13]

Further, "[t]he federal structure allows local policies 'more sensitive to the diverse needs of a heterogeneous society,' permits 'innovation and experimentation,' enables greater citizen 'involvement in democratic processes,' and makes government 'more responsive by putting the States in competition for a mobile citizenry.'"[14]

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8. U.S. CONST. amend. X. The Constitution does not directly give Congress the power to define or regulate property. *See id.* art. I, § 8.

9. *E.g.*, Eram Abbasi, *State by State Face Mask Mandates*, LEADINGAGE (June 9, 2022), https://leadingage.org/state-by-state-face-mask-mandates/.

10. *See* Claire Hansen et al., *Where Is Marijuana Legal? A Guide to Marijuana Legalization*, U.S. NEWS (Dec. 14, 2022, 5:05 PM), https://www.usnews.com/news/best-states/articles/where-is-marijuana-legal-a-guide-to-marijuana-legalization ("Nineteen other states, Washington, D.C., and Guam would act to legalize the drug in the next 10 years as public support for legalization rose rapidly – despite marijuana being illegal at the federal level.").

11. *See* Clint Bolick, *Federalism: A Cure for What Ails the U.S.*, WASH. TIMES (July 27, 2021), https://www.washingtontimes.com/news/2021/jul/27/clint-bolick-federalism-cure-what-ails-us/.

12. *See id.*

13. Bond v. United States, 564 U.S. 211, 221 (2011). The question presented in *Bond* was "whether a person indicted for violating a federal statute has standing to challenge its validity on grounds that, by enacting it, Congress exceeded its powers under the Constitution, thus intruding upon the sovereignty and authority of the States." *Id.* at 214.

14. *Id.* at 221 (quoting Gregory v. Ashcroft, 501 U.S. 452, 458 (1991)).

Although *Bond* was a criminal matter and concerned the ability of a defendant to challenge a federal criminal law as violating the Tenth Amendment, the platitudes about federalism should apply just as emphatically to takings law.[15] The immovable nature of real property makes it the quintessential local and (at most) state concern.[16] Citizens have a greater impact on local elected officials who in turn create land use and zoning laws that affect the value of their property.[17] It is a concept that courts can—and should—take into account when rendering a decision to guide, explain, and justify reasoning. Federalism itself is a constitutional concept, of course, but not generally a decisive constitutional factor.[18] It is, as one commentator suggested, a category of "sub-constitutional considerations."[19] Professor Garrick B. Pursley divides the application of federalism norms into two types, direct and indirect: "Indirect federalism rules are familiar. We frequently say that federalism 'values' or 'principles' *effect* outcomes in all sorts of cases."[20] Direct federalism is when "courts identify and invalidate violations of constitutional norms."[21] Federalism in property law should have a weighty influence, although it is not (and cannot) be a dispositive factor.[22]

## II. REAL PROPERTY INTERESTS ARE (AND SHOULD BE) DEFINED BY STATE LAW

In many instances, the U.S. Supreme Court has noted that property rights are created at the state level.[23] States are better equipped to

15. *See id.* at 214.

16. *See* United States v. Craft, 535 U.S. 274, 274, 278–79 (2002) ("[A] common idiom describes property as a 'bundle of sticks'–a collection of individual rights which, in certain combinations, constitute property. State law determines which sticks are in a person's bundle.").

17. *See* Melvyn R. Durchslag, *Forgotten Federalism: The Takings Clause and Local Land Use Decisions*, 59 MD. L. REV. 464, 467 (2000).

18. Garrick B. Pursley, *Defeasible Federalism*, 63 ALA. L. REV. 801, 802 (2012).

19. *Id.*; *see also* Durchslag, *supra* note 17, at 490 ("Most generally, federalism is a political concept (judicially enforced or not) . . . .").

20. Pursley, *supra* note 18, at 805 (citing GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 167–69 (6th ed. 2009) (describing federalism as a clear structural presupposition of the Constitution)).

21. *Id.* at 804.

22. *See* Stewart E. Sterk, *Dueling Denominators and the Demise of* Lucas, 60 ARIZ. L. REV. 67, 74 (2018). There must be a constitutional check on a state's authority to regulate its own citizens' real (and sometimes personal) property. *See id.* A state should not, for example, be able to define property in a manner that allows it to evade any Fifth Amendment takings claim. *See id.*

23. *See* Kelo v. City of New London, 545 U.S. 469, 482 (2005) ("Our earliest cases in particular embodied a strong theme of federalism, emphasizing the 'great respect' that we owe to state legislatures and state courts in discerning local public needs." (citing Hairston

address, define, and limit the parameters of property interests.[24] Real property is, by definition, a matter of state concern.[25] It lies exclusively in a particular jurisdiction and citizens rely on locally elected decisionmakers to make the land use policies that define property rights—policies which are frequently the subject of eminent domain lawsuits.[26] "[I]t is a commonplace of Our Federalism that [rules of property] are left for definition by bodies of state law that the States are free to shape as they severally choose."[27] States should be able to "experiment" with a variety of land use regulatory policies, and that ability should not be limited, "whether in the name of an overriding federal legislative agenda or in the name of individual rights."[28] "In the same vein, one can hardly imagine a greater disincentive to political engagement at the local level, the government most conducive to republican values of participation, than severely circumscribing its major policy making role, controlling its physical and environmental amenities."[29]

v. Danville & W. R. Co., 208 U.S. 598, 606–07 (1908))); *see also Hairston*, 208 U.S. at 607 ("The cases cited, however, show how greatly we have deferred to the opinions of the state courts on this subject [of eminent domain], which so closely concerns the welfare of their people."); Mugler v. Kansas, 123 U.S. 623, 662 (1887) (deferring to a state's ability to regulate for health and safety in the regulation of alcohol and finding no taking of a brewery under the state's prohibition).

24. *See* Maureen E. Brady, *Property Convergence in Takings Law*, 46 PEPP. L. REV. 695, 698 (2019).

25. *Id.* at 695 ("The Supreme Court has repeatedly emphasized that property rights are created at the state level. And while federal regulations—for example, environmental regulations—certainly limit property rights, state and local land-use laws and state nuisance and trespass rules serve as major constraints on property's use and enjoyment."); *see also* Nestor M. Davidson & Timothy M. Mulvaney, *Takings Localism*, 121 COLUM. L. REV. 215, 222 (2021) ("[T]he Supreme Court has repeatedly reaffirmed state authority in takings, reflecting the highly contextual nature of the balance between individual rights and community imperatives in constitutional property.").

26. Frank I. Michelman, *Property, Federalism, and Jurisprudence: A Comment on* Lucas *and Judicial Conservatism*, 35 WM. & MARY L. REV. 301, 310 (1993).

27. *Id.*; *see* Phillips v. Wash. Legal Found., 524 U.S. 156, 164 (1998) ("Because the Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to 'existing rules or understandings that stem from an independent source such as state law.'" (quoting Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972))); *see also* Maureen E. Brady, *Property's Ceiling: State Courts and the Expansion of Takings Clause Property*, 102 VA. L. REV. 1167, 1169–70 (2016) (stating that states have expanded the property that may be subject to Fifth Amendment takings through regulation).

28. Durchslag, *supra* note 17, at 491–92.

29. *Id.* at 492; *cf.* James Y. Stern, *Property's Constitution*, 101 CALIF. L. REV. 277, 286 (2013) (discussing the sources of property law, including "independent source[s] such as state law").

States frequently develop their own discrete concepts of property laws; "because the Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to 'existing rules or understandings that stem from an independent source such as state law.'"[30] Takings law represents the tension between individual private property rights and the scope of government authority.[31]

In instances where the federal government (not a state or subdivision thereof) has "taken" private property for a public use without just compensation, there is a separate and distinct procedure for bringing claims before a federal tribunal under the United States Code. Under the Tucker Act of 1887, the U.S. Court of Federal Claims has national jurisdiction to hear takings claims against the federal government, along with other claims for monetary damages.[32] "The Tucker Act is the Federal Government's equivalent of a state's inverse condemnation procedure, by which a property owner can obtain just compensation."[33]

### *A.* Lucas *and* Tahoe-Sierra *Reinforce the Importance of State Law*

According to the Fifth Amendment, "nor shall private property be taken for public use, without just compensation."[34] Fifth Amendment takings law was historically a matter of state concern. When a state or local government "took" private property through regulation[35] such that just compensation was due, it was state law and state courts that governed the parameters of the property interest and whether that property had been "taken."[36] Upon a determination that property was "taken," state courts would then determine what is "just compensation."[37]

30. *Phillips*, 524 U.S. at 164 (quoting *Bd. of Regents of State Colls.*, 408 U.S. at 577).

31. *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.").

32. *See* 28 U.S.C. § 1491(a)(1).

33. Knick v. Twp. of Scott, 139 S. Ct. 2162, 2186 (2019) (Kagan, J., dissenting).

34. U.S. CONST. amend. V.

35. If a regulation "goes too far" it will be recognized as a taking. *Pa. Coal Co.*, 260 U.S. at 415. Litigants may seek to challenge an uncompensated government regulation for (1) physical invasions of their property, (2) a *Lucas*-type total regulatory taking, or (3) a *Penn-Central* taking. *See* Lingle v. Chevron, 544 U.S. 528, 537 (2005) (noting that "government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster—and that such "regulatory takings" may be compensable under the Fifth Amendment").

36. *See, e.g.*, Phillips v. Wash. Legal Found., 524 U.S. 156, 164 (1998) (stating that property rights protected by the Takings Clause are creatures of state law).

37. *See* U.S. CONST. amend. V; Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972).

This is the story of the *Lucas v. South Carolina Coastal Council*[38] and *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*[39] cases, for example.[40]

The Fifth Amendment test to determine whether property has been taken by regulation generally begins with a discussion of *Penn Central Transportation Co. v. City of New York*.[41] The owners of Grand Central Station in New York City sought to build a cantilevered fifty-five story office tower in the airspace above the train station.[42] Although the proposal complied with all applicable building and zoning regulations, the proposed development was denied because the station had been designated as a landmark under New York's landmark preservation law.[43] The New York Landmark Preservation Commission denied permission to build the office tower under a "certificate of appropriateness" because the project was inconsistent with the city's standards for historic preservation.[44] Penn Central and its development partner brought a Fifth Amendment takings claim.[45]

The Supreme Court rejected Penn Central's argument and, in doing so, articulated a three-part test to determine when a valid takings claim exists.[46] The three-part *Penn Central* test is now the lodestar of modern Fifth Amendment takings cases:

> When a regulation impedes the use of property without depriving the owner of all economically beneficial use, a taking still may be found based on "a complex of factors," including (1) the economic impact of the regulation on the claimant; (2) the extent to which

38. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029–31 (1992).
39. 535 U.S. 302, 314–19 (2002).
40. This Article focuses on cases dealing with the question of whether property has been "taken" for a public use such that compensation is due, but there are numerous other examples of takings law cases that (historically) further federalism. *See, e.g.*, Kelo v. City of New London, 545 U.S. 469, 487–90 (2005) (deferring to state and local legislatures in determining whether taking private property for a development which would include a public park and walkway constituted a public use under the Fifth Amendment's Takings Clause).
41. 438 U.S. 104 (1978).
42. *Id.* at 116. There was also a proposal for a larger development. *Id.* at 116–17.
43. *Id.* at 115–16.
44. *See id.* at 112, 117–18 (The Commission stated: "But to balance a 55-story office tower above a flamboyant Beaux-Arts façade seems nothing more than an aesthetic joke.").
45. *Id.* at 122 ("The issues presented by appellants are . . . whether the restrictions imposed by New York City's law upon appellants' exploitation of the Terminal site effect a 'taking' of appellants' property for a public use within the meaning of the Fifth Amendment . . . .").
46. *Id.* at 124.

the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action.[47]

The *Penn Central* test is an "ad hoc, factual inquir[y], designed to allow careful examination and weighing of all the relevant circumstances"[48] that serves as the basis of regulatory takings jurisprudence.

### *B.* Lucas*, Among Other Cases, Defers to States to Determine Whether the Government Has "Taken" Property*

Under *Lucas v. South Carolina Coastal Council*, the Supreme Court found that denial of all economically viable use of a property by state regulation was paramount to a "physical appropriation" of the property, which constituted a per se "taking" under the Fifth Amendment, such that compensation is automatically due.[49] This is a categorial exception to the *Penn Central* test.

In *Lucas*, a property owner paid $975,000 for two lots on the Isle of Palms, South Carolina.[50] Two years later, the South Carolina legislature enacted the Beachfront Management Act, which barred Lucas from building any structures on the land.[51] The state trial court found that "this prohibition rendered [the property] 'valueless'" and ordered the respondent to pay damages of $1,232,387.50.[52] The Supreme Court of South Carolina reversed, finding that the Beachfront Management Act was validly designed to preserve the state's beaches.[53] The South Carolina Supreme Court stated that "when a regulation respecting the use of property is designed 'to prevent serious public harm', no compensation is owing under the Takings Clause regardless of the regulation's effect on the property's value."[54]

The U.S. Supreme Court overturned the South Carolina Supreme Court, remanding the matter for proceedings "not inconsistent" with its

47. Murr v. Wisconsin, 137 S. Ct. 1933, 1943 (2017); *Penn Cent.*, 438 U.S. at 124–25.
48. *Murr*, 137 S. Ct. at 1942 (quoting Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 322 (2002)).
49. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016–17 (1992).
50. *Id.* at 1007.
51. *Id.* Notably, Lucas did not challenge the validity of the Beachfront Management Act as a lawful exercise of the state's police power.
52. *Id.* at 1007, 1009.
53. *Id.* at 1009–10.
54. *Id.* at 1010 (citations omitted).

opinion.[55] "The question . . . is one of state law to be dealt with on remand."[56]

In *Lucas*, the U.S. Supreme Court determined that a regulation that constitutes a wipeout of all economically viable uses of a property is a per se taking and the state owes compensation to the property owner.[57] This is a "total taking" that is tantamount to a physical invasion of the property by the government.[58] But the Court also carved out state law exceptions to the per se rule: when the offending regulation is consistent with background principles of nuisance and state law, there is no per se taking.[59] In other words, a takings claimant does not have to go through the three-part *Penn Central* test to show a taking if the offending regulation deprives a property owner of all economically viable use of the property unless that regulation is consistent with background principles of state law.[60] The Court recognized that this was a matter better left for the lower court on remand.[61]

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55. *Id.* at 1032.

56. *Id.* at 1031; *see also* Michael C. Blumm & Lucus Ritchie, Lucas*'s Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENV'T L. REV. 321, 333 (2005) (stating that *Lucas* ruled that a taking could not occur if a regulation's effect merely duplicated the relief which "could have been achieved in the courts by adjacent landowners (or other uniquely affected persons) under the state's law of private nuisance, or by the State under its complimentary power to abate nuisances that affect the public generally." (quoting *Lucas*, 505 U.S. at 1029)).

57. *See Lucas*, 505 U.S. at 1019. The *Lucas* per se rule is an exception to the ad hoc balancing test of *Penn Central*. *See* John D. Echeverria, *Making Sense of* Penn Central, 23 UCLA J. ENV'T L. & POL'Y 171, 172–73 (2005); *see also* James E. Krier & Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 WM. & MARY L. REV. 35, 58–59, 59 tbl.2 (2016) (finding that fewer than ten percent of regulatory takings claims are successful in lower courts when a *Penn Central* test is employed); *cf.* Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979). The *Penn Central* test generally favors the government. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 138 (1978).

58. *See Lucas*, 505 U.S. at 1029–30. *See generally* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435–37 (1982). A physical invasion is another per se exception to the *Penn Central* rule. *See* Echeverria, *supra* note 57, at 172.

59. *See Lucas*, 505 U.S. at 1030 ("In light of our traditional resort to 'existing rules or understandings that stem from an independent source such as state law' to define the range of interests that qualify for protection as 'property' under the Fifth and Fourteenth Amendments, this recognition that the Takings Clause does not require compensation when an owner is barred from putting land to a use that is proscribed by those 'existing rules or understandings' is surely unexceptional." (citations omitted)).

60. *See* s*upra* Section IV.A.

61. *Lucas*, 505 U.S. at 1031–32 ("'[A] State, by *ipse dixit*, may not transform private property into public property without compensation . . . .' Instead, as it would be required to do if it sought to restrain Lucas in a common-law action for public nuisance, South Carolina must identify background principles of nuisance and property law that prohibit the uses he now intends in the circumstances in which the property is presently found." (quoting Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980))).

### *C.* Tahoe-Sierra *Defers to State Law, Too*

In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, the Supreme Court held that a regional planning agency's thirty-two month moratorium on development did not constitute a per se taking under *Lucas*.[62] The *Tahoe-Sierra* Court acknowledged that the thirty-two month moratorium by the Tahoe Regional Planning Agency effectively banned development during that period, but the Court found that the thirty-two month delay in development was not unreasonable and deferred to state legislatures in determining a general rule around planning timelines.[63] The Court affirmed the Ninth Circuit's decision to remand the case to the district court for consideration under the *Penn Central* factors.[64]

The *Tahoe-Sierra* Court relied on the *Penn Central* admonition to consider the "parcel as a whole" when determining whether a regulation has "gone too far" such that a taking has occurred.[65] In doing so, the Court considered the temporal as well as the physical nature of property, stating that "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking."[66] An interest in real property is not just defined by metes and bounds, but also the terms of years that describes the "temporal aspect of the owner's interest."[67] The temporal nature of property ownership is but one of the sticks in the bundle and temporarily denying a property owner that stick did not constitute a taking under *Tahoe-Sierra*.[68] The Court was also concerned about the effect of its ruling on local decision making: "A rule that required compensation for every delay in the use of property would render routine government processes prohibitively expensive or encourage hasty decisionmaking. Such an important change in the law

62. *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 325–26, 341–42 (2002).

63. *See id.* The Court noted that "[s]everal [s]tates already have statutes authorizing interim zoning ordinances with specific time limits." *Id.* at 342 n.37.

64. *Id.* at 342–43.

65. *Id.* at 327–28; *see* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 130–31 (1978).

66. *Tahoe-Sierra*, 535 U.S. at 327–28 (quoting Andrus v. Allard, 444 U.S. 51, 65–66 (1979)).

67. *Id.* at 331–32 (citing RESTATEMENT (FIRST) OF PROP. §§ 7–9 (AM. L. INST. 1936)); *cf.* Patrick Wiseman, *May the Market Do What Taking Jurisprudence Does Not: Divide a Single Parcel into Discrete Segments?*, 19 TUL. ENV'T L.J. 269, 287 (2006) ("Are there any principled limits on what property segments may be severed in the market? *Lucas*, *Tahoe-Sierra*, and other cases suggest how such limits may be set—by state law. If, *preregulation*, a property interest was treated as discrete under state law, it had exchange value under state law, and so was 'severable' in the market.").

68. *See* 535 U.S. at 341–42.

should be the product of legislative rulemaking rather than adjudication."[69] And "moratoria . . . are used widely among land-use planners to preserve the status quo while formulating a more permanent development strategy."[70] This is particularly concerning for the Court when an agency is developing a regional plan, as was the case in *Tahoe-Sierra*, rather than considering a permit for a single project on a discrete parcel.[71]

*Tahoe-Sierra* and *Lucas* are somewhat recent examples of a long history of Supreme Court cases that illustrate the importance of federalism (and state law) in delineating property interests in Fifth Amendment takings decisions. That trend, however, has turned in more contemporary cases.

## III. *KNICK* LIMITS THE IMPORTANCE OF STATE COURTS IN DETERMINING COMPENSATION FOR TAKINGS CASES

In 2019, the U.S. Supreme Court overruled a thirty-four-year-old case, which held that Fifth Amendment takings cases must be first brought before a state tribunal.[72] In *Knick v. Township of Scott*,[73] the Court overruled *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*'s[74] requirement that inverse condemnation litigants must first seek compensation from the state before turning to federal court.[75] The Court's reasoning turned on the timing of the state's obligation to pay just compensation under a valid takings claim,[76] and went against the Supreme Court's trend of property cases under the Fifth Amendment that promote federalism.

69. *Id.* at 335; *see also* Block v. Hirsh, 256 U.S. 135, 157 (1921) ("A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change.").

70. *Tahoe-Sierra*, 535 U.S. at 337.

71. *Id.* at 337–39.

72. *See* Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 200 (1985), *overruled by* Knick v. Twp. of Scott, 139 S. Ct. 2162, 2179 (2019)..

73. 139 S. Ct. at 2179.

74. 473 U.S. at 200.

75. *Knick*, 139 S. Ct. at 2179 ("The state-litigation requirement of *Williamson County* is overruled.").

76. *Id.* at 2170 ("The Fifth Amendment right to full compensation arises at the time of the taking, regardless of post-taking remedies that may be available to the property owner.").

### *A.* Williamson County *Prioritized State Remedies for Inverse Condemnation*

In *Williamson County*, a local Tennessee Planning Commission approved a preliminary plat for a new home development in 1973.[77] The plat included 676 acres, including a 260-acre golf course and up to 736 dwelling units.[78] When the preliminary plat was approved, the developer granted an open space easement for the golf course to the county and began building roads and installing utilities.[79] The developer spent three million dollars on the golf course and half a million dollars on infrastructure.[80]

The development was subject to the requirements of a county zoning ordinance for cluster developments and the planning commission's implementing regulations.[81] According to the Court, "[t]he county legislative body is responsible for zoning ordinances to regulate the uses to which particular land and buildings may be put, and to control the density of population and the location and dimensions of buildings."[82] Further, "[t]he planning commissions are responsible for more specific regulations governing the subdivision of land within their region or municipality for residential development."[83]

In 1977, the county zoning ordinance changed, reducing the allowable density for the type of cluster development sought, although the planning commission continued to apply the 1973 code to the development.[84] In 1979 the planning commission changed course and insisted the plat be subject to current standards.[85] In doing so, the commission disapproved the plat.[86]

The developer's successor in interest sued in federal court, alleging that the commission had taken its property without just compensation under the Fifth Amendment and 42 U.S.C. § 1983[87] by failing to apply

77. *Williamson Cnty.*, 473 U.S. at 177.

78. *Id.* ("A notation on the plat indicated that the number of 'allowable dwelling units for total development' was 736, but lot lines were drawn in for only 469 units.").

79. *Id.* at 178.

80. *Id.*

81. *See id.* at 176–77 ("Under Tennessee law, responsibility for land-use planning is divided between the legislative body of each of the State's counties and regional and municipal 'planning commissions.'").

82. *Id.* at 176 (citing TENN. CODE ANN. § 13-7-101 (1980)).

83. *Id.* (citing TENN. CODE ANN. §§ 13-3-403, 13-4-303 (1980)). This scheme of local decisionmaking over local property development is typical of land use approvals throughout the United States.

84. *Id.* at 178.

85. *Id.* at 178–79.

86. *Id.* at 180.

87. *Id.* at 182.

the 1973 code to the proposed development.[88] The jury found that the developer had been denied the economically viable use of the property in violation of the Fifth Amendment's Just Compensation Clause and awarded damages of $350,000 for a "temporary taking" of the property.[89] However, the trial court judge granted a judgment notwithstanding the verdict in favor of the county, reasoning that the developer's inability to derive economic benefit from the property was only temporary and therefore could not constitute a taking.[90]

The Sixth Circuit Court of Appeals reversed, holding that a taking may occur if the regulation denies the owner all "economically viable use" of the land, and a temporary denial of property could be a taking.[91] Temporary takings, according to the Sixth Circuit, would be "analyzed in the same manner as a permanent taking."[92]

*Williamson County* was not originally a case about jurisdiction, federalism, or the applicability of state and local laws to the developer's property.[93] This was a case about temporary takings.[94] In fact, the question presented to the Court was "whether Federal, State, and Local governments must pay money damages to a landowner whose property allegedly has been 'taken' temporarily by the application of government regulations."[95] This question would remain unanswered by the *Williamson County* Court.[96]

After discussing ripeness and the requirement of exhausting administrative remedies,[97] the Court turned to the developer's failure to seek compensation through the state.[98] In doing so, the Court considered the timing of compensation, determining that the Fifth Amendment does not require that just compensation "be paid in advance of, or contemporaneously with, the taking; all that is required is that a 'reasonable, certain and adequate provision for obtaining compensation' exist at the time of the taking."[99] The Court correctly notes that the Fifth Amendment does not prevent the government from taking property—"it

88. *Id.*
89. *Id.* at 182–83.
90. *Id.* at 183.
91. *Id.* at 183–84; *see id.* at 201(Brennan, J., dissenting).
92. *Id.* at 184 (majority opinion).
93. *Id.* at 185.
94. *See id.*
95. *Id.*
96. *Id.*
97. *Id.* at 186–94. The exhaustion requirement was uncontroversial and was later upheld by the Court in *Knick*. Knick v. Twp. of Scott, 139 S. Ct. 2162, 2167 (2019).
98. *Williamson Cnty.*, 473 U.S. at 194.
99. *Id.*

proscribes taking without just compensation."[100] This seemingly uncontroversial take coincides with the plain language of the Constitution: "nor shall private property be taken for public use, *without just compensation*."[101]

*Williamson County* was roundly criticized for effectively cutting off a petitioner's right to seek compensation in federal court.[102] If a property owner brought a matter to state court to obtain just compensation under the second prong of *Williamson County*, that decision would be barred by the doctrine of res judicata for a subsequent federal court action.[103] Critics also bemoaned the fact that *Williamson County* relegated the Fifth Amendment's Takings Clause to a lesser right because seeking compensation was the only right under the Bill of Rights that could not be brought first in federal court.[104]

But rights concerning real property are not by definition the same as other constitutionally protected rights. If *any* constitutional right should be first considered by a state law, it would concern the rights related to the unlawful taking of real property. According to the U.S. Supreme Court in *San Remo Hotel, L.P. v. City of San Francisco*, which upheld *Williamson County's* state court requirement: "State courts are fully competent to adjudicate constitutional challenges to local land-use decisions. Indeed, state courts undoubtedly have more experience than federal courts do in resolving the complex factual, technical, and legal questions related to zoning and land-use regulations."[105] Therefore, because of the particular nature of property law and its unique tie to

100. *Id.* (citing Hodel v. Va. Surface Mining & Reclamation Ass'n Inc., 452 U.S. 264, 297 n.40 (1981)).

101. U.S. CONST. amend. V (emphasis added).

102. *See, e.g.*, Christopher M. Kieser, *What We Have Here Is a Failure to Compensate: The Case for a Federal Damages Remedy in* Koontz *"Failed Exactions"*, 40 WM. & MARY ENV'T L. & POL'Y REV. 163, 193 n.189 (2015) ("*Williamson County* ripeness is one of the most widely criticized doctrines in today's law.").

103. *See* San Remo Hotel, L.P. v. City of San Francisco, 545 U.S. 323, 341–42 (2005). This phenomenon was known as the "*San Remo* preclusion trap." *See* Knick v. Twp. of Scott, 139 S. Ct. 2162, 2166–67 (2019) ("The takings plaintiff thus finds himself in a Catch-22: He cannot go to federal court without going to state court first; but if he goes to state court and loses, his claim will be barred in federal court."); *see also* Raymond J. Nhan, *Minimalist Solution to* Williamson County, 28 DUKE ENV'T L. & POL'Y F. 73, 82 (2017) (discussing how *San Remo* makes it nearly impossible for litigants to bring a takings action in state court); Stewart E. Sterk & Michael C. Pollack, *A Knock on* Knick*'s Revival of Federal Takings Litigation*, 72 FLA. L. REV. 419, 432 (2020).

104. *See Knick*, 139 S. Ct. at 2169 ("The state-litigation requirement relegates the Takings Clause 'to the status of a poor relation' among the provisions of the Bill of Rights." (quoting Dolan v. City of Tigard, 512 U.S. 374, 392 (1994))).

105. *San Remo*, 545 U.S. at 347.

state-specific jurisprudence, takings law is the one area where federalism should reign.

Unfortunately, this was the not the view of the majority of Justices in *Knick v. Township of Scott*.[106]

### *B.* Knick *Expanded Venues for Inverse Condemnation Plaintiffs at the Expense of Federalism*

In *Knick v. Scott*, the U.S. Supreme Court squarely overruled *Williamson County*'s requirement that a property owner must first seek compensation in state court before bringing a federal claim.[107] The *Knick* Court concluded "that the state-litigation requirement imposes an unjustifiable burden on takings plaintiffs, conflicts with the rest of our takings jurisprudence, and must be overruled."[108] Further, "[a] property owner has an actionable Fifth Amendment takings claim when the government takes his property without paying for it."[109]

The *Knick* case began in 2012 when the Township of Scott, Pennsylvania, passed a new ordinance requiring that "[a]ll cemeteries . . . be kept open and accessible to the general public during daylight hours."[110] The ordinance further defined cemetery as: "[a] place or area of ground, whether contained on private or public property, which has been set apart for or otherwise utilized as a burial place for deceased human beings."[111] The ordinance authorized local officers to enter any property to determine whether a cemetery existed.[112] In Scott Township's view, "the ordinance did little more than codify Pennsylvania common law, which (the Township says) has long required property owners to make land containing human remains open to the public."[113]

The following year, a township officer identified several grave markers on Ms. Knick's property and notified her that by not opening the cemetery to the public during the day she violated the ordinance.[114] Ms. Knick sued in state court, seeking injunctive relief on the ground that the ordinance effectively took her property.[115] The Court notes, however, that

106. *See generally Knick*, 139 S. Ct. at 2178.
107. *See id.* at 2167.
108. *Id.*
109. *Id.*
110. *Id.* at 2168.
111. *Id.*
112. *Id.*
113. *Id.* at 2187 (Kagan, J., dissenting).
114. *Id.* at 2168 (majority opinion).
115. *Id.*

she "did not seek compensation for the taking by bringing an 'inverse condemnation' action under state law."[116]

While the state proceeding was pending, Scott Township withdrew Ms. Knick's violation notice and stayed its enforcement of the ordinance.[117] The court subsequently declined to rule on Ms. Knick's motion for injunctive relief because there was no longer an active enforcement action under which she could show the irreparable harm necessary for injunctive relief.[118] Ms. Knick then filed an action in federal court under 42 U.S.C. § 1983, alleging that the cemetery access ordinance "violated the Takings Clause of the Fifth Amendment."[119] The federal district court predictably dismissed the takings claim under *Williamson County* because Knick had not first pursued an inverse condemnation action in state court.[120] The Third Circuit affirmed the lower court's decision regarding the takings claim for the same reason.[121] The Supreme Court granted certiorari to reconsider the holding in *Williamson County*.[122]

The Supreme Court reversed the prong of *Williamson County* requiring a litigant to first seek state court remedies.[123] In doing so, the Court again turned to the timing of the compensation requirement.[124] According to the Court, "the Fifth Amendment right to full compensation arises at the time of the taking, regardless of post-taking remedies that may be available to the property owner."[125] "[O]nce there is a 'taking,' compensation *must* be awarded . . . ."[126] In other words, a Fifth

116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*; *see generally* 42 U.S.C. § 1983 ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . .").
120. Knick v. Twp., No. 14-CV-02223, 2016 WL 4701549, at *5–6 (M.D. Pa. Sept. 8, 2016).
121. Knick v. Twp. of Scott, 862 F.3d 310, 328 (3d Cir. 2017).
122. *Knick*, 139 S. Ct. at 2169.
123. *Id.* at 2179.
124. *See id.* at 2170–71.
125. *Id.* at 2170 (citing Jacobs v. United States, 290 U.S. 13, 17 (1933)). *Jacobs* concerned a taking by the federal government under the Tucker Act—not a state action. *Jacobs*, 290 U.S. at 15–16.
126. *Knick*, 139 S. Ct. at 2172 (quoting San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 654 (1981) (Brennan, J., dissenting)).

Amendment violation occurs the moment the government acquires property, regardless of any available remedy.[127]

In a particularly unfortunate passage, the *Knick* Court reasons: "A later payment of compensation may remedy the constitutional violation that occurred at the time of the taking, but that does not mean the violation never took place . . . . A bank robber might give the loot back, but he still robbed the bank."[128]

The bank robbing analogy is not only inapposite, but it also demonstrates the Court's willingness to stretch logic to arrive at its conclusion. The Court focuses only on the first half of the Takings Clause.[129] The Fifth Amendment says: "[N]or shall private property be taken for public use, without just compensation."[130] In other words, private property may be "taken" if just compensation is paid. There is no "violation" unless there is a taking without just compensation. The bank robbing analogy only works if a law against bank robbing absolves the robber of the crime if funds are returned, and that is absurd.[131] Land use regulations by a local government are not akin to a bank robbery, even if those regulations deny a landowner of all economically viable use of the property. If so, the government owes "just compensation" under the plain language of the Constitution.[132] Characterizing a taking as a bank robbery does not justify eliminating the state court requirement of *Williamson County*.

Further, in many cases, it is not at all clear whether there is a "taking" in the first place. Just compensation is only due when there is a "taking," and there are many more allegations than there are findings of a "taking."[133] This should be the realm of state courts. But *Knick* has brought the question of the existence of a taking and the question of compensation into the federal court realm.[134] This issue was a great concern to the *Knick* dissent, which stated that the regulation of land use and question of whether a state property right exists in the first place is

127. *See id.* at 2169–70. The second point made by the Court—which is more compelling—is that *Williamson County* relegates the Takings Clause to a lesser status than other constitutional rights because no other constitutional right requires a state court venue. *See id.*

128. *Id.* at 2172.

129. *See id.* at 2167.

130. U.S. CONST. amend. V.

131. *See* 18 U.S.C. § 2113 (the federal bank robbery statute, which does not absolve robbers who return funds).

132. *Knick*, 139 S. Ct. at 2172.

133. *See, e.g.*, Palazzolo v. Rhode Island, 533 U.S. 606, 617, 620 (2001) ("[A] landowner may not establish a taking before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation.").

134. *See Knick*, 139 S. Ct. at 2179.

"perhaps the quintessential state activity."[135] Those questions "are nuanced and complicated. And not a one of them is familiar to federal courts."[136] Perhaps that is why the federal government has its own court specifically dealing with monetary claims like the types of takings claims at issue in *Williamson County* and *Knick*.[137] The U.S. Court of Federal Claims—not every federal district court in the country—is charged with resolving takings claims under the Tucker Act.[138] *Knick* turns that calculation on its head.[139]

The dissent in *Knick*'s 5-4 decision criticizes the effect and reasoning of the majority's decision, stating "[i]ts consequence is to channel a mass of quintessentially local cases involving complex state-law issues into federal courts,"[140] which "will subvert important principles of judicial federalism."[141] Issues of background state principles are peculiarly state-specific and state courts are the "ultimate expositors of state law."[142] The *Knick* decision "makes federal courts a principal player in local and state land-use disputes. It betrays judicial federalism."[143]

The *Knick* dissent justifiably decries the majority's departure from the "important principles of judicial federalism."[144] States should decide issues of property law, which includes analysis of state-specific concepts like background principles of the state's tradition, nuisance law, property rights, public trust doctrine, and all other aspects of the "bundle of sticks."[145] In this regard, state takings challenges have little in common with other guaranteed constitutional rights. This area, more than any others, should be protected by concepts of judicial federalism.

135. *Id.* at 2187 (Kagan, J., dissenting) (quoting F.E.R.C. v. Mississippi, 456 U.S. 742, 767 n.30 (1982)); *see also id.* at 2188 (stating that there is "no excuse for making complex state-law issues part of the daily diet of federal district courts").

136. *Id.* at 2187.

137. *See* Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 172–74, *overruled by Knick*, 139 S. Ct. at 2179; *Knick*, 139 S. Ct. at 2168–69.

138. *See Knick*, 139 S. Ct. at 2170.

139. *See id.* at 2179.

140. *Id.* at 2181 (Kagan, J., dissenting).

141. *Id.* at 2187.

142. *Id.* at 2188 (quoting Mullaney v. Wilbur, 421 U.S. 684, 691 (1975)).

143. *Id.* at 2189.

144. *Id.* at 2187.

145. *See* United States v. Craft, 535 U.S. 274, 278 (2002) (citations omitted) ("A common idiom describes property as a 'bundle of sticks'—a collection of individual rights which, in certain combinations, constitute property. State law determines only which sticks are in a person's bundle.").

## IV. *MURR* LIMITS THE IMPORTANCE OF STATE LAW IN DETERMINING THE "RELEVANT PARCEL"

Under *Penn Central*, courts were directed to look at the "parcel as a whole" in determining the parameters of the property that is alleged to have been taken:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole—here, the city tax block designated as the "landmark site."[146]

This is the "denominator test."[147]

*Tahoe-Sierra* slightly altered this equation by affirming the "bundle of sticks" analogy.[148] In addition to the metes and bounds that define property under state law, there is a temporal aspect to the "bundle of sticks" to consider when a regulation "goes too far" and there is a taking under the Fifth Amendment.[149] Although the "parcel as a whole" rule raised some questions, it generally relied on a state of local jurisdiction's definition of what constitutes a property owner's interest.[150] *Murr v. Wisconsin* complicated this equation by unnecessarily introducing new factors into the "denominator" rule that are contrary to state and local definitions of property interests,[151] and in doing so, deviated from the norms of federalism found in prior cases.[152]

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146. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 130–31 (1978).

147. *See, e.g.*, Henry R. Topper, *Regulatory Takings and the Constitutionality of Commercial Rent Regulation in New York City*, 104 CORNELL L. REV. 529, 549 (2019) ("[T]he denominator test is an objective test of whether reasonable expectations about property ownership would lead a landowner to anticipate his holdings to be treated as one parcel or as separate tracts.").

148. *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 327 (2002). It should be noted that the opinion refers to the bundle of sticks analogy as "'bundle' of property rights." *Id.*

149. *Id.* at 332 ("Both dimensions [geographic and the term of years that define the temporal aspect of ownership] must be considered if the interest is to be viewed in its entirety."); Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) ("[I]f regulation goes too far it will be recognized as a taking.").

150. *See Penn Cent.*, 438 U.S. at 130–31, 134.

151. *See* Murr v. Wisconsin, 137 S. Ct. 1933, 1945–46 (2017).

152. *See, e.g.*, Kelo v. City of New London, 545 U.S. 469, 482 (2005); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1031–32 (1992).

*Murr* involves a difficult and unfortunate set of facts. The Murrs owned property along Lake St. Croix, where the St. Croix River widens near the Minnesota/Wisconsin border east of Minneapolis.[153] The Murrs bought a parcel on the lake in the early 1960s and subsequently titled it in the name of their plumbing company.[154] They built a small cabin on this lot near the water's edge.[155] Soon thereafter, they bought an adjoining parcel, under which they held title in their own names.[156] The two lots are each approximately 1.25 acres but contain only 0.48 and 0.50 acres of buildable land because of the unusual topography.[157] Each lot is bisected by a 130-foot bluff with flat areas at the bottom near the river and at the top.[158]

The St. Croix River, including Lake St. Croix, was designated for federal protection in 1972 under the National Wild and Scenic Rivers Act.[159] The Wisconsin legislature subsequently directed the State Department of Natural Resources to adopt rules, guidelines, and standards for local zoning ordinances to apply to the banks, bluffs, and bluff tops of the lower St. Croix River.[160] Wisconsin law also changed to state that buildable lots in the Lower St. Croix area must have at least one acre of land suitable for development, and neither of the two Murr lots satisfied this test.[161] Further, adjacent lots under common ownership may not be separably sold or developed if they do not meet the one acre minimum, a policy which created a "merger" law.[162] But because one of the Murr lots was in the name of the plumbing company, this was not an issue for the Murrs yet because the 1976 law contained a grandfather clause under which pre-existing lots under separate ownership were not subject to the law.[163] There was also a variance provision that allowed exceptions for unnecessary hardship.[164]

153. *Murr*, 137 S. Ct. at 1939–40.
154. *Id.* at 1940.
155. *Id.*
156. *Id.*
157. *Id.*
158. Murr v. St. Croix Cnty. Bd. of Adjustment, 796 N.W.2d 837, 841 (Wis. Ct. App. 2011).
159. *Murr*, 137 S. Ct. at 1940 (citing 16 U.S.C. § 1274(a)(6), (9)) (designating the Lower and Upper Street Croix Rivers). "The law required the State[] of Wisconsin . . . to develop 'a management and development program' for the river area." *Id.* (citing 41 Fed. Reg. 26237 (June 25, 1976)).
160. WIS. STAT. ANN. § 30.27(2) (West 2022).
161. *Murr*, 796 N.W.2d at 841.
162. *Id.* at 842.
163. *See id.* at 843.
164. *See* WIS. ADMIN. CODE NR § 118.09(4)(b) (2022). St. Croix County (where the Murr Property was sited) had an identical provision. *See* ST. CROIX COUNTY, WIS., CODE OF ORDINANCES: LAND USE AND DEVELOPMENT § 17.09.265 (2017) ("Unnecessary Hardship:

Unfortunately, in the mid-1990s, the Murrs transferred both lots to the names of their children.[165] This effectively merged the two separate lots into one lot under the applicable Wisconsin law, since they were now under common ownership.[166] The Murrs later wanted to reconstruct the cabin on one of their lots because of periodic flooding.[167] They also sought to sell the undeveloped lot to defray the cost of updating the cabin and sought a variance to do so.[168] Their variance request was denied and after a failed appeal, the Murrs brought a takings claim against both the State of Wisconsin and St. Croix County, alleging they had been "deprived . . . of all, or practically all, of the use of Lot E" because the lot cannot be sold or developed as a separate lot.[169]

The Murrs lost their takings claim both in the trial court and in an unpublished decision from the Wisconsin Court of Appeals.[170] The Wisconsin Supreme Court denied review, and the U.S. Supreme Court subsequently granted certiorari.[171] The question before the Court was: "What is the proper unit of property against which to assess the effect of the challenged governmental action?"[172] The lower courts answered this question with a simple application of state law.[173] This question was not complicated or difficult. There was no Fifth Amendment taking according to a simple application of the merger doctrine under Wisconsin law.[174] The U.S. Supreme Court agreed that there was no taking, but in doing so, unnecessarily diminished the importance of state law in determining the parameters of the "relevant parcel."[175]

Where special conditions affecting a particular property, which were not self-created, have made strict conformity with restrictions governing areas, setbacks, frontage, height or density unnecessarily burdensome or unreasonable in light of the purposes of this ordinance.").

165. *See* Murr v. Wisconsin, 137 S. Ct. 1933, 1940 (2017).

166. *See id.* at 1941.

167. *See Murr*, 796 N.W.2d at 841.

168. *Murr*, 137 S. Ct. at 1941.

169. *Id.* at 1937.

170. *See Murr*, 796 N.W.2d at 844; *see also* Murr v. State, No. 2013AP2828, 2014 WL 7271581, at *2, *5 (Wis. Ct. App. Dec. 23, 2014) (the well-established rule in Wisconsin is that "contiguous property under common ownership is considered as a whole regardless of the number of parcels contained therein.").

171. *Murr*, 137 S. Ct. at 1942.

172. *Id.* at 1943.

173. *See id.* at 1941–42; *Murr*, 796 N.W.2d at 841–44; *Murr*, 2014 WL 7271581, at *8.

174. *Murr*, 137 S. Ct. at 1941–42; *Murr*, 2014 WL 7271581, at *8.

175. *Murr*, 137 S. Ct. at 1947, 1950; *see* Timothy M. Harris, *No* Murr *Tests:* Penn Central *is Enough Already!*, 30 GEO. ENV'T L. REV. 605, 631 (2018) (arguing that the *Murr* three-part test is unnecessary and duplicates Fifth Amendment takings tests in existing law); Joseph Blocher, *Rights as Trumps of What*?, 132 HARV. L. REV. F. 120, 126 (2019) ("[T]he *Murr* test is that it is itself a multifactor 'reasonable expectations' approach that operates as a *predicate* to a potential bright-line rule (that is, a finding of total takings)."); Robert H.

Moreover, the U.S. Supreme Court introduced a new three-part test to determine the relevant parcel: "First, courts should give substantial weight to the treatment of the land, in particular how it is bounded or divided, under state and local law."[176] This is a plausible place to start, although state law in this regard is not dispositive, it is only given substantial weight.[177] In other words, factors outside the realm of state law may play into the analysis.[178] The *Murr* Court points to the long history of the merger doctrine, which originated in Great Neck, New York, more than 1,000 miles from the Murr property.[179] The Murrs could not possibly be expected to have a working knowledge of the history of the merger doctrine, much less the status of land use laws in Great Neck. This history is largely irrelevant to most property owners in understanding their own real property rights. The analysis is also completely unnecessary because the local law applies to the Murr situation, and the outcome of the decision would be unchanged if Wisconsin's merger doctrine had been applied without further comment.[180]

The second part of the test provides that:

> [C]ourts must look to the physical characteristics of the landowner's property. These include the physical relationship of any distinguishable tracts, the parcel's topography, and the surrounding human and ecological environment. In particular, it may be relevant that the property is located in an area that is subject to, or likely to become subject to, environmental or other regulation.[181]

Thus, under the second prong, state law may be overridden if the peculiar characteristics of the property and the surrounding environment dictate

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Thomas, *Restatement (SCOTUS) of Property: What Happened to Use in* Murr v. Wisconsin*?*, 87 UMKC L. REV. 891, 892 (2019) ("In my view, [the *Murr* test] federalizes the property question, an issue that, until now, has mostly been left to state law.").

176. *Murr*, 137 S. Ct. at 1945.

177. *Id.*

178. *See id.*; *cf.* Brady, *supra* note 24, at 715 ("*Murr* raises the prospect that other states' property laws could be used to contract the scope of protection for property owners.").

179. *See Murr*, 137 S. Ct. at 1947–48 ("Petitioners' rule would frustrate municipalities' ability to implement minimum lot size regulations by casting doubt on the many merger provisions that exist nationwide today."); *see also* Brief for National Association of Counties et al. as Amici Curiae Supporting Respondents at 12–31, Murr v. Wisconsin, 137 S. Ct. 1933 (2017) (No. 15-214), 2016 WL 3383223, at *9, *14–32 (listing more than 100 examples of merger provisions).

180. *See* Harris, *supra* note 175, at 626–27.

181. *Murr*, 137 S. Ct. at 1945–46.

a differing result.[182] State law is also relevant if it represents an "environmental or other regulation."[183]

Finally, the third part specifies that:

> [C]ourts should assess the value of the property under the challenged regulation, with special attention to the effect of burdened land on the value of other holdings. Though a use restriction may decrease the market value of the property, the effect may be tempered if the regulated land adds value to the remaining property, such as by increasing privacy, expanding recreational space, or preserving surrounding natural beauty.[184]

This third prong marks the most significant departure from state property law. This prong elevates the value of the property and other holdings if there is a corresponding value of improved recreational space or natural beauty.[185]

The three-part *Murr* denominator test appears to be borne of the peculiar factual circumstances of the case. The parcels at issue had unusual physical characteristics in the form of steep slopes and were water-facing.[186] They were also the subject of the Federal Wild and Scenic Rivers Act (and the state counterpart),[187] and there were two separate property holdings at issue that affected the value of the properties.[188] But the properties were also regarded as contiguous under the clearly applicable state law as the lower courts had determined—courts which reached the same conclusion as the U.S. Supreme Court without having to consider extraneous factors.[189] A simple application of state law was enough to decide the matter.[190] There was no need for the Court to

182. *See* Luke A. Wake, *The Enduring (Muted) Legacy of* Lucas v. South Carolina Coastal Council*: A Quarter Century Retrospective*, 28 GEO. MASON C.R. L.J. 1, 24–25 (2017) ("[T]he directive to 'look to the physical characteristics of the landowner's property' stands as an open invitation for courts to disregard an owner's objective expectations as to what uses may be permissible under an existing regulatory regime.").

183. *Murr*, 137 S. Ct. at 1945–46.

184. *Id.* at 1946.

185. *Id.*

186. *Id.* at 1940.

187. *Id.*

188. *Id.* at 1941.

189. *Id.* at 1941–42.

190. *See id.* at 1953 (Roberts, C.J., dissenting) ("State laws define the boundaries of distinct units of land, and those boundaries should, in all but the most exceptional circumstances, determine the parcel at issue."). Chief Justice Roberts would have remanded the case to the Wisconsin courts for identification of the relevant property "using ordinary principles of Wisconsin property law." *Id.* at 1956; *see also* Sterk, *supra* note 22, at 73 ("[T]he

introduce factors beyond the scope of state law in reaching its conclusion. Doing so unduly confused takings law and discounted the importance of state law in determining the scope of the property that had been "taken." It also was an affront to federalism in an area of traditional state control.[191]

## V. *CEDAR POINT* LIMITS THE IMPORTANCE OF STATE LAW

*Cedar Point Nursery v. Hassid* represents another recent and unnecessary judicial departure from the importance of state property law in determining whether there is a Fifth Amendment taking. In that case, the U.S. Supreme Court found a compensable taking due to a California state law that allowed union organizers to enter private property under discrete circumstances to meet with unrepresented farm workers.[192] California has a compelling, particular, and interesting history of advancing farm workers' rights,[193] and the law in question was in harmony with that history—and had been in place since 1975.

The law at issue in *Cedar Point* was a regulation enacted by the state in the wake of the California Agricultural Labor Relations Act of 1975, which gave "agricultural employees a right to self-organization and makes it an unfair labor practice for employers to interfere with that right."[194] According to the regulations promulgated by California's Agricultural Labor Relations Board, "the self-organization rights of employees include 'the right of access by union organizers to the premises

denominator problem should have been irrelevant on the facts of the *Murr* case. Regardless of denominator, the Murrs' takings claim had no merit.").

191. *But see Murr*, 137 S. Ct. at 1945 (noting that a state could not insulate itself from a takings claim by enacting a law consolidating all nonadjacent property owned by a single person anywhere in the state and then imposing development limits on the aggregate set). Commentators have expressed concern that states may legislate away their responsibilities to private property owners by defining property laws in ways that benefit the state. *See* Sterk, *supra* note 22, at 74. *But cf.* Maureen E. Brady, Penn Central *Squared: What the Many Factors of* Murr v. Wisconsin *Mean for Property Federalism*, 166 U. PA. L. REV. ONLINE 53, 56 (2017) ("*Murr* gives individual states' positive law of property short shrift, replacing the inquiry into the form and content of property within a single jurisdiction with an analysis of reasonable property rules and expectations that is divorced from jurisdictional boundaries."). This evaluation is fair enough, but concern about states overextending their authority was obviously not a concern for the Court in, for example, *Dobbs*.

192. Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2079–80 (2021).

193. *See, e.g.*, Maureen Pao, *Cesar Chavez: The Life Behind a Legacy of Farm Labor Rights*, NPR (Aug. 12, 2016, 4:43 PM), https://www.npr.org/2016/08/02/488428577/cesar-chavez-the-life-behind-a-legacy-of-farm-labor-rights.

194. *Cedar Point*, 141 S. Ct. at 2069 (citing CAL. LAB. CODE §§ 1152, 1153(a) (West 2022)).

of an agricultural employer for the purpose of meeting and talking with employees and soliciting their support.'"[195] Unions may "'take access' to an agricultural employer's property for up to four 30-day periods in one calendar year," and "[i]n order to take access, a labor organization must file a written notice with the Board and serve a copy on the employer."[196] The regulation further provides that "[t]wo organizers per work crew (plus one additional organizer for every 15 workers over 30 workers in a crew) may enter the employer's property for up to one hour before work, one hour during the lunch break, and one hour after work."[197] "Organizers may not engage in disruptive conduct, but are otherwise free to meet and talk with employees as they wish."[198] If an employer interferes with the union's right of access under these regulations, it may constitute an unfair labor practice that may result in sanctions.[199]

Ostensibly, under these regulations, members of the United Farm Workers entered the property of Cedar Point Nursery, a strawberry grower in Northern California that employs 500 workers, 400 of which are seasonal employees.[200] Importantly, none of the workers lived on the property.[201] The organizers did not give prior notice as is expressly required.[202] The organizers called through bullhorns at 5:00 AM and disturbed operations, causing some workers to join the protest and others to leave altogether.[203] Cedar Point filed charges against the union for "taking access" without notice, and the union responded with a charge that Cedar Point had committed an unfair labor practice.[204]

In a consolidated case, Fowler Packing Company is a "grower and shipper of table grapes and citrus."[205] "It has 1,800 to 2,500 employees in its field operations and around 500 in its packing facility."[206] Like Cedar Point, none of the employees live on the premises.[207] Union organizers attempted to "take access" to Fowler's property without notice, "but the company blocked them from entering."[208] "The union filed an unfair labor

195. *Id.* (citing CAL. CODE REGS. tit. 8, § 20900(e) (2022)).
196. *Id.* (citing § 20900(e)(1)(A), (B)).
197. *Id.* (citing § 20900(c)(3)(A)–(B), 4(A)).
198. *Id.* (citing § 20900(e)(3)(A)–(B), (4)(C)).
199. *Id.* (citing § 20900(e)(5)(C); Harry Carian Sales v. Agric. Lab. Rels. Bd., 703 P.2d 27, 41–43 (Cal. 1985) (en banc)).
200. *Cedar Point*, 141 S. Ct. at 2069.
201. *Id.*
202. *Id.*
203. *Id.* at 2069–70.
204. *Id.* at 2070.
205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.*

practice charge . . . which it later withdrew."[209] Fowler filed a federal suit, arguing the California regulations providing for labor organizers' access constituted a per se physical Fifth Amendment taking by appropriating an easement for union organizers to enter their property.[210] "They requested declaratory and injunctive relief."[211]

The District Court rejected Cedar Point's motion for an injunction and granted the Agricultural Labor Relations Board's motion to dismiss.[212] The district court rejected the companies' "argument that the access regulation constituted a *per se* physical taking, reasoning that it did not 'allow the public to access their property in a permanent and continuous manner for whatever reason.'"[213] According to the lower court, the law allowing the unions to enter the growers' property was subject to evaluation under the three-part *Penn Central* test.[214]

The Ninth Circuit Court of Appeals confirmed the district court.[215] The court sensibly identified the three categories of regulatory actions in takings law: (1) "regulations that impose permanent physical invasions"; (2) "regulations that deprive an owner of all economically beneficial use of his property"; and (3) "the remainder of regulatory actions" that are evaluated under the *Penn Central* three-part test.[216] According to the court, the California law allowing entry of union organizers did not fall under the first category because it was not permanent and did not allow access to the general public, nor did it fall under the second category because "the growers did not contend that the regulation deprived them of all economically beneficial use of their property."[217] In an en banc hearing, the Ninth Circuit denied a rehearing, but several judges noted in dissent that "the access regulation appropriated from the growers a traditional form of private property—an easement in gross—and transferred that property to union organizers."[218] The U.S. Supreme Court granted certiorari.[219]

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209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.* (quoting Cedar Point Nursery v. Gould, No. 16-cv-00185, 2016 WL 1559271, at *5 (E.D. Cal. Apr. 18, 2016)).
214. *Id.* (citing Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 104–05 (1978)). The growers did not argue the *Penn Central* factors. *Id.*; *see Penn Cent.*, 438 U.S. at 124–25 (providing the three-part *Penn Central* test).
215. *Cedar Point*, 141 S. Ct. at 2070; Cedar Point Nursery v. Shiroma, 923 F.3d 524, 536 (9th Cir. 2019), *rev'd sub nom.* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021).
216. *Cedar Point*, 141 S. Ct. at 2070; *Cedar Point*, 923 F.3d at 530–31.
217. *Cedar Point*, 141 S. Ct. at 2070.
218. *Id.* at 2071.
219. *Id.*

The U.S. Supreme Court held that California's union access regulation constituted a per se physical taking.[220] The Court likened the union access regulations to the appropriation of an easement: "The Court has long treated government-authorized physical invasions as takings requiring just compensation. The Court has often described the property interest taken as a servitude or an easement."[221] According to the Court, "compensation is mandated when a leasehold is taken and the government occupies property for its own purposes, even though that use is temporary."[222] Even physical invasions that are temporary may constitute a physical taking, regardless of whether they are intermittent.[223]

The dissent framed the issue differently, questioning whether "a regulation that *temporarily* limits an owner's right to exclude others from property *automatically* amounts to a Fifth Amendment taking."[224] The dissent concluded that under the Court's prior cases, it did not.[225] In other words, the situation in *Cedar Point* might well be a taking. It is just not an automatic taking and should be subject to the *Penn Central* three-part test to determine if the regulation "goes too far."[226] Indeed, "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government."[227]

The *Cedar Point* dissent also notes the local nature of land use decision making: "We live together in communities . . . . Modern life in these communities requires different kinds of regulation. Some, perhaps many, forms of regulation require access to private property . . . for different reasons and for varying periods of time."[228]

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220. *Id.* at 2079–80.

221. *Id.* at 2073; *see* Kaiser Aetna v. United States, 444 U.S. 164, 176, 179–80 (1979) (noting that the right to exclude is "universally held to be a fundamental element of the property right" and is "one of the most essential sticks in the bundle of rights that are commonly characterized as property").

222. *Cedar Point*, 141 S. Ct. at 2074 (quoting Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 322 (2002)).

223. *Id.* at 2075 (citing United States v. Causby, 328 U.S. 256, 259 (1946)) (recognizing that flights over private property may constitute a taking).

224. *Id.* at 2083 (Breyer, J., dissenting).

225. *Id.*

226. *Id.* at 2081; *cf.* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 n.12 (1982) ("Not every physical *invasion* is a taking."); *see also* Ark. Game & Fish Comm'n v. United States, 568 U.S. 23, 36 (2012) (stating that permanent physical occupations are per se takings but temporary invasions are not—they are subject to a more complex balancing process under *Penn Central*).

227. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

228. *Cedar Point*, 141 S. Ct. at 2087 (Breyer, J., dissenting).

It is no less a physical invasion if workers dwell off the property than if they live where they work.[229] The entry is the same.[230] But *Cedar Point* leaves in place a rule where union organizers may access a worksite if employees live on company property and union organizers have no other reasonable means of communicating with employees.[231] In both cases, the law will allow workers to enter property (presumably with the appropriate notice) in identical fashion.[232] In that regard, the *Cedar Point* case should be analyzed more like *Lucas* and/or *Penn Central* than *Loretto*. *Lucas* involved a total wipeout of all economically viable use of the property due to regulations that prevented development.[233] *Loretto* involved a physical invasion of the property in the form of cable boxes.[234] According to the *Loretto* Court, a physical invasion is a per se taking.[235] But if entry depends on whether workers sleep on the premises—and if their quarters make the difference between a taking and not—this is not a physical invasion like *Loretto*, but rather more like the scenario in *Lucas*. Added to the distinction is the fact that the "invasion" in *Cedar Point* is, by statutory definition, temporary. That was not the case in *Loretto*, nor in *Lucas*, but it was in *Tahoe-Sierra* where the Court found no Fifth Amendment taking.[236]

It is also difficult to reconcile *Cedar Point* with *Tahoe-Sierra*. In *Lucas*, a total wipeout of all economically viable use of the property is a per se taking tantamount to a physical invasion.[237] In *Tahoe-Sierra*, there was a total denial of all development rights for thirty-two months, longer than the law at issue in *Lucas* was in place,[238] yet the Court found

229. *Id.* at 2069 (majority opinion).

230. *Id.* at 2069, 2074.

231. *Id.* at 2080 (Kavanaugh, J., concurring) (citing NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 113 (1956)).

232. This point was not lost on Justice Kavanaugh, who noted the difference in dissent: "As I read it, *Babcock* recognized that employers have a basic Fifth Amendment right to exclude from their private property, subject to a 'necessity' exception . . . ." *Id.*

233. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1007 (1992).

234. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 421–22 (1982).

235. *Id.* at 421.

236. *See* Jessica L. Asbridge, *Redefining the Boundary Between Appropriation and Regulation*, 47 BYU L. REV. 809, 870 (2022) ("The *Cedar Point* Court, by doubling down on the physical takings doctrine without attempting to explain the many inconsistencies in the doctrine, ultimately may have weakened the Takings Clause's protections, contrary to the majority's stated goal of seeking to strengthen the protection of private property rights.").

237. *Lucas*, 505 U.S. at 1029.

238. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 347 n.2 (Rehnquist, J., dissenting) (2002); *see id.* at 330 ("While the State's appeal was pending, the statute was amended to authorize exceptions that might have allowed Lucas to obtain a building permit."); *cf.* 301, 712, 2103 & 3151 LLC v. City of Minneapolis, 27 F.4th 1377,

that the moratorium at issue was not a per se taking.[239] But under *Cedar Point*, a temporary physical invasion constituted a per se taking.[240] The *Cedar Point* case cites favorably to *Tahoe-Sierra* seven times[241] but fails to effectively reconcile the different outcomes in the cases. There was also no analysis of whether the law at issue in *Cedar Point* was a matter of state background principles (arguably it was) nor did the court remand for further findings of state law. A temporary invasion with notice at discrete times is but one stick in the bundle of property rights; this was enough to defeat a takings claim in *Tahoe-Sierra*, but apparently not in *Cedar Point*.

One of the differences between *Tahoe-Sierra* and *Cedar Point* was that the law at issue in *Tahoe-Sierra* did not permit third parties to access the property.[242] It simply prohibited all development, although the difference after *Lucas* is suspect because *Lucas* likened economic restrictions to a physical invasion in finding a taking.[243] Another difference is a different stick in the bundle was affected: in *Cedar Point*, it was the right to exclude[244] while in *Tahoe-Sierra*, it was the right to use,[245] apparently elevating the right to exclude stick over the right to use stick.

The other striking difference is that in *Tahoe-Sierra*, the U.S. Supreme Court deferred to the state legislature and lower courts for guidance,[246] while the *Cedar Point* Court failed to do so.[247] Principles of federalism and deference to state laws were a factor in *Tahoe-Sierra* but not in *Cedar Point*.

The Supreme Court in *Cedar Point* opted not to remand the case to the lower court for a determination of whether the law at issue was consistent with background principles of state law, as was done in *Lucas*.[248] It is an interesting and unresolved question, since California has a strong history of agricultural workers' rights,[249] and states

1383 (8th Cir. 2022) (refusing to extend *Cedar Point*'s right to exclude takings analysis to landlords who were subject to a city code that set criteria for accepting tenants).

239. *Tahoe-Sierra*, 535 U.S. at 306, 320.
240. *See* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2072 (2021).
241. *Id.* at 2071, 2072, 2074–75, 2077–78.
242. *See Tahoe-Sierra*, 535 U.S. at 306.
243. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1017 (1992).
244. *Cedar Point*, 141 S. Ct. at 2072.
245. *Tahoe-Sierra*, 535 U.S. at 306.
246. *Id.* at 339, 342.
247. *Cedar Point*, 141 S. Ct. at 2076.
248. *See Lucas*, 505 U.S. at 1031.
249. *See* FRANCISCO ARTURO ROSALES, CHICANO!: THE HISTORY OF THE MEXICAN AMERICAN CIVIL RIGHTS MOVEMENT 149 (1996).

frequently differ in their handling of property interests.[250] The *Cedar Point* Court recognized this possibility, noting that "many government-authorized physical invasions will not amount to takings because they are consistent with longstanding background restrictions on property rights."[251] But the Court missed an opportunity and dismissed this argument in a single sentence: "Unlike a law enforcement search, no traditional background principle of property law requires the growers to admit union organizers onto their premises."[252] But that point was not argued by the parties, and there may be a colorable argument to show that California has a long history of worker rights and employer suppression of organizing efforts.[253] Failing to address the issue in detail illustrates the lack of interest in advancing federalism principles in modern takings law.

## VI. THE SUPREME COURT'S BACKWARDS TURN TOWARD FEDERALISM IN MATTERS OF NATIONAL CONCERN

Several of the Supreme Court's decisions startled Supreme Court followers, and much of the country, in 2022. Two in particular concern matters of national importance that turned into a boon for proponents of federalism: reproductive rights and climate change.

In *Dobbs v. Jackson Women's Health Organization*,[254] the U.S. Supreme Court overturned *Roe v. Wade*'s holding that the U.S. Constitution confers a right to an abortion.[255] *Roe* held that the Fourteenth Amendment guaranteed a right to privacy against state

250. *See* Brady, *supra* note 24, at 698. For instance, states frequently have different environmental protections. *Id.* at 699. California also has stronger laws protecting the likeness of actors and celebrities than other states do. *Id.* at 698–99; *see also* Michael C. Blumm & Rachel G. Wolfard, *Revisiting Background Principles in Takings Litigation*, 71 FLA. L. REV. 1165, 1207 (2019) ("The cases do not reveal how old a statutory provision must be to qualify as a background principle, but there is evidence to suggest that forty years is sufficient.").

251. *Cedar Point*, 141 S. Ct. at 2079.

252. *Id.* at 2080. The Court describes background principles exceptions, such as a right of entry for public necessity, which permits entry to a "property to effect an arrest or enforce the criminal law under certain circumstances." *Id.* at 2079.

253. *See* ROSALES, *supra* note 249, at 130–51 (explaining the rise of what eventually became known as the United Farm Workers in California).

254. 142 S. Ct. 2228 (2022).

255. *Id.* at 2242 ("We hold that *Roe* and *Casey* must be overruled."); *see also* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 846 (1992) (upholding the "essential holding" of *Roe* under the Fourteenth Amendment's Due Process Clause), *overruled by Dobbs*, 142 S. Ct. at 2242.

action, including the right to an abortion.[256] The *Dobbs* decision was a defeat for pro-choice advocates but was also hailed as a victory for federalism.[257]

But *Roe* itself balanced states' right in rendering its decision, stating that:

> [T]he State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman, whether she be a resident of the State or a non-resident who seeks medical consultation and treatment there, and that it has still another important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct.[258]

The Court concluded "that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation."[259] *Roe* created a trimester approach to balancing states' rights in regulating health with the fundamental right to an abortion.[260] The *Roe* trimester framework prohibited states from regulating abortion during the first trimester of pregnancy, allowed state regulations designed to protect a woman's health in the second trimester, and permitted prohibitions on abortion only during the third trimester unless the life or health of the mother was at risk.[261]

In other words, although states have general rights to regulate for the general health and welfare under the police power held by the states under the Tenth Amendment, there is a point at which states may not infringe upon a fundamental right; in the case of *Roe*, upheld by *Casey*, it was the fundamental right of privacy, which is found under the First, Fourth, Fifth, Ninth, and particularly, the Fourteenth Amendments.[262]

The idea that access to health care is a matter of national concern is hardly a matter of serious debate. For instance, under the federal

256. Roe v. Wade, 410 U.S. 113, 153 (1973), *overruled by Dobbs*, 142 S. Ct. at 2242. *See generally* David H. Gans, *Reproductive Originalism: Why the Fourteenth Amendment's Original Meaning Protects the Right to Abortion*, 75 SMU L. REV. F. 191 (2022).

257. *A Court for the Constitution*, *supra* note 1.

258. *Roe*, 410 U.S. at 162.

259. *Id.* at 154.

260. *Id.*

261. *Id.*; *see* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 872 (1992), *overruled by Dobbs*, 142 S. Ct. at 2242. *Casey* changed the trimester approach to one in which states could not place an "undue burden" on a woman's fundamental right to an abortion. *Casey*, 505 U.S. at 878.

262. *Roe*, 410 U.S. at 152–53; *Casey*, 505 U.S. at 926–27.

Emergency Medical Treatment and Active Labor Act ("EMTALA"), if any individual presents at a Medicare-participating hospital for treatment, the hospital must screen to determine if an emergency medical condition exists.[263] If so, the hospital cannot discharge or transfer–with limited exceptions–the patient until it provides "such treatment as may be required to stabilize the medical condition."[264] This is a federal law that applies to all states and applies regardless of a patient's insurance status or ability to pay.[265] The law was passed by Congress in 1986 and is also known as the "Patient Anti-Dumping Law."[266] It is a federal healthcare law and is broad enough to include abortion access in situations where there is an emergency medical condition.[267]

In *United States v. Idaho*, the United States District Court for the District of Idaho granted the federal government's request to enjoin enforcement of Idaho's strict abortion ban because the state law was in direct conflict with EMTALA.[268] The state law and the federal law cannot exist simultaneously, and—as the Supremacy Clause dictates—federal law prevails.[269] So, *United States v. Idaho* illustrates that *Dobbs* only slightly moved the bar on federalism.

This balancing of a state's interest in health and welfare up to the point where a fundamental right has been breached—as the Court did in *Roe*—is a direct correlation to the way that the Court, under prior law,

263. 42 U.S.C. § 1395dd(a).

264. *Id.* § 1395dd(b)(1)(A). Penalties for noncompliance include termination of a hospital's Medicare agreement, hospital fines of up to $104,826, and potential private causes of action. *Id.* § 1395dd(d).

265. *See* SHANNA ROSE, FINANCING MEDICAID: FEDERALISM AND THE GROWTH OF AMERICA'S HEALTH CARE SAFETY NET 130 (2013).

266. *1986 – Ending Hospital "Dumping"*, NAT'L HEALTH L. PROGRAM (Apr. 7, 1986), https://healthlaw.org/announcement/ending-hospital-dumping-1986/.

267. The Biden Administration recently issued guidance on EMTALA, stating that doctors must perform an abortion when it will "provide stabilizing medical treatment" for a pregnant woman when necessary to resolve an "emergency medical condition." Letter from Xavier Becerra, Sec'y of Health & Hum. Servs., U.S. Dep't of Health & Hum. Servs., to Health Care Providers (July 11, 2022), https://www.hhs.gov/sites/default/files/emergency-medical-care-letter-to-health-care-providers.pdf; *see also* Nina Shapiro, *Washington Attorney General Enters Fray in Idaho Abortion Lawsuit*, SEATTLE TIMES (Aug. 16, 2022, 5:34 PM), https://www.seattletimes.com/seattle-news/wa-attorney-general-enters-fray-in-idaho-abortion-lawsuit/ (discussing the U.S. Department of Justice lawsuit against Idaho's restrictive abortion laws in the wake of *Dobbs*).

268. United States v. Idaho, No. 22-cv-00329, 2022 WL 3692618, at *15 (D. Idaho Aug. 24, 2022). Under Idaho's law, which was set to take effect on August 25, 2022, "every person who performs or attempts to perform an abortion . . . commits the crime of criminal abortion," punishable by up to five years' imprisonment. IDAHO CODE § 18-622(2) (2020).

269. *See Idaho*, 2022 WL 3692618, at *1 ("At its core, the Supremacy Clause says state law must yield to federal law when it's impossible to comply with both.").

analyzed Fifth Amendment takings or inverse condemnation matters. The state's law dictated the method of compensation under *Williamson County*,[270] the parameters of an individual's property interest under *Penn Central*,[271] and the right to use land under *Tahoe-Sierra*.[272] All of those rights have been abrogated by subsequent decisions that limit the role of federalism.[273]

The *Dobbs* decision is replete with references to federalism in justifying its decision to overturn *Roe* and *Casey*: "Given that procuring an abortion is not a fundamental constitutional right, it follows that the States may regulate abortion for legitimate reasons, and when such regulations are challenged under the Constitution, courts cannot 'substitute their social and economic beliefs for the judgment of legislative bodies'"[274] and

> the people of the various States may evaluate those interests differently. In some States, voters may believe that the abortion right should be even more extensive than the right that *Roe* and *Casey* recognized. Voters in other States may wish to impose tight restrictions based on their belief that abortion destroys an 'unborn human being';[275]

and "The Court thus asserted raw judicial power to impose, as a matter of constitutional law, a uniform viability rule that allowed the States less freedom to regulate abortion than the majority of western democracies enjoy."[276] And in summation, the Court proclaims:

> Both sides make important policy arguments, but supporters of *Roe* and *Casey* must show that this Court has the authority to weigh those arguments and decide how abortion may be regulated in the States. They have failed to make that showing,

270. *See* discussion *supra* Section V.A.

271. *See* discussion *supra* Part IV.

272. *See* discussion *supra* Section IV.B.

273. *See, e.g.*, Murr v. Wisconsin, 137 S. Ct. 1933, 1945–46 (2017) (introducing new factors into the takings denominator test which conflict with state and local definitions of property interests); Knick v. Twp. of Scott, 139 S. Ct. 2162, 2179 (2019) (bringing the issue, which has largely been state determinative, of whether a taking has occurred into the federal realm); Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2080 (2021) (holding that California's union access represented a per se physical taking even though the state has a long history of supporting agricultural workers).

274. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2239 (2022) (quoting Ferguson v. Skrupa, 372 U.S. 726, 729–30 (1963)).

275. *Id.* at 2257.

276. *Id.* at 2269–70.

> and we thus return the power to weigh those arguments to the people and their elected representatives.[277]

*Dobbs* has therefore taken federalism to a higher plane in the arena of abortion than the one found in an individual's real property rights. This is backwards federalism.

The Court similarly embraced federalism by recently limiting the role of the federal government in regulating climate change in *West Virginia v. EPA*.[278] In that case, the state of West Virginia along with several other states petitioned for review of the court of appeals' vacatur of the EPA's repeal of the Clean Power Plan, which concerned carbon dioxide emissions emitting from existing power plants fueled by coal and natural gas.[279] Chief Justice Roberts, writing for the majority, conceded that "[c]apping carbon dioxide emissions at a level that will force a nationwide transition away from the use of coal to generate electricity may be a sensible 'solution to the crisis of the day'"[280] but ultimately struck down the rule, which allowed the EPA to regulate existing plants.[281] This left individual states to regulate greenhouse gas emissions of existing power plants,[282] which is a ridiculous solution to a global problem.[283] Although the case is a matter of statutory interpretation and the EPA's jurisdiction is arguably limited and defined by congressional action,[284] the effect of the Supreme Court's ruling coupled with the inaction of Congress is that of furthering federalism.

*West Virginia v. EPA* is a case that turns on statutory interpretation: the question is whether Congress expressly authorized the regulation of

277. *Id.* at 2259.
278. 142 S. Ct. 2587, 2594–96 (2022).
279. *Id.* at 2606.
280. *Id.* at 2616 (quoting New York v. United States, 505 U.S. 144, 187 (1992)).
281. *Id.*
282. *See id.* at 2599 ("For existing plants, the States then implement that requirement by issuing rules restricting emissions from sources within their borders."); *id.* at 2621 (Gorsuch, J., concurring) ("When an agency claims the power to regulate vast swaths of American life, it not only risks intruding on Congress's power, it also risks intruding on powers reserved to the States."); *id.* at 2622 ("[T]he regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States." (quoting Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n, 461 U.S. 375, 377 (1983))).
283. *See* Rashmi Dyal-Chand, *Sharing the Climate*, 122 COLUM. L. REV. 581, 583 (2022) ("[I]t is imperative for property law to develop durable, systemic responses to the climate crisis."). Dyal-Chand compellingly argues that national and international players are essential to addressing the climate crisis. *Id.* at 585.
284. *See Laws and Executive Orders*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/laws-regulations/laws-and-executive-orders (last updated July 27, 2022).

existing power plants.[285] The case also turns on the major questions doctrine, or whether an agency is "asserting highly consequential power beyond what Congress could reasonably be understood to have granted."[286] But it is not unreasonable, given the global nature of climate change,[287] to think that Congress could have intended the EPA to regulate existing power plants. And although *West Virginia* is not a federalism case per se, the impact is to regale authority to the states on matters that should logically be reserved to the federal government.

## VII. THE EFFECT OF THE WITHERING IMPORTANCE OF STATE LAW IN TAKINGS CASES

If the concept of federalism is to mean anything, it must be applied in a way that supports core aspects of state jurisdiction. This area is primarily the domain of state property law and Fifth Amendment takings law in particular. Although not necessarily dispositive, federalism should guide a court in matters involving a state's purview. The Court's decisions on Fifth Amendment takings law are already frustratingly unpredictable, and departing from core principles of federalism only complicates the matter.

Consistency, predictability, and fairness are hallmarks of a balanced judiciary. When rulings are inconsistent and unpredictable, the public may lose faith in the nation's court system.[288] As the Ohio Supreme Court stated: "[W]henever possible we must maintain and reconcile our prior decisions to foster predictability and continuity, prevent the arbitrary administration of justice, and provide clarity to the citizenry."[289] If, for example, a local jurisdiction has no idea how a court will rule on an inverse condemnation matter because of unpredictably muddled cases, it will affect that jurisdiction's drafting of ordinances, land use decisions,

285. *West Virginia*, 142 S. Ct. at 2600 ("The question before us is whether this broader conception of EPA's authority is within the power granted to it by the Clean Air Act.").

286. *Id.* at 2609.

287. WORLD METEOROLOGICAL ORG., STATE OF THE GLOBAL CLIMATE 2021, at 4 (2021).

288. *See, e.g.*, Linda Greenhouse, *A Precedent Overturned Reveals a Supreme Court in Crisis*, N.Y. TIMES (Apr. 23, 2020), https://www.nytimes.com/2020/04/23/opinion/supreme-court-precedent.html.

289. Shay v. Shay, 863 N.E.2d 591, 597 (Ohio 2007) (citing Westfield Ins. Co. v. Galatis, 797 N.E.2d 1256, 1260 (Ohio 2003) ("Well-reasoned opinions become controlling precedent, thus creating stability and predictability in our legal system.")). This is, of course, a primary justification for stare decisis. *See, e.g.*, Brookfield Asset Mgmt., Inc. v. Rosson, 261 A.3d 1251, 1279 (Del. 2021) ("Clarity and administrability also relate to reliance interests, since reliance can only be created by a ruling which is amenable to consistent, stable, and thus predictable application.").

and ultimately the urban landscape.[290] Local land use decision making factors Fifth Amendment takings questions into decisions about granting variances, setting parameters for conditional use permits, and allowing nonconforming uses.[291] For instance, local codes usually provide for variances or exceptions to land use planning law.[292] The variance is in place in case the law is otherwise so restrictive on a piece of property that there will be a total elimination of all economically viable use of the property.[293] The variance is a kind of relief valve to allow individuals to develop unusual parcels and to allow the jurisdiction to avoid compensation for a taking.[294] If a variance is denied, it may be challenged before a local hearing examiner.[295] The code itself and the hearing examiner's decision making are influenced by an understanding of the scope of federal takings law.[296] If that scope calls the importance of local laws into question, the entire system becomes increasingly fraught with uncertainty.

## CONCLUSION

Federal Fifth Amendment takings law can be a confusing muddle of cases.[297] The rules are not necessarily complicated. To determine if there is an inverse condemnation, apply the three-part *Penn Central* test,[298] unless there is one of two exceptions: (1) a permanent physical invasion[299] (or temporary under *Cedar Point*)[300] or (2) a total deprivation of all economically viable use of the property unless the use restriction is

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290. *See, e.g.*, Christopher P. Belisle & Mary Ann Hallenborg, *Takings Clause Interpretation: The Tradition of Inconsistency Continues*, 3 J. LEGAL COMMENT. 27, 54 (1987) ("[T]he unsettled state of [takings] law will have a 'chilling effect' on the trend toward creative utilization of land use controls.").

291. *See, e.g.*, Jonathan E. Cohen, Comment, *A Constitutional Safety Valve: The Variance in Zoning and Land-Use Based Environmental Controls*, 22 B.C. ENV'T AFFS. L. REV. 307, 308 (1995) ("For a landowner to be eligible for an exception from a comprehensive zoning scheme's use restrictions, prevailing doctrine requires a showing of a burden that would amount to a denial of all reasonable use of the property–the equivalent of a constitutional taking.").

292. *See, e.g.*, N.J. REV. STAT. § 40:55D-25 (2022).

293. Cohen, *supra* note 291, at 308.

294. *Id.*

295. *Id.* at 331.

296. *See id.* at 331–32.

297. *See* Bradley C. Karkkainen, *The Police Power Revisited: Phantom Incorporation and the Roots of the Takings "Muddle"*, 90 MINN. L. REV. 826, 883 (2006); Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561, 561 (1984).

298. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

299. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982).

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

consistent with background principles of state law (*Lucas*).[301] In defining the parameters of a property interest, look at the "parcel as a whole."[302] That is the rule, in a nutshell, of the test to determine if there has been a "taking" under the Fifth Amendment.

Recent cases have confused an already bewildering application of these simple rules. The common thread among the three most recent takings cases—*Murr*, *Knick*, and *Cedar Point*—is that each has departed from the norms of federalism that marked prior takings law. Sticking to a federalism model for these property cases would have resulted in decisions that were at least consistent, predictable, and fair. As Justice Breyer said in his *Cedar Point* dissent, "I suspect that the majority has substituted a new, complex legal scheme for a comparatively simpler old one,"[303] and "I recognize that the Court's prior cases in this area are not easy to apply."[304]

Adding to this frustration is the fact that the Court has inexplicably embraced federalism in areas outside the traditional realm of state's rights. This is backwards federalism.

301. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1030 (1992).
302. *See Penn Cent.*, 438 U.S. at 130–31.
303. *Cedar Point*, 141 S. Ct. at 2088 (Breyer, J., dissenting).
304. *Id.* at 2089.