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"Character" as "Worthiness": A New Meaning for *Penn Central*'s Third Test?

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Introduction

This article sketches a possible new career for the "character of the governmental regulation" regulatory takings test enunciated in *Penn Central Transportation Co. v. City of New York*.[1] It explains that the original "character" distinction drawn by Justice Brennan quickly became outmoded. Recent cases have renewed and enhanced *Penn Central* as the primary basis for analysis of regulatory takings. The Court now stresses "fairness" as the crucial *Penn Central* attribute. These developments, and some ensuing lower court cases, may be the avatar of a new function for the "character" test.

The article's thesis is that, just as the "investment-backed expectations" test[2] in *Penn Central* has been emblematic of the Court's consideration of the worthiness of the landowner's claim, so might the "character" test become emblematic of the worthiness of the government's regulatory purpose.

The "Character" Test in *Penn Central*

The Penn Central *Multifactor Test*

In *Penn Central*, the railroad had sought permission to construct an office tower on top of Grand Central Terminal, an acclaimed Beaux Arts structure. While the proposal complied with zoning and development regulations in all other respects, it was rejected under the city's historic preservation law.

Justice Brennan's opinion upholding the preservation ordinance held that the regulation would be judged with respect to the parcel as a whole, and not merely the airspace rights above the terminal.[3] He declared that the Court was unable to devise a "set formula" for regulatory takings cases, and that judges must decide each case based on "essentially ad hoc, factual inquiries."[4] He added that three factors were of "particular significance" in such inquiries. These were the "economic impact of the regulation on the claimant and, particularly, the

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extent to which the regulation has interfered with distinct investment-backed expectations," and also "the character of the governmental action."[5] On the latter point, he declared:

> A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.[6]

This division implies that governmental actions respecting private property constitute either a physical usurpation for government use, or an adjustment in the benefits and burdens in the everyday life of citizens. The "adjustment" brings to mind the "arbital" distinction of Professor Joseph Sax, who, at one time, distinguished between government's proprietary role, where an appropriation of property would require compensation, and government's role of mediating between economic actors, where an appropriation would be a consequence of exercise of the police power and would not require compensation.[7]

The Transformation of "Physical Appropriation" into a Per Se Test

In any event, only four years after *Penn Central* was handed down, the Supreme Court decided *Loretto v. Teleprompter Manhattan CATV Corp*.[8] There, it declared that "when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred. In such a case, 'the character of the government action' not only is an important factor in resolving whether the action works a taking but also is determinative." *Loretto* added that "Penn Central *simply holds that in cases of physical invasion short of permanent appropriation, the fact that the government itself commits an invasion from which it directly benefits is one relevant factor in determining whether a taking has occurred*.[9] Thus, permanent physical invasions now constituted categorical, or per se, takings.

In *Loretto* and subsequent cases the Court has assumed that government necessarily "benefits" more from a physical invasion than from the imposition of even stringent restrictions on use. However, trivial physical invasions, such as the roof-mounted bread-box sized cable TV box in *Loretto* that was intended to facilitate service to apartment house tenants, often benefit third parties and impose far lighter burdens on owners than severe restrictions on their use of land.

Further making simple distinctions untenable is that fact that some physical "invasions" are not appropriations, at least in a physical sense. Such limited incursions include overflights, as in *United States v. Causby*.[10] Some intrusions might be deemed "temporary," but, as Judge Jay Plager observed in *Hendler v. United States*, "[i]n this context, 'permanent' does not mean forever, or anything like it."[11] "If the term 'temporary' has any real world reference in takings jurisprudence, it logically refers to those governmental activities which involve an occupancy that is transient and relatively inconsequential, and thus properly can be viewed as no more than a common law trespass *quare clausum fregit*."[12] As interesting as the question of whether given physical incursions are *de minimis*, tortious, or partial takings are, they have been a relatively minor aspect of takings jurisprudence.

The issue of physical appropriation arises, in a derivative sense, in *Lucas v. South Carolina Coastal Council*,[13] where the Supreme Court established a second categorical exception to the *Penn Central* multifactor test. *Lucas* declared that a landowner suffers a per se taking when deprived of "all economically beneficial or productive use of land."[14] The Court explained that the "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation."[15]

Regulations "Adjusting Benefits and Burdens" Might Not Provide Public Benefit

The other prong of *Penn Central*, whether the regulation constitutes a "public program adjusting the benefits and burdens of economic life to promote the common good," cannot bear the role that *Penn Central* assigned to it. In particular, Justice Brennan's "character" test is agnostic about the specific content of regulations, so long as they adjust aspects of "economic life" to promote the common good.[16] When coupled with the high level of deference that the Supreme Court accords economic and social regulations, the result is that all regulations meeting a very low threshold are assigned a very high value.

A regulation limiting property rights might not require compensation on the grounds that it promotes the common good, as Professor Sax concluded after abandoning his "enterprise/arbital" test.[17] However, it might instead promote a private good,[18] or no good at all.[19] A rule that would not result in a demonstrable public benefit in any application could be stricken, under the traditional rubric, as being arbitrary and capricious and violative of substantive due process.[20] In the contemporary formulation, such a rule would work a taking, since it "does not substantially advance legitimate state interests."[21]

Regulations Providing Public Benefits Might Also Be Takings

Judicial review of a challenged regulation under the *Penn Central* "character of the governmental action"

test, the Federal Circuit recently explained in *Maritrans Inc. v. United States*,[22] "requires a court to consider the purpose and importance of the public interest underlying a regulatory imposition, by obligating the court to 'inquire into the degree of harm created by the claimant's prohibited activity, its social value and location, and the ease with which any harm stemming from it could be prevented."[23]

However, the fact that a regulation might provide substantially greater public benefit than the private use of property precluded by it does not insulate the regulation from working a compensable taking. The Supreme Court noted, in *First English*, that the Takings Clause "is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking."[24] As Justice Kennedy put it, the Takings Clause "operates as a conditional limitation, permitting the government to do what it wants so long as it pays the charge. The Clause presupposes what the government intends to do is otherwise constitutional."[25] Nothing adjudicated since has undercut the trenchancy of Justice Holmes' declaration in *Pennsylvania Coal* that "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[26]

The Limited Import of the "Character" Test as Propounded in Penn Central

Since *Loretto*, the *Penn Central* "character" test does not apply to permanent physical invasions of private property, which are now categorical takings. Regulations that do not promote the common good are likewise not within the purview of *Penn Central*, since they do not pass muster under *Agins v. City of Tiburon*, which deems a taking regulations that do not "substantially advance legitimate state interests."[27] This leaves for review under the "character" test only regulations, including those that work transient physical incursions, that provide some public benefit. These "public program[s] adjusting the benefits and burdens of economic life" are approved by Justice Brennan in an undifferentiated manner.

"Character of the Governmental Action" Meets the "*Armstrong* Principle"

In *Armstrong v. United States*,[28] the Supreme Court declared that the Takings Clause was "designed to bar Government from forcing some people alone to bear burdens which, in all fairness and justice, should be borne by the public as a whole."[29] This seminal formulation was quoted by Justice Brennan in *Penn Central*.[30] It was stressed by Justice O'Connor in her pivotal concurrence in *Palazzolo v. Rhode Island*,[31] where, citing its use in *Penn Central*, she noted:

> The concepts of "fairness and justice" that underlie the Takings Clause, of course, are less than fully determinate. Accordingly, we have eschewed "any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." The outcome instead "depends largely 'upon the particular circumstances [in that] case.'"[32]

Most recently, in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,[33] Justice Stevens quoted extensively the O'Connor concurrence in *Palazzolo*, and affirmed the Court's adherence to *Penn Central* as the "polestar" of its takings jurisprudence.[34] He asserted that the Justices "still resist the temptation to adopt *per se* rules in our cases involving partial regulatory takings," as distinguished from the *Penn Central* approach.[35]

For the first time, the Court in *Tahoe-Sierra* used the term "*Armstrong* principle" to enshrine the quest for fairness and justice that it sought to vindicate through multifactor, ad hoc examination.[36]

Attempting to Reconcile the "Character" Test with Armstrong

In *Palazzolo* and *Tahoe-Sierra*, the Supreme Court rededicated its regulatory takings jurisprudence to fairness and to equitable sharing of burdens under the "*Armstrong* principle." *Tahoe-Sierra* also marginalized the *Lucas* per se rule almost into insignificance, declaring that "our holding was limited to 'the extraordinary circumstance

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when *no* productive or economically beneficial use of land is permitted."[37] Thus, the Court has established the ad hoc tests of *Penn Central*, with the gloss of fairness, as the dispositive formulation for the evaluation of claims of non-physical takings.

There is, however, a disparity between the "character of the governmental action" test and the reinvigorated "fairness" test. In its *Penn Central* iteration, the "character" test differentiates only between physical and regulatory actions. It gives an undifferentiated grade of "pass" to all programs promoting the "common good," regardless of the extent to which they do so or to how evenly they distribute corresponding burdens. Fairness, it would seem, requires more.

New Content for the "Character of the Governmental Action" Test?

Examples of Unworthy Character: Severe Retroactivity and Targeting

Recent cases suggest that certain types of regulations possess a "character" that augurs in favor of a compensable taking.

Severe Retroactivity

The question of whether a severely retroactive, costly, and unexpected government exaction constituted a taking was the subject of *Eastern Enterprises v. Apfel*.[39] There, the Supreme Court reviewed the constitutionality of applying a statute intended to rescue a coal industry retiree pension and medical benefit plan from insolvency so as to obtain very large cash payments from a company that had not employed miners for many years prior to the statute's enactment.

Writing for the four-justice plurality, Justice O'Connor found that the statute worked a taking under *Penn Central*. She noted that the Court's decisions "have left open the possibility that legislation might be unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience."[40] Also, analysis of the case under the Takings Clause was appropriate:

> Finally, the nature of the governmental action in this case is quite unusual. That Congress sought a legislative remedy for what it perceived to be a grave problem in the funding of retired coal miners' health benefits is understandable; complex problems of that sort typically call for a legislative solution. When, however, that solution singles out certain employers to bear a burden that is substantial in amount, based on the employers' conduct far in the past, and unrelated to any commitment that the employers made or to any injury they caused, the governmental action implicates fundamental principles of fairness underlying the Takings Clause. Eastern cannot be forced to bear the expense of lifetime health benefits for miners based on its activities decades before those benefits were promised. Accordingly, in the specific circumstances of this case, we conclude that the Coal Act's application to Eastern effects an unconstitutional taking.[41]

The dissenters argued that the case should be decided on due process grounds. The principal dissent, by Justice Breyer, declared:

> [T]here is no need to torture the Takings Clause to fit this case. The question involved—the potential unfairness of retroactive liability—finds a natural home in the Due Process Clause, a Fifth Amendment neighbor. That Clause says that no person shall be "deprive[d] ... of life, liberty, or property, without due process of law." It safeguards citizens from arbitrary or irrational legislation. And the Due Process Clause can offer protection against legislation that is unfairly retroactive at least as readily as the Takings Clause might, for as courts have sometimes suggested, a law that is fundamentally unfair because of its retroactivity is a law which is basically arbitrary.[42]

With four justices in the plurality and four in dissent, the swing opinion in *Eastern Enterprises* was written by Justice Kennedy. He concurred with the plurality in the judgment that declarative relief should be granted, since the statute was unconstitutional, but dissented in part, on the grounds that a due process analysis and not a takings analysis was proper. His argument was grounded both in the fact that the Court's concern was about the legitimacy of the statute, as opposed to the availability of compensation for takings of cash, and the fact that the statute did not take a specific asset from the petitioner, but rather imposed upon it a general obligation to pay money.[43]

In the leading case of *Commonwealth Edison Co. v. United States*,[44] the Federal Circuit held that the mere imposition of an obligation to pay money did not give rise to a takings claim. It noted that a majority of justices in *Eastern Enterprises* had rejected the theory that an obligation to pay money constitutes a taking.[45] However, the Federal Circuit acknowledged, "It is … clear that a [specific] fund of money can be property protected under the Takings Clause."[46] Most recently, in *Brown v. Legal Foundation of Washington*,[47] the Supreme Court also affirmed that that the owner of a specific fund owns the interest generated by it.

Given the nature of Justice Kennedy's views in *Eastern Enterprises* and the Supreme Court's opinion in *Brown*, the question of whether the character of a regulation as severely retroactive augurs for a taking, at least where specific valuable assets are at issue, remains open.

"Targeting" as a New Characterization of Governmental Action

The notion that the "character of the governmental action" test should have augmented content has been made most directly by United States Court of Federal Claims Judge Eric Bruggink in *American Pelagic Fishing Co. v. United States*.[48] There, the plaintiff was a limited partnership that had invested nearly $40 million in a 369-foot freezer trawler, the *Atlantic Star*. The vessel was very large, since it could not otherwise economically deliver Atlantic mackerel (not a desirable fish to American consumers) to overseas markets. A vessel's size is not directly related to how many fish it could catch. The necessary federal fisheries permits were obtained, but a subsequent rider to an appropriations bill retroactively cancelled the permits and prospectively prohibited their re-issuance. The court found that there was a temporary taking of the *Atlantic Star* under the *Penn Central* ad hoc test for the period that ended when the vessel was sold to the plaintiffs' lenders. It subsequently awarded over $37 million in damages, representing the fair rental value for the temporary regulatory period.[49] The government's appeal is pending.[50]

The evidence summarized by Judge Bruggink strongly suggests that the legislation resulting in the revocation of the *Atlantic Star*'s fishing permits was enacted as a result of industry lobbying, based on concerns that it would harm the interests of smaller fishing vessels, particularly those based in the Northeast.

With respect to the distinct, investment-backed expectations test of *Penn Central*, the court noted that government agencies had expressly stated the need for larger vessels in the mackerel fishery and that satisfactory fishing permits had been obtained.

> [H]aving established a particular regulatory scheme, there are limits imposed by the Fifth Amendment to the actions Congress can take in regard to that regulatory scheme without compensating investors who have reasonably relied on the scheme. Plaintiff, when considering entry to the fisheries, could have reasonably anticipated a certain range of future governmental regulation, duly promulgated through the regulatory scheme Congress established. Plaintiff perhaps also could have reasonably foreseen legislation that would limit, in a way applicable to others similarly situated, the issuance of future permits. The targeted revocation of existing permits, however, and the targeted denial of future permits by Congress were not events any citizen in a constitutional republic could have reasonably expected. In short, at the time plaintiff made its investment in the *Atlantic Star,* its expectation of participating in the Atlantic mackerel fishery was reasonable.[51]

Likewise, under the *Penn Central* economic impact test, the plaintiff's losses were "severe." The plaintiff "spent nearly $40 million on the *Atlantic Star* specifically to equip it to participate in the Atlantic mackerel and herring fisheries. With the enactment of the riders, this investment was wiped out."[52]

"Character" as Retroactive Targeting in *American Pelagic*

The court began its analysis of the character of the government's action by noting that *Penn Central* had treated "character" in terms of physical appropriation.

> The plurality opinion in *Eastern Enterprises*, however, suggests that, in considering the character of a governmental action alleged to constitute a taking, at least two other factors are also relevant: (1) whether the action is retroactive in effect, and if so, the degree of retroactivity; and (2) whether the action is targeted at a particular individual. Both factors are present here.[53]

The court noted that the appropriations riders not only denied future fishing permits, but also voided present ones. "This revocation retroactively made the regulatory scheme established by the Magnuson Act unavailable to plaintiff. Plaintiff had complied with the scheme, but that compliance was retroactively rendered ineffective by Congress."[54]

The court continued:

> The disproportionate impact of the legislation is as severe as that at issue in *Eastern Enterprises*. In *Eastern Enterprises*, the plurality stressed the plaintiff's lack of responsibility for the "problem in the funding of retired coal miners' health benefits." [Citation omitted.] Here, there is no serious evidence that a problem in the Atlantic mackerel fishery even existed, and there is no evidence that plaintiff was uniquely responsible for any alleged problem. Without this evidence of responsibility, retroactively making the regulatory scheme unavailable to plaintiff has no support. This retroactivity favors finding a taking.[55]

The appropriations riders were aimed at the *Atlantic Star*, and its permits were the only ones revoked:

> The acts could not have achieved their objective any more fully if the *Atlantic Star* had been identified by

name in the text of the acts. *The character of the governmental action here, because that action, in both purpose and effect, was retroactive and targeted at plaintiff, supports the finding of a taking.* Because the other two parts of the *Penn Central* test are also satisfied, we find that defendant took plaintiff's property interest in the use of its vessel to fish for Atlantic mackerel … from the time the 1997 Appropriations Act was enacted until the time plaintiff sold its vessel.[56]

Another case pertaining to fishing permits, *Arctic King Fisheries, Inc. v. United States*,[57] illustrates that fishing licenses do not constitute "property" as such. It is the claimants' vessels and equipment that is the applicable property. Judge Allegra's discussion of "character of the regulation" distinguished the facts from the targeting aspect of *American Pelagic*. He noted that, in *Arctic King*, "the burden of the legislative change was spread across a wide sector of the pollack fishing industry and was not home solely by plaintiff or those situated similarly to it."[58] A similar rationale, he explained, was present in the Federal Circuit's *Maritrans* decision, which held that the post-Exxon Valdez requirement that oil tankers have double hulls did not constitute a taking. "The legislation applied uniformly across the oil transport industry, 'thereby spreading the burden imposed by the statute over the entire industry' and, therefore, did not rise to a taking of plaintiff's property."[59]

The Rise of Character as Fairness

The *Penn Central* ad hoc test, as the U.S. Supreme Court subsequently described it in *Palazzolo*, involves analysis of "a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action."[60] When dealing with an "all facts and circumstances" inquiry stressing "fairness," no taxonomy is obviously correct. Indeed, the California Supreme Court has devised a 13-factor totality of the circumstances test, comprising the three *Penn Central* factors plus ten others.[61]

What Justice O'Connor referred to in *Eastern Enterprises* as "fundamental principles of fairness underlying the Takings Clause"[62] also are fundamental principles of fairness with respect to substantive due process analysis.

"Character" as Worthiness

It is notable that, of the three *Penn Central* tests, only the first, "economic impact of the regulation on the claimant,"[63] directly pertains to the property taken, and, even then, does so only with reference to the property's value.[64] The second test, "investment-backed expectations,"[65] is borrowed from a seminal work by Professor Frank Michelman, who deemed the ownership interest of the "speculator" unworthy of full protection. "The zoned-out apartment house owner no longer has the … investment he depended on, whereas the nearby land speculator who is unable to show that he has yet formed any specific plans for his vacant land still has a package of possibilities …"[66]

As a matter of logic, the notion that one's property rights depends on one's expectations of them seems odd and is not a standard the law generally applies. As a matter of constitutional law as it pertains to property, the Court has been bereft of "any telling explanation of why this tantalizing notion of expectations is preferable to the words 'private property' (which are, after all, not mere gloss, but actual constitutional text)."[67]

Just as the "expectations" test examines the motivation and circumstances of the property owner, and not the property, the "character" test in an era of "fairness" would examine the motivation and circumstances of the regulator, and not merely the regulation's effect on the property.

In examining the fairness of a regulation, issues of applicability of means to ends play an important role. This relationship is at the heart of the "substantially advance legitimate state interests" test of *Agins v. City of Tiburon*.[68] Proportionality of means to ends plays an important role as well. In *Dolan v. City of Tigard*,[69] the Court demanded "individualized determinations" of "rough proportionality" between governmental exactions and the burdens imposed by proposed new development in the case of "adjudicative" decisions by agency staff. The Court shied away from making similar demands of "legislative" decisions made by elected representatives, although "[t]he distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference."[70]

In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,[71] a case reeking of unfairness in which the city placed new sets of burdens upon the owner seeking development approval as soon as the owner complied with the previous set, the Solicitor General's office, both on brief and in oral argument, stridently asserted that the Supreme Court should disclaim its *Agins* substantial advancement test. The Court rebuffed the challenge.[72]

"Fairness" seemingly requires us to travel farther down the path of fusion of takings and substantive due-process concepts.

It might be, as John Echeverria has suggested, that "reciprocity of advantage might usefully be deployed to give some content to the 'character' factor."[73] Certainly, the absence of reciprocity goes to the essence of Judge Bruggink's concern about "targeting" in *American Pelagic*,[74] as well as to *Armstrong*'s more general concern with burden sharing.[75] As Professor Richard Epstein

pointed out in his seminal work, reciprocity of advantage also is "implicit, in-kind compensation,"[76] and, to that extent, negates the need for explicit compensation. A meaningful examination of reciprocity would have to confront the criticism of then-Justice Rehnquist that it was given short shrift in *Penn Central* itself.[77]

Conclusion

In a regime of ad hoc regulatory takings determinations based on the totality of the circumstances and fairness, the "character of the governmental action" is as open to question as the nature of the property owner's "investment-backed expectations." Neither is a coherent substitute for a more rigorous judicial definition of "property," which is, after all, that which is taken and that which must be compensated for.[78] However, so long as the Supreme Court continues to look to the worthiness of intent, its inquiry is advanced by a symmetrical analysis in which features of regulations that might detract from fairness are taken into account together with concerns about property owners' motivations. The "character of the governmental action" test is a good vehicle for the accomplishment of this task. As the *Eastern Enterprises* and *American Pelagic* cases suggest, it might have already been launched upon that new career.

NOTES

1. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124, 98 S. Ct. 2646, 57 L. Ed. 2d 631, 11 Env't. Rep. Cas. (BNA) 1801, 8 Envtl. L. Rep. 20528 (1978).

2. *Id*.

3. *Id*., 438 U.S. at 130-31.

4. *Id*., 438 U.S. at 124.

5. *Id*.

6. *Id*. (citations omitted).

7. Joseph L. Sax, Takings and the Police Power, 74 Yale L.J. 36, 62 (1964). Sax subsequently abandoned the enterprise/arbitral distinction. See infra, n. 17.

8. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426, 102 S. Ct. 3164, 73 L. Ed. 2d 868, 8 Media L. Rep. (BNA) 1849 (1982).

9. *Id*., 458 U.S. at 432 n.9 (emphasis in original).

10. U.S. v. Causby, 328 U.S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206 (1946).

11. Hendler v. U.S., 952 F.2d 1364, 1376, 34 Env't. Rep. Cas. (BNA) 1441, 22 Envtl. L. Rep. 20646 (Fed. Cir. 1991) (government pollution monitoring wells were drilled and maintained on private land).

12. *Id*., 952 F.2d at 1377.

13. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798, 34 Env't. Rep. Cas. (BNA) 1897, 22 Envtl. L. Rep. 21104 (1992).

14. *Id*., 505 U.S. at 1015.

15. *Id*. at 1017.

16. *See* Eric R. Claeys, Takings, Regulations, and Natural Property Rights, 88 Cornell L.Rev. 1549, 1647-48 (2003).

17. In abandoning the enterprise/arbitral distinction, Professor Sax asserted that many enterprise actions are better understood as "exercise[s] of the police power in vindication of ... 'public rights'" for which compensation was not required. *See* Joseph L. Sax, Takings, Private Property and Public Rights, 81 Yale L.J. 149, 150-51 (1971).

18. Among the significant recent cases asserting that condemnation was predominantly for private, and not public, use are Southwestern Illinois Development Authority v. National City Environmental, L.L.C., 199 Ill. 2d 225, 263 Ill. Dec. 241, 768 N.E.2d 1 (2002), cert. denied, 537 U.S. 880, 123 S. Ct. 88, 154 L. Ed. 2d 135 (2002); and 99 Cents Only Stores v. Lancaster Redevelopment Agency, 237 F. Supp. 2d 1123 (C.D. Cal. 2001), dismissed, 60 Fed. Appx. 123 (9th Cir. 2003).

19. *See* Chevron USA, Inc. v. Lingle, 363 F.3d 846 (9th Cir. 2004) (finding that a Hawaii law proscribing the maximum rent that oil companies could collect from dealers who leased company-owned service stations would not benefit consumers as intended).

20. *See* Calder v. Bull, 3 U.S. 386, 388, 3 Dall. 386, 1 L. Ed. 648, 1798 WL 587 (1798) ("a law that takes property from *A*. and gives it to *B* … is against all reason and justice").

21. *See* Agins v. City of Tiburon, 447 U.S. 255, 260, 100 S. Ct. 2138, 65 L. Ed. 2d 106, 14 Env't. Rep. Cas. (BNA) 1555, 10 Envtl. L. Rep. 20361 (1980).

22. Maritrans Inc. v. U.S., 342 F.3d 1344, 56 Env't. Rep. Cas. (BNA) 2121, 2003 A.M.C. 2274 (Fed. Cir. 2003).

23. *Id*., 342 F.3d at 1356 (quoting Creppel v. U.S., 41 F.3d 627, 631, 39 Env't. Rep. Cas. (BNA) 2077 (Fed. Cir. 1994)).

24. First English Evangelical Lutheran Church of Glendale v. Los Angeles County, Cal., 482 U.S. 304, 315, 107 S. Ct. 2378, 96 L. Ed. 2d 250, 26 Env't. Rep. Cas. (BNA) 1001, 17 Envtl. L. Rep. 20787 (1987).

25. Eastern Enterprises v. Apfel, 524 U.S. 498, 545, 118 S. Ct. 2131, 141 L. Ed. 2d 451, 22 Employee Benefits Cas. (BNA) 1225 (1998) (Kennedy, J., concurring in the judgment and dissenting in part).

26. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416, 43 S. Ct. 158, 67 L. Ed. 322, 28 A.L.R. 1321 (1922).

27. Agins v. City of Tiburon, 447 U.S. 255, 260, 100 S. Ct. 2138, 65 L. Ed. 2d 106, 14 Env't. Rep. Cas. (BNA) 1555, 10 Envtl. L. Rep. 20361 (1980).

28. Armstrong v. United States, 364 U.S. 40, 80 S. Ct. 1563, 4 L. Ed. 2d 1554 (1960).

29. *Id*., 364 U.S. at 49.

30. *Penn Central*, 438 U.S. at 123.

31. Palazzolo v. Rhode Island, 533 U.S. 606, 121 S. Ct. 2448, 150 L. Ed. 2d 592, 52 Env't. Rep. Cas. (BNA) 1609, 32 Envtl. L. Rep. 20516 (2001).

32. *Id*., 533 U.S. at 633 (O'Connor, J., concurring) (citing *Penn Central*, 438 U.S. at 124) (brackets in original) (citations to cases quoted in *Penn Central* omitted).

33. Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 122 S. Ct. 1465, 152 L. Ed. 2d 517, 54 Env't. Rep. Cas. (BNA) 1129, 32 Envtl. L. Rep. 20627 (2002).

34. *Id*., 535 U.S. at 327 n.23 (quoting *Palazzolo*, 533 U.S. at 633 (O'Connor, J., concurring)).

35. *Id* at 326 and 327 n.23.

36. *Id*. at 321.

37. *Id*. at 330 (quoting *Lucas*, 505 U.S. at 1017). *See also* Cooley v. U.S., 324 F.3d 1297, 56 Env't. Rep. Cas. (BNA) 1262, 33 Envtl. L. Rep. 20161 (Fed. Cir. 2003) (vacating holding that a *Lucas* taking had occurred when 98.8% of the parcel's value was lost).

38. Oliver Wendell Holmes, Jr., The Common Law 8 (1881).

39. Eastern Enterprises v. Apfel, 524 U.S. 498, 118 S. Ct. 2131, 141 L. Ed. 2d 451, 22 Employee Benefits Cas. (BNA) 1225 (1998).

40. *Id*., 524 U.S. at 528-529.

41. *Id*. at 537.

42. *Id*. at 556-557 (Breyer, J., dissenting).

43. *Id*. at 540-546 (Kennedy, J., concurring in the judgment and dissenting in part).

44. Commonwealth Edison Co. v. U.S., 271 F.3d 1327, 32 Envtl. L. Rep. 20322 (Fed. Cir. 2001), cert. denied, 535 U.S. 1096, 122 S. Ct. 2293, 152 L. Ed. 2d 1051 (2002) (en banc).

45. *Id*., 271 F.3d at 1339.

46. *Id*. at 1338 (citing Phillips v. Washington Legal Foundation, 524 U.S. 156, 160, 118 S. Ct. 1925, 141 L. Ed. 2d 174 (1998) (law client funds in IOLTA accounts) and Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164-65, 101 S. Ct. 446, 66 L. Ed. 2d 358 (1980) (trustee's funds in court interpleader account)).

47. Brown v. Legal Foundation of Washington, 538 U.S. 216, 123 S. Ct. 1406, 155 L. Ed. 2d 376 (2003). *Brown* nevertheless concluded that there was no taking, because funds deposited in IOLTA accounts were limited to those that could not independently generate "net interest," and that, therefore, the law clients suffered no loss.

48. American Pelagic Fishing Co., L.P. v. U.S., 49 Fed. Cl. 36 (2001) (*American Pelagic I*) (liability).

49. American Pelagic Fishing Co., L.P. v. U.S., 55 Fed. Cl. 575 (2003) (*American Pelagic II*) (damages).

50. American Pelagic Fishing Co. v. United States, No. 03-5101 (Fed. Cir. 2003).

51. *American Pelagic I* at 49-50.

52. *Id*. at 50.

53. *Id.* (citing *Eastern Enterprises*, 524 U.S. at 532-37).

54. *Id*.

55. *Id*.

56. *Id*. at 51 (emphasis added).

57. Arctic King Fisheries, Inc. v. U.S., 59 Fed. Cl. 360 (2004).

58. *Id*. at 382.

59. *Id*. at 381 n.44 (quoting Maritrans Inc. v. U.S., 342 F.3d 1344, 1357, 56 Env't. Rep. Cas. (BNA) 2121, 2003 A.M.C. 2274 (Fed. Cir. 2003).

60. Palazzolo v. Rhode Island, 533 U.S. 606, 617, 121 S. Ct. 2448, 150 L. Ed. 2d 592, 52 Env't. Rep. Cas. (BNA) 1609, 32 Envtl. L. Rep. 20516 (2001).

61. Kavanau v. Santa Monica Rent Control Bd., 16 Cal. 4th 761, 66 Cal. Rptr. 2d 672, 941 P.2d 851, 860 (1997).

62. *Eastern Enterprises*, 524 U.S. 498, 537 (1998).

63. *Penn Central*, 438 U.S. at 124.

64. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413, 43 S. Ct. 158, 67 L. Ed. 322, 28 A.L.R. 1321 (1922) (noting that "[o]ne fact for consideration in determining such limits [of the police power] is the extent of the diminution [in value of the affected property]").

65. *Penn Central*, 438 U.S. at 124.

66. Frank I. Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L.Rev. 1165, 1234 (1967). See also Steven J. Eagle, The Rise and Rise of "Investment-Backed Expectations," 32 Urb. Law. 437, 437-42 (2000).

67. Richard Epstein, Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations, 45 Stan. L.Rev. 1369, 1370 (1993).

68. Agins v. City of Tiburon, 447 U.S. 255, 260, 100 S. Ct. 2138, 65 L. Ed. 2d 106, 14 Env't. Rep. Cas. (BNA) 1555, 10 Envtl. L. Rep. 20361 (1980).

69. Dolan v. City of Tigard, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304, 38 Env't. Rep. Cas. (BNA) 1769, 24 Envtl. L. Rep. 21083 (1994).

70. Parking Ass'n of Georgia, Inc. v. City of Atlanta, Ga., 515 U.S. 1116, 1118, 115 S. Ct. 2268, 132 L. Ed. 2d 273 (1995) (Thomas, J., dissenting from denial of certiorari).

71. City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 119 S. Ct. 1624, 143 L. Ed. 2d 882, 48 Env't. Rep. Cas. (BNA) 1513, 29 Envtl. L. Rep. 21133 (1999).

72. *Id.*, 526 U.S. at 704.

73. John D. Echeverria, The Once and Future *Penn Central* Test, 54 Land Use L. & Zoning Dig., June, 2002 at 19, 21.

74. *American Pelagic*, 49 Fed.Cl. 36 (2001) (*American Pelagic I*) (liability). See text associated with n. 51, supra.

75. Armstrong v. United States, 364 U.S. 40, 49, 80 S. Ct. 1563, 4 L. Ed. 2d 1554 (1960).

76. Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain 195-99 (1985).

77. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 139, 98 S. Ct. 2646, 57 L. Ed. 2d 631, 11 Env't. Rep. Cas. (BNA) 1801, 8 Envtl. L. Rep. 20528 (1978) (Rehnquist, J., dissenting). "Of the over one million buildings and structures in the city of New York, appellees have singled out 400 for designation as official landmarks." *Id.*

78. For an elaboration of this point, see Steven J. Eagle, The Development of Property Rights in America and the Property Rights Movement, 1 Geo. J. L. & Pub. Pol'y 77 (2002).

RECENT CASES

Nude Dancing Regulations Upheld by Seventh Circuit under *Renton*, *O'Brien* and *Alameda Books*, Even If Secondary Effects Studies Lack "Methodological Rigor"

The Seventh Circuit upheld two nude dancing regulations adopted by a Wisconsin town in G.M. Enterprises, Inc. v. Town of St. Joseph, Wis., 350 F.3d 631, 62 Fed. R. Evid. Serv. 1656 (7th Cir. 2003). One ordinance prohibited physical contact between dancers and patrons by imposing minimum distance requirements. The other ordinance prohibited nude performances at establishments licensed to sell alcohol. Relying on the Supreme Court's decisions in *Renton*, *O'Brien* and *Alameda Books*, the Seventh Circuit concluded that the ordinances were constitutional because the town had a reasonable basis for believing the regulations would reduce undesirable secondary effects. The court rejected a challenge based on alleged inadequacies in the various secondary effects studies relied upon by the town.

The Seventh Circuit began its analysis with the plurality decision in *Alameda Books*. It found that Justice Kennedy's concurrence was the controlling authority in *Alameda Books*, because it was the narrowest opinion joining in the Court's judgment. Quoting Justice Kennedy, the Seventh Circuit wrote that the rationale of an adult business ordinance "must be that it will suppress secondary effects—and not by suppressing speech." 350 F.3d at 638, quoting *Alameda Books*, 535 U.S. at 450 (Kennedy, J., concurring). The Seventh Circuit found that the town's two ordinances met this burden. The court stated, "Neither of the ordinances prohibit nude dancing; rather, they merely seek to minimize the factors that the Board believed would heighten the probability that adverse secondary effects would result from nude dancing . . ." 350 F.3d at 638. The court found that "[r]equiring that adult entertainment establishments maintain a minimal physical buffer between patrons and dancers does not reduce the availability of nude dancing entertainment." 350 F.3d at 638. It also found that alcohol prohibition is the "least restrictive means" for combating the secondary effects resulting from the "combination of adult entertainment and alcohol." 350 F.3d at 638. Additionally, the Seventh Circuit noted that dancers could avoid both ordinances by wearing the "de minimus clothing necessary to cover all 'specified anatomical parts.'" 350 F.3d at 648. "Thus, as the ordinances will leave the availability of nude dance entertainment substantially the same . . . the Town has demonstrated that its goal is to minimize secondary effects, rather than the speech itself." 350 F.3d at 638.

Next, the Seventh Circuit applied intermediate scrutiny to the ordinances, under the *Renton* and *O'Brien* tests. The court noted that it was unclear exactly which of the two Supreme Court precedents was controlling, because the ordinances at issue, which regulated "the manner in which patrons view nude dancing; specifically, the patron's physical proximity to the nude dancer and the patron's access to alcoholic beverages," were neither zoning regulations (examined under *Renton*), nor public nudity regulations (examined under *O'Brien*). 350 F.3d at 638. The Seventh Circuit determined that "Because this case concerns only the 'substantial government interest' prong that is found in both the *O'Brien* and *Renton* tests, we need not decide which test of intermediate scrutiny provides the correct analytical framework for these ordinances . . . Indeed, this Court has held that the constitutional standard for 'evaluating adult entertainment regulations, be they zoning ordinances or public indecency statutes, are virtually indistinguishable.'" 350 F.3d at 638, quoting Ben's Bar, Inc. v. Village of Somerset, 316 F.3d 702, 714 (7th Cir. 2003).

The Seventh Circuit then determined that the plaintiff's evidence challenging the secondary effects studies relied upon by the town was insufficient to survive a motion for summary judgment:

> Plaintiff submitted some evidence that might arguably undermine the Town's inference of the correlation of adult entertainment and adverse secondary effects, including a study that questions the methodology employed in the numerous studies relied upon by the Board; evidence of an increase of property values near the Club; and evidence that the majority of police calls in regards to the club originated during periods of time when no semi-nude dancing occurred. Although this evidence shows that the Board might have reached a different and equally reasonable conclusion regarding the relationship between adverse secondary effects and sexually oriented businesses, it is not sufficient to vitiate the result reached in the Board's legislative process.

350 F.3d at 639.

The court described its role under Supreme Court precedents as follows: "*Alameda Books* does not require a

court to re-weigh the evidence considered by a legislative body, nor does it empower a court to substitute its judgment in regards to whether a regulation will best serve a community, so long as the regulatory body has satisfied the *Renton* requirement that it consider evidence 'reasonably believed to be relevant to the problem' addressed." 350 F.3d at 639-40, quoting City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 51-52, 106 S. Ct. 925, 89 L. Ed. 2d 29, 12 Media L. Rep. (BNA) 1721 (1986).

Finally, the Seventh Circuit vehemently rejected the argument that the secondary effects studies relied upon by the town must be of "sufficient methodological rigor" to be admissible under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469, 27 U.S.P.Q.2d (BNA) 1200, Prod. Liab. Rep. (CCH) P 13494, 37 Fed. R. Evid. Serv. 1, 23 Envtl. L. Rep. 20979 (1993):

> This argument is completely unfounded. The plurality in *Alameda Books* bluntly rejected Justice Souter's suggestion that the municipality be required to present empirical data in support of its contention: "such a requirement would go too far in undermining our settled position that municipalities must be given a 'reasonable opportunity to experiment with solutions' to address the secondary effects of protected speech." *Alameda Books*, 535 U.S. at 439, 122 S.Ct. 1728. Further, the purpose of the evidentiary requirement of *Alameda Books* is to require municipalities to demonstrate reliance on some evidence in reaching a reasonable conclusion about the secondary effects. The municipality need not "prove the efficacy of its rationale for reducing secondary effects prior to implementation." *Ben's Bar*, 316 F.3d at 720. A requirement of *Daubert*-quality evidence would impose an unreasonable burden on the legislative process, and further would be logical only if *Alameda Books* required a regulating body to prove that its regulation would—undeniably—reduce adverse secondary effects. *Alameda Books* clearly did not impose such a requirement.

350 F.3d at 640.

Fifth Circuit Applies Intermediate Scrutiny to Houston SOB Amendments under *Alameda Books* and *Renton*

In an action brought by 105 individuals and 88 adult businesses, the Fifth Circuit Court of Appeals upheld various aspects of amendments adopted by the city of Houston in 1997 relating to its ordinances governing sexually oriented businesses. N.W. Enterprises Inc. v. City of Houston, 352 F.3d 162 (5th Cir. 2003). Most significantly, the court held that the entire amendment ordinance was a content-neutral enactment that should be subjected to intermediate scrutiny, not strict scrutiny, under the Supreme Court's *Alameda Books* decision. "According to the [*Alameda Books*] majority, intermediate scrutiny applies to SOB regulations whenever the governmental entity was predominantly concerned with regulating secondary effects of adult speech . . . [W]hile Justice Kennedy [in his concurring opinion] takes issue with the plurality's use of the content-based/content-neutral dichotomy in these cases, he, too, would apply the intermediate scrutiny standard to regulate secondary effects of adult speech so long as a municipal regulation does not ban the protected speech." 352 F.3d at 173-74.

The Fifth Circuit stated, "The standard of constitutional scrutiny, after *Alameda Books*, and taking into account Justice Kennedy's concurrence, is simply whether [the ordinance in question] addressed secondary effects of adult speech, as demonstrated by the legislative record submitted by the City." 352 F.3d at 174. The court further noted that questions regarding the efficacy of proposed regulations are not to be considered until after the level of scrutiny is established. "Disputes over the effectiveness of the proposed regulations are properly reserved for the final prong of the *Renton* analysis." 352 F.3d at 175.

In this case, the Fifth Circuit found that the city council made "express findings of adverse secondary effects related to SOBs and the City's interest in ameliorating those effects," and incorporated those findings into the preamble of the amendment ordinance. 352 F.3d at 175. The court concluded that "[u]nder either the plurality opinion or Justice Kennedy's concurrence in *Alameda Books*, intermediate scrutiny applies." 352 F.3d at 176. Furthermore, the court held that intermediate scrutiny was the standard for the entire ordinance. "Because the constitutional standard of review depends only upon the City's predominate legislative concern, not its pre-enactment proof that the ordinance would work, there is no reason to parse each provision of the ordinance separately to determine the standard of review." 352 F.3d at 176.

Having established the constitutional standard of review, the Fifth Circuit then examined various challenged provisions under *Alameda Books* and *Renton*. Of particular concern was a provision which increased the minimum permissible distance between an SOB and a protected land use from 750 feet to 1,500 feet. The Fifth Circuit stated, "Viewed from the perspective of *Alameda Books*, the City of Houston has proven that its strengthened distance regulation furthers substantial government interests. The challengers did not demonstrate that the evidence fails to support the City's rationale or that the City factual findings are wrong." 352 F.3d at 180. The Fifth Circuit found that the city had fulfilled the "substantial government interest" prong of *Renton* by presenting evidence that adverse secondary effects of SOBs

remained a problem and that increasing the distance restriction would restrain those effects. However, the Fifth Circuit did order further proceedings on remand to clarify whether the increased distance would deprive SOBs of reasonable avenues of communication.

The Fifth Circuit upheld various licensing provisions in the ordinance. The ordinance required each manager and entertainer of an SOB to obtain a permit. The Fifth Circuit upheld a 10-day time period for processing permit applications, finding that it was justified by the need to perform background checks. The court also upheld a provision that if the city failed to make a permit decision within the 10-day period, it would be required to immediately issue a temporary permit upon written request of the applicant. The court found that the requirement of a written request did not place an undue burden on license applicants. The court upheld a provision requiring permit applicants to disclose their phone numbers and home addresses on their applications. The court found that this information was "highly relevant to the ability of law enforcement officers to investigate criminal activity in SOBs." 352 F.3d at 195. The court also noted that the confidentiality of this information would be protected under the Texas Public Information Act.

The Fifth Circuit also upheld a provision requiring each manager or entertainer to conspicuously display a personal identification card while working. The court stated, "Law enforcement offices must be able to determine from a distance quickly, and without being intrusive, whether both entertainers and managers of clubs are engaging in or permitting illegal activity. The conspicuous display requirement is narrowly tailored to serve this important government interest." 352 F.3d at 196-97.

On a nonconstitutional matter, the Fifth Circuit held that the Houston ordinance was not a zoning regulation under Texas precedents. The city council was therefore not required to comply with zoning enactment requirements.

Denial of Permit for Wireless Antenna Violates TCA, But No Attorney Fees Available

The Seventh Circuit held that a decision by a city planning commission to deny a permit for a wireless antenna was not supported by substantial evidence, and therefore was in violation of the Telecommunications Act. PrimeCo Personal Communications, Ltd. Partnership v. City of Mequon, 352 F.3d 1147 (7th Cir. 2003). The court stated, "It is doubtful that the planning commission's decision can be said to be supported by any evidence at all; certainly it cannot be said to be supported by substantial evidence." 352 F.3d at 1151.

The crucial problem identified by the Seventh Circuit was that "the record contains insufficient evidence to have enabled the commission to make a responsible decision." 352 F.3d at 1151. The court said, "[N]o evidence or reasoned analysis can be found in the transcript of the commission's meetings, and except for the commission's letter turning down Verizon's application on the ground that alternative locations for its antenna were available (which is not denied—the issue is how inferior they are), that transcript is the only record of the basis for the commission's decision." 352 F.3d at 1150.

Noting that the city had not requested that the case be remanded, the Seventh Circuit held that the federal district court acted properly when it ordered that the permit be issued to Verizon without further evidentiary proceedings.

However, the Seventh Circuit held that Verizon was not entitled to attorneys' fees under 42 U.S.C.A. §§1983 and 1988. Judge Posner, writing for the court, expressed his views in largely economic terms:

> The Telecommunications Act, in contrast to the federal civil rights statutes, creates rights in telecommunications enterprises, which are usually substantial corporations, such as Verizon. They have the wherewithal to finance their own litigation without the boost given by fee-shifting statutes, and it would make no sense to carve an exception for cases in which they find themselves opposed not by other large corporations but by small towns such as Mequon, population 21,000, with a planning commission some of whose members double as aldermen.

352 F.3d at 1152.

Ninth Circuit Upholds Oregon Sign Regulations

In Lombardo v. Warner, 353 F.3d 774 (9th Cir. 2003), the Ninth Circuit upheld sign regulations contained in the Oregon Motorist Information Act (OMIA). The regulations generally prohibited outdoor advertising signs, but a property owner could display an "on-premises" sign without a permit or variance, regardless of the commercial or non-commercial nature of the sign, if the sign "identifie[d] activities conducted on the premises." The regulations also contained an exception for temporary signs not larger than 12 square feet. A party seeking a variance from the temporary sign restrictions could get one "for good cause" from the Director of Transportation, who was prohibited from considering the content of the sign in deciding whether to allow a variance.

The regulations were challenged by a property owner who wished to display a 32-square-foot sign on his residence reading "For Peace in the Gulf." The landowner argued that the OMIA violated the First Amendment because it permitted commercial establishments to display billboards advertising activities conducted on their premises, but prohibited him from freely expressing his political beliefs outside his own home. The Ninth Circuit rejected this argument surprisingly quickly, based

on its interpretation of the Supreme Court's *Metromedia* decision, and on its own decisions in Clear Channel Outdoor Inc., a Delaware Corp. v. City of Los Angeles, 340 F.3d 810 (9th Cir. 2003); and Outdoor Systems, Inc. v. City of Mesa, 997 F.2d 604 (9th Cir. 1993). The Ninth Circuit stated, "The OMIA defines on premises signs with respect to location alone, not content. . . . The key consideration is whether the sign relates to activity conducted on the premises. Although commercial billboards may prevail under the OMIA's legislative scheme, neutrality is nonetheless maintained because the regulation allows non-commercial messages on either onsite or offsite signs. . . . We follow *Clear Channel* and hold that the OMIA is a content neutral time, place, and manner restriction." 353 F.3d at 778.

The Ninth Circuit also rejected an argument that the OMIA violated the Constitution by giving unbridled discretion to the Director of Transportation regarding permit decisions. The court gave two reasons for its holding: "First, the OMIA expressly precludes content-based decisions by prohibiting officials from 'consider[ing] the content of the signs in deciding whether to allow a variance.' . . . Second, as in other cases considering this issue, 'judicial precedent' provides adequate guidelines to state officials interpreting billboard codes." 353 F.3d at 778.

One judge filed a dissenting opinion in which he stated, "The OMIA allows commercial messages where noncommercial speech is not permitted, draws content-based distinctions among noncommercial billboards and includes an essentially standardless variance procedure." 353 F.3d at 779 (Fletcher, C.J., dissenting).

Lack of Ripeness Defeats Takings Claims in Ninth Circuit Mobile Home Rent Control Cases

Applying the *Williamson County* ripeness rules, the Ninth Circuit rejected takings claims against local mobile home park rent control ordinances in two cases from California. In Hacienda Valley Mobile Estates v. City of Morgan Hill, 353 F.3d 651 (9th Cir. 2003), a park owner challenged an ordinance that prohibited it from raising the rent on a mobile home "pad" when a home was sold. The Ninth Circuit held that the claim was not ripe because the park owner had failed to pursue California state remedies, nor had it proven that recourse to state remedies would be futile. Similarly, in Carson Harbor Village, Ltd. v. City of Carson, 353 F.3d 824 (9th Cir. 2004), the Ninth Circuit held that *Williamson County* defeated a park owner's challenge to a local mobile home park rent control law. The court held that the park owner had failed to seek state remedies for the alleged taking, and had failed to show that California's procedures for seeking just compensation were inadequate. "We acknowledge that Carson Harbor raises serious concerns about the adequacy of the . . . compensation procedures . . . Nevertheless, the alleged inadequacy of the procedures remains highly speculative. . . . At best, Carson Harbor has merely alleged that the new compensation procedures are 'untested or uncertain.' . . . Under our precedents, that is not enough to qualify for an exemption from *Williamson*'s second ripeness requirement." 353 F.3d at 830.

CAE PRACTICE TEST 1 READING - Part 1 You are going to read three extracts which are all concerned in some way with health issues. For Questions 1-6, choose the answer (A, B, C or D) which you think fits best according to the text. Emotional wellbeing in the workplace Stress is the result of a struggle or battle that you donâ€™t have the resources to cope with. Some stress at work is inevitable - itâ€™s an inherent part of getting things done, of moving projects on.Â A The government started a new health programme in 1991. B New diseases hit the country in 1991. C MSF advised the new government on health issues in 1991. 5. They build a new ring-road round the city every two years. A new ring-road _. 6. I didn't realise that someone recorded our conversation. I didn't realise that our conversation _.Â 10. She _ here for three years. A has lived B lived C have lived. 5. Put the verbs in brackets in the Past Simple and then match the beginning of the sentence with the suitable ending (a-h). 1. John _ (be) tired, so a. he _ (go) to the dentist. 2. Alex _____ (need) some money, so b. he _ (call) the police. 3. Jane _ (not/like) the film, so c. I _ (take) an aspirin. 4. Sophia and Mary _____ (miss) the bus, so d. she _ (shout) at them. IELTS Reading Practice Test 3. Section 2. An examination of the functioning of the senses in cetaceans, the group of mammals comprising whales, dolphins and porpoises. Some of the senses that we and other terrestrial mammals take for granted are either reduced or absent in cetaceans or fail to function well in water. For example, it appears from their brain structure that toothed species are unable to smell. Baleen species, on the other hand, appear to have some related brain structures but it is not known whether these are functional.Â Choose NO MORE THAN THREE WORDS from Reading Passage 2 for each answer. Write your answers in boxes 15â€“21 on your answer sheet. SENSE. Test3_CAE - Free download as PDF File (.pdf), Text File (.txt) or read online for free. cae.Â Part 4 For =Jr questions 25-30, complete the second sentence so that it has a simil ar meaning to the first sentence, using the ~1 e word given. Do not change the word given . You must use between three and six words, including the w. ord given .Â H is central character is a l 3-year-old girl called Briony, already a maker of stories and plays and so already a writer of fict ions that have on ly their own kind of truth and are dependent on fantasies which readers are invited to share. with whatever measure of scepticism o r credulity they can muster. Create new account. Request new password. Forgot Password? Register.Â Take Test. VIA Strength Survey for Children. Measures 24 Character Strengths for Children. N/a. N/a.Â Meaning In Life Questionnaire. Measures Meaningfulness. N/A.