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A REIGN OF ERROR: PROPERTY RIGHTS AND STARE DECISIS

MICHAEL ALLAN WOLF*

ABSTRACT

Mistakes matter in law, even the smallest ones. What would happen if a small but substantively meaningful typographical error appeared in the earliest published version of a U.S. Supreme Court opinion and remained uncorrected for several decades in versions of the decision published by the two leading commercial companies and in several online databases? And what would happen if judges, legal commentators, and practitioners wrote opinions, articles, and other legal materials that incorporated and built on that mistake? In answering these questions, this Article traces the widespread, exponential replication of an error (first appearing in 1928) in numerous subsequent cases and other law and law-related sources; explores why the phenomenon of reproducing mistakes matters in a legal system whose lifeblood is words and that heavily relies on the principle of stare decisis; and argues that one legacy of this cautionary tale of an unforced error can be a functional understanding of how the Due Process, Equal Protection, and Takings Clauses can and should protect private property rights in different yet related ways.

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The number of people who read Supreme Court opinions carefully and the varied expertise of those readers are enormous. Every word, every fact, every characterization of the facts, and every discussion of background legal doctrine is subject to close scrutiny. Errors will be discovered and reported, if not immediately, then eventually, perhaps nearly a hundred years later.

Richard J. Lazarus¹

I think the only issue is . . . if there was a property right, was it taken. This Court has said in the *State of Washington v. Roberge* that the

1. Richard J. Lazarus, *The (Non)Finality of Supreme Court Opinions*, 128 HARV. L. REV. 540, 561 (2014).

right to devote one's land to a legitimate use is property within the protection of the Constitution.

Supreme Court oral argument in *PFZ Properties, Inc. v. Rodriguez*²

INTRODUCTION

What would happen if a typographical error, very small but substantively meaningful, appeared in the earliest published version of a U.S. Supreme Court opinion and remained uncorrected for several decades in case reports published by the two leading commercial companies and in several online databases? And what would happen if judges, commentators, and practitioners wrote opinions, articles, and other legal materials that incorporated that mistake? These are not hypothetical questions spun by a clever law professor; they are inquiries based on real facts.

On February 13, 2019, U.S. Court of Appeals Judge Gerald Tjoflat closed the book on a property rights dispute originating in Hillcrest Property's application, in December, 2006, to develop an "83,000 square-foot retail shopping center and three commercial spaces" in Pasco County, Florida.³ Five years before, the county and the Florida Department of Transportation promised to compensate Hillcrest \$4.7 million for a 100-foot strip needed for future road development, and Hillcrest agreed to drop its Fifth Amendment takings claim.⁴ However, Hillcrest kept alive an as-applied substantive due process claim, for which it sought nine years of attorney's fees.⁵

Judge Tjoflat displayed scant sympathy for Hillcrest's attempt to erase litigation costs and for its legal theory, including counsel's misplaced reliance on one of the Supreme Court's earliest zoning decisions:

Washington ex rel. Seattle Title & Trust Co. v. Roberge . . . another decision of the Supreme Court that Hillcrest flags, is yet another police-power case. . . .

Hillcrest cites a single line within the opinion: "The right of the trustee to devote its land to any legitimate use is property within the protection of the Constitution." But that language has no significance

2. Transcript of Oral Argument at 12, *PFZ Props., Inc. v. Rodriguez*, 503 U.S. 257 (1992) (No. 91-122) (*italics missing in original*) [hereinafter *PFZ Oral Argument Transcript*].

3. *Hillcrest Prop., L.L.P. v. Pasco Cnty.*, 915 F.3d 1292, 1295 (11th Cir. 2019).

4. *See id.* at 1296–97.

5. *See id.* at 1297. The trial judge awarded \$1 in damages for this as-applied claim, leaving open the issue of attorney's fees and costs. *Hillcrest Prop., L.L.C. v. Pasco Cnty.*, 2017 U.S. Dist. LEXIS 160832, at *3–4 (M.D. Fla. 2017), *rev'd*, 915 F.3d 1292.

here when the entire paragraph is devoted to discussing whether the enactment at issue accords with the police power.⁶

The effort to recoup attorneys' fees and costs came up short: "[R]egardless of how arbitrarily or irrationally the County has acted with respect to Hillcrest, Hillcrest has no substantive-due-process claim."⁷

Hillcrest's counsel, like counsel in dozens of state and federal cases, quoted language from the 1928 decision in *Washington ex rel. Seattle Title Trust Co. v. Roberge*⁸ in support of their aggressive defense of property rights against unsympathetic land use regulators. Unfortunately, these briefs and opinions include a very small, but meaningful, mistake, because Justice Butler's opinion for a unanimous Court in *Roberge in actuality* reads, "The right of the trustee to devote its land to any legitimate use is *properly* [not 'property'] within the protection of the Constitution."⁹

This Article traces the widespread, exponential replication of an error that first appeared in the earliest released version of *Roberge*. The Article shows how the error reappears in numerous cases and other sources well into the twenty-first century, explores why the phenomenon of reproducing mistakes matters in a legal system whose lifeblood is words and that heavily relies on stare decisis, and ponders lessons gleaned from this very real, cautionary tale.

For more than ninety years, litigators; authors and editors of law review articles, books, treatises, encyclopedias, case reporter headings and summaries, and statutory compilations; and, most importantly, trial and appellate judges, have cited, relied upon, and reproduced an error that first appeared when the Court released the text of Justice Butler's ruling as a slip opinion to the public generally and to West Publishing Company (compiler of the *Supreme Court Reporter*) and Lawyers Co-operative Publishing Company (compiler of the *United States Supreme Court Reports, Lawyers' Edition*) specifically.¹⁰ The error was corrected in the Preliminary Print and

6. *Hillcrest*, 915 F.3d at 1300 n.11 (citations omitted) (misquoting *Wash. ex rel. Seattle Title & Tr. Co. v. Roberge*, 278 U.S. 116, 121 (1928)). Hillcrest's counsel actually quoted the correct word from *Roberge*, although in an earlier brief he had included the incorrect word. *Compare* Answer Brief of Plaintiff-Appellee, *Hillcrest Property, L.L.P.* at 34, *Hillcrest Prop., L.L.P. v. Pasco Cnty.*, 915 F.3d 1292 (11th Cir. 2019) (No. 17-14789), 2018 WL 1007904, at *34 ("is properly"), with Answer Brief of Plaintiff-Appellee at 33, *Hillcrest Prop., L.L.C. v. Pasco Cnty.*, 754 F.3d 1279 (11th Cir. 2014) (No. 13-12383), 2013 WL 4648213, at *33 ("is property").

7. *Hillcrest*, 915 F.3d at 1302.

8. 278 U.S. 116 (1928).

9. *Id.* at 121 (emphasis added).

10. *Roberge*, 49 S. Ct. 50, 52 ("The right of the trustee to devote its land to any legitimate use is property within the protection of the Constitution."). Headnote 3, *id.* at 50, only compounds the error: "Right of person to devote his land to any legitimate use is 'property,' within the protection of Const. Amend. 14, providing property shall not be taken without due process of law." See also *Roberge*, 73 L. Ed. 210, 213 ("The right of the trustee to devote its land to any legitimate use is property within the

in permanent Volume 278 of the *United States Reports*.¹¹ Nevertheless, even today, when judges, lawyers, students, and other consumers of Supreme Court opinions rely on Thomson Reuters Westlaw, they are misled by the text of the *Roberge* opinion and by West Headnote 2, which incorrectly reads: “Right of owner to devote his land to any legitimate use is ‘property,’ within due process clause.”¹² The mistake also appears in versions of the case posted on Cornell University Law School’s Legal Information Institute site,¹³ and on the Justia,¹⁴ Wikisource,¹⁵ and Fastcase sites.¹⁶

Despite the correct language in the official reporter and in the LexisNexis version (though not in the LexisNexis headnotes¹⁷), attorneys in dozens of briefs filed between 1930 and 2020 (including one by future FBI Director James B. Comey¹⁸), many seeking to persuade courts to extend the Constitution’s already ample protections of property rights one large step further, have invoked and sought support from the *Roberge* language featuring the improper *t*. The ultimate outcomes of most cases were, thankfully, unaffected by this misquotation. In other instances, courts, relying at least in part on this still-uncorrected error, have rendered substantive opinions that expand property rights protection at the expense of sensible land use regulations. And attorneys continue to offer the incorrect language in pursuing due process and takings challenges against longstanding land use regulatory practices.

protection of the Constitution.”). Headnote 3, *id.* at 201, echoes the mistake: “The right to devote real estate to any legitimate use is property within the protection of the Constitution.”

11. See *infra* notes 107–108 and accompanying text.

12. *Roberge*, 49 S. Ct. at 50.

13. See *State of Washington ex rel. Seattle Title Trust Co. v. Roberge*, Superintendent of Building of City of Seattle, LEGAL INFO. INST., <https://www.law.cornell.edu/supremecourt/text/278/116> [<https://perma.cc/PY4C-F83E>].

14. *Washington ex Rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928), JUSTIA, <https://supreme.justia.com/cases/federal/us/278/116/> [<https://perma.cc/YVX5-QMGF>].

15. *Washington ex rel. Seattle Title Trust Co. v. Roberge*/Opinion of the Court, WIKISOURCE, https://en.wikisource.org/wiki/Washington_ex_rel._Seattle_Title_Trust_Company_v._Roberge/Opinion_of_the_Court [<https://perma.cc/V69U-47SY>].

16. *State of Washington ex rel. Seattle Title Trust Co. v. Roberge*, Superintendent of Building of City of Seattle, HEIN ONLINE FASTCASE, https://heinonline-org.lp.hscl.ufl.edu/HOL/CaseLaw?1=1&native_id=356350&cop=&collection=journals# (last visited Jan. 22, 2021). The Bloomberg Law and Google Scholar versions of *Roberge* do not include the “property” mistake. See *Washington ex rel. Seattle Title Tr. Co. v. Roberge*, 278 U.S. 116, 121, BLOOMBERG L., <https://www.bloomberglaw.com/document/X5BU1V>; see also *Washington ex rel. Seattle Title Tr. Co. v. Roberge*, 278 U.S. 116, 121, GOOGLE SCHOLAR, https://scholar.google.com/scholar_case?case=5253904659925356181&q=seattle+trust+v+roberge&hl=en&as_sdt=40003 [<https://perma.cc/B6BC-Y45K>].

17. *Washington ex rel. Seattle Title Trust Co. v. Roberge* 278 U.S. 116, Headnote 3, (1928) (LexisNexis). The LexisNexis version of *Roberge* is identical with the (incorrect) *Lawyers’ Edition* version. See *supra* note 10.

18. See *infra* note 238.

This Article is divided into four substantive sections followed by closing thoughts. Part I reviews the chief constitutional provisions that protect private property owners from arbitrary, unreasonable, and confiscatory regulations of the use of land, and shows how the mistaken reading of *Roberge* gives false hope to counsel, judges, and commentators who believe those protections are not robust enough. Part II provides the background of the *Roberge* litigation culminating in the Court's slip opinion, explains how and when the mistake was officially corrected, and highlights the earliest sources that replicated the error. Part III traces two lines of authorities developing over several decades: those quoting the correct language and those duplicating the mistake. Part IV explores why this mistake matters, arguing that the legacy of this simple error can be a proper understanding of how the Due Process, Equal Protection, and Takings Clauses comprehensively protect private property rights in different though related ways. In the wider context, the tale of this error exposes the fragility of a system of constitutional lawmaking based on the principle of *stare decisis*. The Conclusion reviews lessons learned from this curious, if not unique, dramedy of errors. In a world in which lightning-quick Wikipedia and Google searches too often substitute for careful research, the tale of the improper *t* reminds us of the importance of taking the time and effort to check the original source, especially when what is seen on the page or screen looks too good to be true.

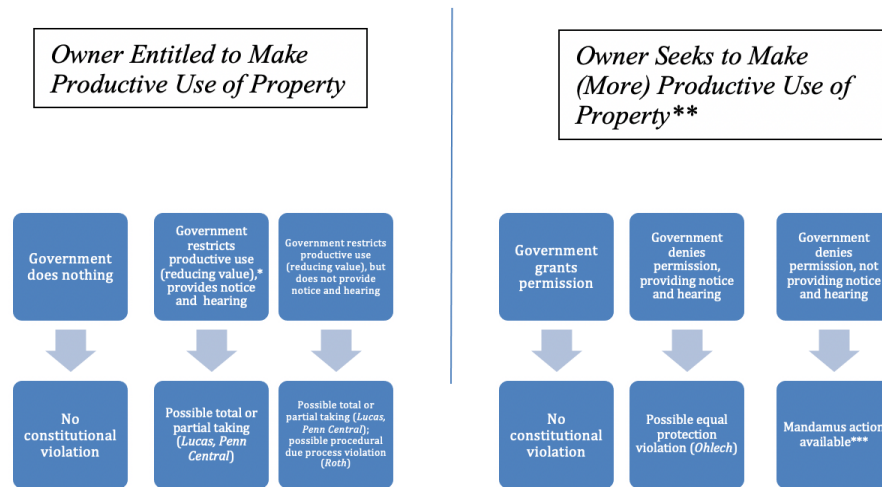
I. CONSTITUTIONAL PROTECTIONS FOR LANDOWNERS: COMPREHENSIVE OR DEFICIENT?

As with all government regulation affecting private property,¹⁹ in the context of zoning and other forms of state and local land use regulation there are two kinds of owners who claim that government officials have violated their constitutional rights: (1) those owners entitled to make productive use of property who want to be left alone, and (2) those owners who want to make more intensive and lucrative use of their property but first need to secure government permission. As Figure 1 below illustrates, landowners in both categories are not without recourse should they be subjected to arbitrary and confiscatory treatment. There is no “gap in coverage,” and, as an added bonus, under §§ 1983 and 1988,²⁰ should the court hold a local government responsible for constitutional violations, damages and attorneys' fees are available. Nevertheless, private property rights advocates believe that the courts still have not gone far enough to protect landowners.

19. It is hard to think of any form of regulation that has no impact on property broadly defined to include intellectual property, contract rights, choses in action, securities, and more.

20. 42 U.S.C. §§ 1983, 1988(b).

Figure 1



Four Clauses of the Constitution provide the strongest protections for real property owners: the Takings Clause of the Fifth Amendment, the Due Process Clauses of the Fifth and Fourteenth Amendments, and the Equal Protection Clause of the Fourteenth Amendment. Although on its face (and based on its pre-framing history and original understanding) the Takings Clause appears to apply only to the affirmative exercise of eminent domain,²¹ for several decades the Supreme Court has also applied

* For example, the local government downzones the property from commercial to residential use.

** For example, the owner seeks a rezoning from residential to commercial use, or a variance, or a special use permit, or permission to develop a subdivision.

***See, e.g., *Mendota Golf, L.L.P. v. City of Mendota Heights*, 708 N.W.2d 162, 176-80 (Minn. 2006) (discussing mandamus in the zoning context).

NOTE: The following situations would also implicate the Takings Clause: (1) the government condemns the property using its power of eminent domain (e.g., *Kelo v. New London*, 545 U.S. 469 (2005)), (2) the government compels a permanent physical occupation of the property (e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)), (3) the government conditions development approval upon the exaction of a real or personal property interest from the owner (e.g., *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013)).

21. The best treatments remain William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995), and William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694 (1985).

the requirement that private property can only be taken for public use upon the payment of just compensation to instances of compelled physical occupation by the government²² and to regulations that are the functional equivalent of a taking by eminent domain in part because they reduce or even eliminate the value of the affected property.²³ In addition, when the government exacts from a landowner real or personal property (including monetary payments) as a condition for receiving development permission, the Court has imposed protections to ensure that the condition is not unconstitutional.²⁴

Even though the Supreme Court has significantly broadened the reach of the Takings Clause far beyond eminent domain, private property rights advocates are nonetheless frustrated by several aspects of takings jurisprudence including ripeness requirements for federal court claims;²⁵ the Court's consideration of "the parcel as a whole" when determining the extent of the diminution in value of property negatively affected by regulation;²⁶ and the Court's use of a multi-factor test that often favors the government when regulations allegedly effect partial regulatory takings.²⁷

The Due Process Clauses have two components—procedural (as suggested by their very words) and substantive (oxymoronic to some).²⁸

22. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) ("We conclude that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve.").

23. See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005) ("Although our regulatory takings jurisprudence cannot be characterized as unified, these three inquiries . . . share a common touchstone. Each aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain.").

24. See *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 619 (2013) ("[T]he government's demand for property from a land-use permit applicant must satisfy the requirements of *Nollan* and *Dolan* even when the government denies the permit and even when its demand is for money.").

25. See *Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985) ("[A] claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue."), *overruled in part by* *Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019). *But see* *Knick*, 139 S. Ct. at 2167 ("We now conclude that the state-litigation requirement imposes an unjustifiable burden on takings plaintiffs, conflicts with the rest of our takings jurisprudence, and must be overruled.").

26. See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 130–31 (1978) ("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 . . ."); see also *Murr v. Wisconsin*, 137 S. Ct. 1933, 1949 (2017) ("Considering petitioners' property as a whole, the state court was correct to conclude that petitioners cannot establish a compensable taking in these circumstances.").

27. See *Penn Cent.*, 438 U.S. at 124 ("In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance.").

28. See James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 315 (1999) (footnotes omitted) ("It has become an article of faith in some quarters that due process pertains entirely to matters of procedure. Thus, John Hart Ely maintained: 'We apparently need periodic reminding that "substantive due process" is a

Under procedural due process, if the government deprives a landowner of property (or, in other contexts, life or liberty), the owner is entitled to sufficient notice and a fair hearing, but the Court has stated that post-deprivation procedures will often be sufficient.²⁹ Substantive due process is more complicated and potentially much more valuable to landowners who believe that the government has confiscated their property or treated them unfairly. Landowners who have vested property rights can prevail if they can carry the heavy burden of demonstrating that there is not an adequate connection between the government regulation of land and the legitimate goals of the police power, which are usually listed as the protection of public health, safety, morals, and general welfare.³⁰ The standard used in most federal cases is that the government activities that give rise to the landowner's legal challenge must "shock the conscience."³¹

Property rights advocates would like to see major modifications in substantive due process jurisprudence, such as relaxation of the requirement in several federal circuits that the plaintiff be entitled to the property of which the owner is allegedly deprived, replacement of the "shock the conscience" standard with a test that is less indulgent of government officials, and increased judicial scrutiny because of the purported fundamentality of private property rights.³²

Landowners often include counts alleging violations of the Equal Protection Clause in complaints alleging that other owners are treated more favorably by government officials, often in tandem with due process and takings claims. Indeed, the earliest Supreme Court zoning cases often paired

contradiction in terms—sort of like "green pastel redness." Other observers have also derided substantive due process as an 'oxymoron.'" (quoting JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 18 (1980)).

29. See, e.g., *Hudson v. Palmer*, 468 U.S. 517, 533 (1984) ("[A]n unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful postdeprivation remedy for the loss is available.").

30. See, e.g., *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928) ("The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, and other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare.").

31. See, e.g., Daniel R. Mandelker, *Litigating Land Use Cases in Federal Court: A Substantive Due Process Primer*, 55 REAL PROP., TR. & EST. L.J. 69, 76 (2020) (citing *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998)) ("Part V discusses the judicial review standards federal courts apply to substantive due process claims in land use cases. These standards protect government conduct, especially the highly protective 'shocks the conscience' standard, which the Supreme Court adopted in a police chase case.").

32. The leading champion of enhanced substantive due process protections in the land use setting is Professor Steven Eagle. See, e.g., Steven J. Eagle, *Substantive Due Process and Regulatory Takings: A Reappraisal*, 51 ALA. L. REV. 977, 981 (2000) ("This Article advocates increased recognition of the need for discerning whether governmental restrictions on private property is legitimate under due process principles apart from the issue of compensation under the Takings Clause.").

equal protection and due process claims.³³ Because the right to use private real property is not included in the set of individual rights deemed fundamental under current Supreme Court jurisprudence, plaintiffs in run-of-the-mill zoning and land use regulation disputes³⁴ must carry the same heavy burden of proof as those bringing ordinary substantive due process claims.

There is one silver lining among these dark clouds. In its 2000 per curiam decision in *Village of Willowbrook v. Olech*,³⁵ the Court affirmed a ruling by the U.S. Court of Appeals for the Seventh Circuit that allowed an equal protection claim to proceed brought by a landowner who “alleg[ed] that the Village intentionally demanded a 33-foot easement as a condition of connecting her property to the municipal water supply where the Village required only a 15-foot easement from other similarly situated property owners.”³⁶ Olech claimed that the village’s behavior “was ‘irrational and wholly arbitrary’” and “motivated by ill will.”³⁷ The Justices were untroubled by the fact that “the plaintiff did not allege membership in a class or group,”³⁸ noting that “[o]ur cases have recognized successful equal protection claims brought by a ‘class of one,’ where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.”³⁹

While *Olech* may enable plaintiffs to survive a motion to dismiss (and thereby provide leverage for a settlement with a local government that is concerned about attorneys’ fees, costs, and the risk of a considerable

33. See *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926) (“The ordinance is assailed on the grounds that it is in derogation of § 1 of the Fourteenth Amendment to the Federal Constitution in that it deprives appellee of liberty and property without due process of law and denies it the equal protection of the law, and that it offends against certain provisions of the Constitution of the State of Ohio.”); see also *Washington ex rel. Seattle Title & Tr. Co. v. Roberge*, 278 U.S. 116, 119–20 (1928); *Gorieb v. Fox*, 274 U.S. 603, 605 (1927); *Zahn v. Bd. of Pub. Works*, 274 U.S. 325, 325–26 (1927). In the fifth of the early zoning cases decided by the Supreme Court, even though the Court opinion focused on due process, the landowner did bring an equal protection claim as well. See *Nectow v. City of Cambridge*, 157 N.E. 618, 619 (Mass. 1927), *rev’d*, 277 U.S. 183 (1928) (“The contention of the plaintiff is that the zoning ordinance as to the locus is unreasonable, an indefensible invasion of his rights, deprives him of the equal protection of the laws, and takes his property without due process of law.”).

34. That is, cases that do not involve, for example, free speech and family associational rights. See *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 76 (1981) (“Here, the Borough totally excludes all live entertainment, including nonobscene nude dancing that is otherwise protected by the First Amendment.”); *Moore v. City of E. Cleveland*, 431 U.S. 494, 499 (1977) (plurality opinion) (“When a city undertakes such intrusive regulation of the family, . . . the usual judicial deference to the legislature is inappropriate.”).

35. 528 U.S. 562 (2000) (per curiam).

36. *Id.* at 565.

37. *Id.* at 563.

38. *Id.* at 564.

39. *Id.*

damages award),⁴⁰ it has not yielded a rich harvest of decisions in which landowners have prevailed. One reason for this record of futility is the adoption by several lower federal courts of a specific requirement that the plaintiff show ill will or personal animus in order to prevail.⁴¹ Moreover, many plaintiffs find it difficult to demonstrate to the court's satisfaction that they are being treated worse than other landowners whose situations are truly comparable.⁴² Still, the Equal Protection Clause provides protection for landowners who are the victims of arbitrary, irrational, unreasonable, and retributive government regulators.

Counsel representing disgruntled landowners have long been frustrated by the reality that, as Charles Haar and I pointed out two decades ago, “the United States Supreme Court has consistently maintained the proposition that there is no fundamental constitutional right to the speculative value of a piece of property.”⁴³ That is one reason why so many attorneys, judges, and commentators have found the *Roberge* misquotation—asserting that the property owner’s “right . . . to devote its land to any legitimate use is property within the protection of the Constitution”⁴⁴—so appealing. According to this misreading, as long as the landowner’s proposed (more profitable) use is not illegal or otherwise illegitimate, the government may well have deprived the landowner of a discrete property interest without due process or have taken (in whole or in part) a discrete private property interest from the owner without paying just compensation. And when one considers that the Takings Clause has been the go-to Clause for zealous advocates

40. William D. Araiza, *Irrationality and Animus in Class-of-One Equal Protection Cases*, 34 *ECOLOGY L.Q.* 493, 494 (2007) (“*Olech*’s most noticeable practical effect may well turn out to be the increased litigation leverage enjoyed by plaintiffs, as *Olech* allows a plaintiff to survive a motion to dismiss without having to plead anything more than irrational government action.”).

41. See, e.g., Alex M. Hagen, *Mixed Motives Speak in Different Tongues: Doctrine, Discourse, and Judicial Function in Class-of-One Equal Protection Theory*, 58 *S.D. L. REV.* 197, 206 (2013) (footnotes omitted) (“[D]ecisions in the First, Fifth, Ninth, Tenth, and Eleventh Circuits have also held that animus or impermissible motive is an element of the class-of-one cause of action that must be pleaded to state a prima facie claim.”).

42. See *id.* at 211 (“Numerous courts have concluded that a claim fails on its face because the plaintiff has failed to allege that others are similarly situated with a requisite degree of precision.”); see also Michael Pappas, *Singled Out*, 76 *MD. L. REV.* 122, 162 (2016) (footnote omitted) (“In determining whether an individual ‘has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment,’ a court must define a class of similarly situated comparators and must assess the rationality of treatment.”).

43. Charles M. Haar & Michael Allan Wolf, *Euclid Lives: The Survival of Progressive Jurisprudence*, 115 *HARV. L. REV.* 2158, 2158 (2002). See *id.* at 2159 (footnote omitted) (“*Village of Euclid v. Ambler Realty Co.* is the case most closely identified with the denial of a constitutional right to speculative value.”). See, e.g., *Concrete Pipe & Prods. v. Constr. Laborers Pension Tr.*, 508 U.S. 602, 645 (1993) (“[O]ur cases have long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking. See, e.g., *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926) (approximately 75% diminution in value); *Hadacheck v. Sebastian*, 239 U.S. 394, 405 (1915) (92.5% diminution).”).

44. *Wash. ex rel. Seattle Title & Tr. Co. v. Roberge*, 49 S. Ct. 50, 52 (1928).

targeting statutes, ordinances, and regulations designed to protect environmentally sensitive lands and to address the causes and impacts of climate change,⁴⁵ there is potentially a lot riding on a simple error.

II. ROBERGE AND ITS IMMEDIATE AFTERMATH

Roberge was the last of a spate of zoning cases decided by the Court between 1926 and 1928. The first, and certainly most influential, ruling came in Justice Sutherland's opinion for a six-member majority in *Village of Euclid v. Ambler Realty Company*.⁴⁶ In this landmark 1926 decision, the Court protected a Cleveland suburb's comprehensive scheme of height, area, and use classifications from a facial constitutional challenge based on the Due Process and Equal Protection Clauses.⁴⁷ Fewer than five months later, in *Zahn v. Public Works*,⁴⁸ Justice Sutherland, for a unanimous Court, rejected a challenge to an ordinance dividing Los Angeles into five use zones.⁴⁹ Two weeks after *Zahn*, the unanimous Court in *Gorieb v. Fox*,⁵⁰ again thanks to Sutherland, rejected a claim that a Roanoke, Virginia ordinance prescribing setbacks in a residential district violated due process and equal protection rights.⁵¹

Justice Sutherland's streak remained intact one year later in *Nectow v. Cambridge*,⁵² when, again writing for the entire Court, he ruled for a landowner who owned property located in an industrial and commercial area that city officials had zoned for residential use.⁵³ This facial Fourteenth Amendment challenge succeeded because, relying on the findings of a special master for the court below, Sutherland concluded that "the invasion of the property of [Nectow] was serious and highly injurious."⁵⁴ The Court's final word on the legitimacy of zoning controls, at least until the early

45. See, e.g., Michael Allan Wolf, *Supreme Court Roadblocks to Responsive Coastal Management in the Wake of Lucas*, 53 REAL PROP., TR. & EST. L.J. 59, 82–83 (2018) ("[T]he use of the Takings Clause to attack allegedly confiscatory regulation of coastal and other environmentally sensitive land remains a popular and occasionally effective litigation strategy."). For a compelling account of a rare and consequential victory for environmentalists in the Roberts Court, see RICHARD J. LAZARUS, THE RULE OF FIVE: MAKING CLIMATE HISTORY AT THE SUPREME COURT (2020) (detailing the story of *Massachusetts v. EPA*, 549 U.S. 497 (2007)).

46. 272 U.S. 365 (1926).

47. See *id.* at 397. See generally MICHAEL ALLAN WOLF, THE ZONING OF AMERICA: EUCLID V. AMBLER (2008).

48. 274 U.S. 325 (1927).

49. See *id.* at 327–28.

50. 274 U.S. 603 (1927).

51. See *id.* at 605–10.

52. 277 U.S. 183 (1928).

53. For fascinating details on this case, see WILLIAM A. FISCHER, ZONING RULES!: THE ECONOMICS OF LAND USE REGULATION 69–128 (2015).

54. *Id.* at 188.

1960s,⁵⁵ was set in motion by the conflict between an unusual element of Seattle, Washington’s first zoning ordinance and an ambitious philanthropic effort.

A. Zoning Comes to Seattle

The document that triggered the events culminating in the Court’s ruling in *Roberge* was the will of Caroline Kline Galland, the terms of which formed the lead story on the front page of the *Seattle Daily Times* for February 16, 1907: “Million and a Half for Charity: Mrs. Kline-Galland So Bequeaths Her Entire Estate.”⁵⁶ The last of five subtitles—“Will Build Home for Sick and Destitute”⁵⁷—highlighted the chief beneficiary of Galland’s celebrated generosity. She named the Seattle Trust and Title Company (“Seattle Trust”) as trustee, with instructions to use “[t]he greater part of the estate . . . to purchase a site, in or near Seattle, and the erection thereon of an institution to be known as the Caroline Kline Galland Home for the Aged and Feeble Poor.”⁵⁸ The Galland Home would provide services “for those of the Jewish faith and for those who are members of that denomination known as the Society of Universal Religion.”⁵⁹

Seven years later, Seattle Trust purchased “Wildwood,” a five-acre parcel with frontage on Lake Washington, with plans to begin construction of a \$150,000 structure for the Galland Home.⁶⁰ A small building was completed in the summer of 1916, but, the *Times* reported, “completion of the main building of the home must be held in abeyance until it is possible to realize on some of the assets of the estate.”⁶¹ The postponement of the larger structure, owing to “[d]elay in the settlement of the estate⁶² and in the sale of real estate, the disposal of which was needed to provide funds for the

55. Cf. *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 596 (1962) (upholding application of town’s ordinance regulating mining excavations to company operating as a nonconforming use under existing zoning ordinance).

56. SEATTLE DAILY TIMES, Feb. 16, 1907, at 1.

57. *Id.*

58. *Id.*

59. *Id.* The will provided that

there shall be admitted to it all aged and feeble Jewish men and women, as well also as aged and feeble men and women of or in accord with the belief recognized by the Society of Universal Religion, that may apply. It being my intention to have those occupy the Home who are in harmony upon religious creeds.

Transcript of Record at 20, Wash. *ex rel.* Seattle Title Tr. Co. v. Roberge, 278 U.S. 116 (1928) (No. 29) (testimony of Henry J. Hudson, Trust Officer of Seattle Trust) (quoting will of Caroline Kline Galland) [hereinafter *Roberge* Transcript of Record].

60. *Site Bought for Home for Aged*, SEATTLE SUNDAY TIMES, July 19, 1914, at 22.

61. *Kline-Galland Home for Poor Will Open at Wildwood July 1*, SEATTLE SUNDAY TIMES, June 25, 1916, at 22.

62. *Id.* See *Kline v. Galland*, 102 P. 440, 442–43 (Wash. 1909) (affirming dismissal on grounds of laches a lawsuit brought by Kline family members against the executors of the Galland estate).

erection of buildings,”⁶³ would prove problematic for Seattle Trust and supporters of the Galland Home. By the time the estate was ready to move forward, a new legal obstacle stood in its path.

Like their counterparts in many municipalities in the opening decades of the twentieth century, Seattle officials had a keen interest in zoning. The city council adopted an ordinance in 1920 “relating to and establishing a City Zoning Commission and defining its powers and duties.”⁶⁴ Following studies, the preparation of maps, and public hearings, the City Council enacted Seattle’s first zoning ordinance in 1923.⁶⁵ The Galland Home property was placed in a First Residence District “for the reason” according to E.L. Gaines, Executive Secretary of the City Planning Commission, “that the existing buildings in the district are practically all first class residences, with ideal surroundings for home life.”⁶⁶ While single-family dwellings, public schools, certain private schools, churches, parks, playgrounds, art galleries, library buildings, conservatories, and railroad and shelter stations were permitted as of right in this district, the same could not be said for a “philanthropic home for children or for old people.”⁶⁷ Facilities such as the Galland Home would only be “permitted in First Residence District when the written consent shall have been obtained of the owners of two-thirds of the property within four hundred (400) feet of the proposed building.”⁶⁸

The Galland Home could not secure neighbors’ consent for reasons that remain unclear. Some clues can be found within the documents comprising the Supreme Court’s Transcript of Record.⁶⁹ Henry F. Dailey, a defense witness who lived in Seattle’s Mount Baker Park District (a few miles from the Galland Home), noted that “[t]he location of a home similar to this Galland Home has a very detrimental effect on the surrounding property”⁷⁰:

It breaks the harmony in a neighborhood. Now, you take that Home,—while we all think a great deal of the old people, and we like to see them taken care of,—nobody thinks more of old people than I do,—at the same time, we do not like in our home neighborhood,—in our homes,—to have those people,—any great number of them constantly before us, every time you look out and every time you turn a corner you meet them, and they are objectionable to a certain extent

63. *Kline-Galland Home for Poor Will Open at Wildwood July 1*, *supra* note 61.

64. *Roberge* Transcript of Record, *supra* note 59, at 13 (affidavit of E.L. Gaines).

65. *See id.* at 14 (affidavit of E.L. Gaines).

66. *Id.* (affidavit of E.L. Gaines).

67. *Wash. ex rel. Seattle Title Tr. Co. v. Roberge*, 278 U.S. 116, 118 (1928) (quoting 1923 Seattle zoning ordinance).

68. *Id.*

69. *Roberge* Transcript of Record, *supra* note 59.

70. *Id.* at 68 (trial court testimony of Henry F. Dailey).

in a neighborhood for this reason, and they are apt to mingle with the little children.⁷¹

Despite his experience in the “general real estate business,”⁷² Bailey’s explanation sounded, to be kind, very subjective.

The second clue appears in the trial judge’s statement before issuing his ruling. In the oral decision announced on July 27, 1926, Judge James B. Kinne of the Superior Court of King County⁷³ took time to reject an insinuation of religious prejudice: “At one point in the argument, counsel for the plaintiff in this case referred to the fact that perhaps there was prejudice in the case for the reason that this home was created for Jewish people. Whatever foundation there is for that does not appear in the evidence.”⁷⁴ Because he could not “find that the zoning ordinance is so clearly oppressive and unreasonable to justify me in granting the relief prayed for,”⁷⁵ Judge Kinne ruled in favor of the city.

Between the trial court’s decision and that of the Supreme Court of Washington on June 8, 1927, the U.S. Supreme Court had placed its seal of approval on comprehensive height, area, and use zoning in *Euclid*.⁷⁶ In affirming the lower court’s ruling, the state high court cited and quoted generously from *Euclid*, offering this *a fortiori* reasoning: “In [*Euclid*] the court specifically upheld the provisions of the ordinance in question, prohibiting apartment houses in the residential district. We think it must be readily conceded that an apartment house would be far more desirable than a charitable institution in a residential district.”⁷⁷

Echoing Judge Kinne, the state supreme court majority confirmed that “the ordinance as drawn and applied is not unreasonable nor arbitrary.”⁷⁸ On October 26, 1927, Washington Chief Justice Kenneth Mackintosh granted the plaintiff’s petition for writ of error,⁷⁹ and three days later Chief Justice Taft directed the Washington state courts to forward the record and proceedings to the Supreme Court.⁸⁰

71. *Id.* (citation omitted) (trial court testimony of Henry F. Dailey).

72. *Id.* at 67 (trial court testimony of Henry F. Dailey).

73. *Id.* at 18.

74. *Id.* at 72 (oral decision of trial court).

75. *Id.* at 74.

76. *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

77. *State ex rel. Seattle Title Tr. Co. v. Roberge*, 256 P. 781, 783 (Wash. 1927) (en banc), *rev’d*, 278 U.S. 116 (1928). The court noted that the “relator has frankly conceded that the vast majority of courts have upheld zoning ordinances, and the recent decision of the United States Supreme Court in *Village of Euclid v. Ambler Realty Co.* has set at rest the question of the right of cities to enact such legislation.” *Id.* at 782 (citation omitted).

78. *Id.* at 784.

79. *Roberge* Transcript of Record, *supra* note 59, at 88–89 (Order Granting Writ of Error).

80. *Id.* at 89–90 (Writ of Error).

B. Justice Butler Writes for the Court

In the Brief of Plaintiff in Error, the trustee's counsel posed a longwinded question to the Court:

[W]hether it is a violation of the provisions of the Fourteenth Amendment for a municipal corporation to forbid the erection of a building for the comfortable housing of some 30 aged persons upon a five-acre tract of land in every way ideally fitted for such a purpose and dedicated thereto by over ten years of prior use, where there is no claim that such use is inimical to the morality, health, peace, good order or general welfare of the community, the only objection brought against the home being that its immediate neighbors do not like to have a number of aged persons so near and that the home exercises a depressing influence upon the neighbors and affects the value of the surrounding property.⁸¹

The trustee seemed to have a good chance of prevailing, since the Court had rendered a landowner-friendly decision in the *Nectow* case only a few months before.⁸²

In his brief, counsel for George W. Roberge, the city's Superintendent of Buildings, noted that, though at first the zoning ordinance prohibited homes for the elderly outright, city officials added the neighborhood approval option "strangely enough *at the express request of the plaintiff in error!*"⁸³ The defendant disagreed with the plaintiff's allegations of unconstitutionality:

[W]e . . . emphatically state that it is our contention that the new and enlarged institution . . . is inimicable to the health, peace, good order

81. Brief of Plaintiff in Error at 7-8, Wash. *ex rel.* Seattle Title Tr. Co. v. Roberge, 278 U.S. 116 (1928) (No. 29).

82. *Nectow v. City of Cambridge*, 277 U.S. 183 (1928).

83. Brief of Defendant in Error at 4, Wash. *ex rel.* Seattle Title Tr. Co. v. Roberge, 278 U.S. 116 (1928) (No. 29) [hereinafter *Roberge* Defendant in Error Brief]. The following exchange between plaintiff's counsel and Gaines occurred during cross-examination:

Q. Originally, this ordinance prohibited such homes as this in any first residence district, didn't it?

A. Yes, sir.

Q. And then an application was made by the Trust Company for a modification of the ordinance, permitting a reclassification, so as to enable them to build this home. That is correct, is it?

A. Yes, sir.

Q. After that application was made, then on the recommendation of the Zoning Commission, there was an amendment made to the first residence district provision, was there not?

A. Yes, sir.

Q. And that amendment was to the effect that you should secure the consent of two-third- [*sic*] of the property owners within a distance of four hundred feet of the proposed building?

A. Yes, sir.

and general welfare of the community. The entire zoning ordinance is based on police power considerations and the regulation of the location of philanthropic and eleemosynary institutions in First Residence Districts is no exception.⁸⁴

While the bulk of the defendant's brief focused on the legitimacy of zoning as a police power regulation, in one small section counsel indicated that the consent provision was not a problem: "Neither can it be said, *indeed it is not contended*, that the ordinance is unreasonable or invalid because it provides that such an institution may be permitted when the written consent has been obtained of the owners of two-thirds of the property within four hundred feet of the proposed building."⁸⁵ As it turned out, the consent provision proved to be the Achilles heel of Seattle's otherwise sound zoning ordinance.

Would the Court continue to speak with one voice, as it also had in *Nectow*, or would the dispute over the Galland Home rekindle the division between those Justices comfortable with police power regulations designed to protect the public good and those dedicated to safeguarding cherished private property rights? According to Justice Stone's docket book entry for *Roberge*,⁸⁶ at the Justices' conference following oral argument, a bare majority of five voted to reverse the holding of the court below. (See Figure 2 below.)

Roberge Transcript of Record, *supra* note 59, at 62 (citation omitted) (cross-examination of E.L. Gaines).

84. *Roberge* Defendant in Error Brief, *supra* note 83, at 8.

85. *Id.* at 38 (emphasis added).

86. The author is most grateful to Professor Robert Post, the preeminent historian of the Taft Court, for discovering and generously sharing this important artifact.

Figure 2

248 ACTION TAKEN ON CASES, MOTIONS, CERTIFICATES, AND MISCELLANEOUS MATTERS

October 11-12, 1928 Argued
 _____, 19____ Submitted
 October 13, 1928 Voted on
 _____, 19____ Announced

No. 29

_____, 19____ Recommended
 _____, 19____ Reallotted
 _____, 19____ Passed
 _____, 19____

Washington ex rel Seattle Trust Co.
 vs.
 Roberge, Superintendent

Hesper,

| | MERITS | | DISMISS | | QUESTION | | | | REQUEST FOR RULE | | DISCHARGE - RULE | | S. D. | | P. TO M. | | Absent | Not Voting | REMARKS |
|------------------|--------|------|---------|----|----------|----|-----|----|------------------|--------|------------------|----|-------|----|----------|----|--------|------------|---------|
| | Aff. | Rev. | Yes | No | Yes | No | Yes | No | Grant | Refuse | Yes | No | Yes | No | Yes | No | | | |
| Stone, J. | | | | | | | | | | | | | | | | | | | |
| Sanford, J. | | | / | | | | | | | | | | | | | | | | |
| X Butler, J. | | | / | | | | | | | | | | | | | | | | |
| Sutherland, J. | | | / | | | | | | | | | | | | | | | | |
| Brandeis, J. | | | / | | | | | | | | | | | | | | | | |
| McReynolds, J. | | | / | | | | | | | | | | | | | | | | |
| Van Devanter, J. | | | / | | | | | | | | | | | | | | | | |
| Holmes, J. | | | / | | | | | | | | | | | | | | | | |
| Taft, C. J. | | | / | | | | | | | | | | | | | | | | |

7-1164

Thanks to Chief Justice Stone’s decision to preserve his Court papers, we can gain a valuable insight into why the unanimous streak remained intact in *Roberge*. In a memorandum to then-Associate Justice Stone dated November 8, 1928, eleven days before the Court issued its decision, Justice Butler hoped “to help remove [Stone’s] doubts” about the opinion. In the final paragraph, Butler, while reminding Stone of his disagreement with the

Euclid ruling, indicated a willingness to move beyond the Court's finding there that comprehensive zoning was not unconstitutional:

I think, following the *Nectow* case and consistently with the *Euclid* case and the later zoning cases, it may be held that the State or municipality is without power to exclude the proposed home. In order to avoid any possibility of impairing the zoning decisions—and I did not agree with the first one—I think it better to let the decision rest upon the ground stated in the opinion.⁸⁷

That ground was not the broad question of the overall legitimacy of zoning, but a narrower issue: the invalidity of the two-thirds approval provision.

After describing the subject property and expansion plans, Justice Butler provided details regarding Seattle's First Residence District, quoting the specific language and including the controversial two-thirds approval provision in the opinion's sole footnote.⁸⁸ After noting that "[t]he trustee concedes that our recent decisions require that in its general scope the ordinance be held valid,"⁸⁹ the opinion then asked the key question: "Is the delegation of power to owners of adjoining land to make inoperative the permission, given by § 3 (c) as amended,⁹⁰ repugnant to the due process clause? Zoning measures must find their justification in the police power exerted in the interest of the public."⁹¹

Nectow cautioned that the power to zone "is not unlimited, and other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare."⁹² Several other Supreme Court decisions, *none of which concerned the regulation of real property*, provided that "[l]egislatures may not, under the guise of the police power impose restrictions that are

87. Memorandum from Pierce Butler, Associate Justice of the Supreme Court of the United States, to Harlan F. Stone, Associate Justice of the Supreme Court of the United States 3 (Nov. 8, 1928) [hereinafter *Butler Memorandum*]; see David R. Stras, *Pierce Butler: A Supreme Technician*, 62 *VAND. L. REV.* 695, 733 n.279 (2009) (noting that "Butler was such a strong adherent to the principle of stare decisis that he even advocated in favor of it when it would contradict his dissent in another case").

88. *Wash. ex rel. Seattle Title & Tr. Co. v. Roberge*, 278 U.S. 116, 118 n.* (1928).

89. *Id.* at 120 (citing *Nectow v. City of Cambridge*, 277 U.S. 183 (1928); *Goreib v. Fox*, 274 U.S. 603 (1927); *Zahn v. Bd. of Pub. Works*, 274 U.S. 325 (1927); and *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)).

90. Section 3(c) of the Seattle zoning ordinance read, in pertinent part, "A philanthropic home for children or for old people shall be permitted in First Residence District when the written consent shall have been obtained of the owners of two-thirds of the property within four hundred (400) feet of the proposed building." *Roberge*, 278 U.S. at 118.

91. *Roberge*, 278 U.S. at 120–21 (citing *Euclid*, 272 U.S. at 387).

92. *Nectow*, 277 U.S. at 188.

unnecessary and unreasonable upon the use of private property or the pursuit of useful activities.”⁹³

In the crucial paragraph that followed this review of constitutional guideposts, Justice Butler contrasted the sensible decision to include compatible uses such as the Galland Home in the First Residence District, with the potentially “uncontrolled” exercise of veto power by neighboring landowners:

The right of the trustee to devote its land to any legitimate use is properly within the protection of the Constitution. The facts disclosed by the record make it clear that the exclusion of the new home from the first district is not indispensable to the general zoning plan. And there is no legislative determination that the proposed building and use would be inconsistent with public health, safety, morals or general welfare. . . . The section purports to give the owners of less than one-half the land within 400 feet of the proposed building authority—uncontrolled by any standard or rule prescribed by legislative action—to prevent the trustee from using its land for the proposed home. The superintendent is bound by the decision or inaction of such owners. There is no provision for review under the ordinance; their failure to give consent is final. They are not bound by any official duty, but are free to withhold consent for selfish reasons or arbitrarily and may subject the trustee to their will or caprice. The delegation of power so attempted is repugnant to the due process clause of the Fourteenth Amendment.⁹⁴

Because the zoning ordinance did not exclude homes for the elderly from the First Residence Zone, it was accurate to state that the trustee’s use of the parcel for an expanded Galland Home was a “legitimate use” of its land. Those making legitimate uses of their land are “properly within the

93. *Roberge*, 278 U.S. at 121 (citing *Tyson & Brother v. Banton*, 273 U.S. 418, 442 (1927) (invalidating state statute forbidding sale of tickets for more than fifty cents over face value), *overruled by Olsen v. Nebraska, ex rel. W. Reference & Bond Ass’n*, 313 U.S. 236 (1941)); *Weaver v. Palmer Brothers Co.*, 270 U.S. 402, 412, 415 (1926) (invalidating state statute prohibiting use of “shoddy” in bedcovers); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925) (enjoining enforcement of state statute requiring public school attendance); *Norfolk & W. Ry. Co. v. Pub. Serv. Comm’n*, 265 U.S. 70, 74 (1924) (upholding order of state public service commission requiring railroad to provide suitable crossing with reasonable facilities for shippers); *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504, 513 (1924) (invalidating state consumer protection statute that fixed maximum and minimum weights for loaves of bread); *Meyer v. Nebraska*, 262 U.S. 390, 399–400 (1923) (invalidating state statute prohibiting teaching of languages other than English to young schoolchildren); *Adams v. Tanner*, 244 U.S. 590, 594 (1917) (invalidating state law making it unlawful for employment agents to demand or receive fees from those seeking jobs), *overruled by Ferguson v. Skrupa*, 372 U.S. 726 (1963)); *Lawton v. Steele*, 152 U.S. 133, 137 (1894) (upholding state statute allowing officials to destroy illegal fishing nets).

94. *Roberge*, 278 U.S. at 121–22 (citation omitted).

protection of the Constitution” generally. The pejoratives that color Justice Butler’s description of the two-thirds consent provision—“uncontrolled,” “selfish,” “arbitrarily,” “caprice”—scream invalidity.

The succeeding paragraph accentuated the Court’s focus on the suspect consent provision. Justice Butler distinguished the disapproval of neighboring landowners’ veto of a reasonable, compatible use from the Court’s decision in *Thomas Cusack Company v. City of Chicago*⁹⁵ to uphold “an ordinance prohibiting the putting up of any billboard in a residential district without the consent of owners of a majority of the frontage on both sides of the street in the block where the board was to be erected.”⁹⁶ In *Cusack*, the proposed use was much more deleterious: “The facts found were sufficient to warrant the conclusion that such billboards would or were liable to endanger the safety and decency of such districts. It is not suggested that the proposed new home for aged poor would be a nuisance.”⁹⁷ Apparently, Justice Butler was not swayed by the testimony regarding negative effects encounters with the elderly would have on children.

Roberge did not expand the scope of private property rights. The Justices assumed that, because homes for the elderly were *included* in the First Residence District (albeit subject to an invalid consent provision), the expansion of the Galland Home was a “legitimate use.” In response to Justice Stone’s concerns, Justice Butler explained, “In the case before us, the prohibition would be against the common right of owners to devote their lands to legitimate use.”⁹⁸ The proposed Galland Home “is legitimate and is not a menace such as bill boards were found to be”⁹⁹ in *Cusack*. Moreover, “[n]othing in the record indicates that the home would injure or annoy anyone,” and, perhaps most importantly, “[t]he legislative determination is in favor of the project.”¹⁰⁰ Grasping the import of these words is crucial to understanding what Justice Butler meant by “legitimate use,” as he distinguished use of the property as a home for the elderly (legitimate) from nuisance-like activities or activities that had not gained the approval of government regulators. Justice Butler emphasized that “surely it cannot be inferred that the city council found that such a home would be contrary to the public safety, health, morals or general welfare and at the same time authorized private individuals to permit it.”¹⁰¹ Here, the phrase “legitimate use” means use of property as authorized by the government.

95. 242 U.S. 526 (1917).

96. *Roberge*, 278 U.S. at 122.

97. *Id.* at 122 (citation omitted).

98. Butler Memorandum, *supra* note 87, at 2.

99. *Id.*

100. *Id.*

101. *Id.*

Justice Butler, no fan of zoning, explained, “[w]e need not decide whether, consistently with the Fourteenth Amendment, it is within the power of the State or municipality by a general zoning law to exclude the proposed new home from a district defined as is the first district in the ordinance under consideration.”¹⁰² The key to the *Roberge* holding was the improper “delegation of legislative power,”¹⁰³ and the main legacy of the decision should have been subsequent challenges to other consent provisions that gave private parties veto power over development plans. However, a curious thing happened when the opinion was first released that complicated and confused *Roberge*’s legacy.

C. *The Improper T Appears in Print*

The *Roberge* slip opinion (see Figure 3 below), released on or soon after November 19, 1928,¹⁰⁴ contained a simple, though ultimately profound, typographical error¹⁰⁵ in the first sentence on page 5: “The right of the trustee to devote its land to any legitimate use is *property* within the protection of the Constitution.”¹⁰⁶ If another letter of the word “properly” had been printed incorrectly, such as “properry,” the mistake would have been evident to any close reader. However, as luck (or an evil printer’s devil) would have it, the substitution of an improper *t* for the proper *l* resulted in (1) an actual word, that (2) made sense in the context of a key sentence, while (3) altering the substantive meaning.

The error was corrected by the time the U.S. Government Printing Office published the Preliminary Print in 1929 (see Figure 4 below).¹⁰⁷ Volume

102. Wash. *ex rel.* Seattle Title Tr. Co. v. Roberge, 278 U.S. 116, 123 (1928).

103. Butler Memorandum, *supra* note 87, at 2.

104. See Lazarus, *supra* note 1, at 553 (“[N]o later than the early twentieth century, the Court was regularly releasing copies of its opinions within a few days of the opinions’ announcements.”).

Roberge was one of eleven decisions announced that day, comprising two percent of the 825 cases decided during the October 1928 Term, in sharp contrast with the 63 cases that merited opinions during the October 2019 Term. *Decisions of the Supreme Court, 1928-29*, CQ PRESS, <https://library.cqpress.com/cqresearcher/document.php?id=cqresre1929061000> [<https://perma.cc/MFA5-4T6P>]; *Opinions of the Court - 2019*, SUP. CT. U.S., <https://www.supremecourt.gov/opinions/slipopinion/19> [<https://perma.cc/27EY-KUSU>]. For the decision rating top billing, see *High Court Upholds New York Klan Law*, N.Y. TIMES, Nov. 20, 1928, at 1 (discussing N.Y. *ex rel.* Bryant v. Zimmerman, 278 U.S. 63 (1928)).

105. It is possible, though less likely, that the mistake was in the draft of the opinion that Justice Butler submitted to the printer and that Butler or someone else familiar with what Butler intended noted the mistake upon reading the slip opinion. For details on the Court’s process for correcting these kinds of errors, see Lazarus, *supra* note 1, at 562–63 nn.111, 113.

106. Wash. *ex rel.* Seattle Title Tr. Co. v. Roberge, No. 29, slip op. at 5 (U.S. Nov. 19, 1928) (emphasis added).

107. Wash. *ex rel.* Seattle Title Tr. Co. v. Roberge, 278 U.S. 116, 121 (1928) (Preliminary Print); see Lazarus, *supra* note 1, at 554 (“The 1922 legislation expressly provided for GPO’s publication of both the final bound volumes of the *United States Reports*, beginning with volume 257, and what the

278 of the *United States Reports*, appearing later that same year, included the correction as well.¹⁰⁸ However, in the interim between the release of the slip opinion and the Preliminary Print, the two most important private publishers of Supreme Court opinions—West Publishing Company (*Supreme Court Reports*) and the Lawyers Co-operative Publishing Company (*Lawyers' Edition*)—had released versions of the case featuring the error.¹⁰⁹

Figure 3

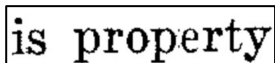
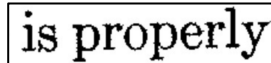


Figure 4



How do we know that the mistake was made in the slip opinion and not in the Preliminary Print and the *United States Reports*? A Supreme Court research librarian provided this answer:

[O]ur Reporter's Office received material from the National Archives and looked into their records including the slip opinion released in the case, the **Preliminary Print** and the *U.S. Reports* opinion. It is their conclusion that the word "property" at issue in the fifth paragraph which appears in the slip opinion was later corrected. It was common practice at that time to edit the text after the slip opinion was released. The later **Preliminary Print** of the *U.S. Reports* shows the word changed to "properly." It remained corrected in the final *U.S. Reports* opinion. The [Supreme Court] Reporter's Office also said that the change from "property" to "properly" was clearly intended. The hot lead type print process meant that a change had to be deliberately zeroed in on and then that part of the opinion had to be reset. In other words, it couldn't be an inadvertent typographical error.¹¹⁰

Two seeds were thus planted by different versions of the *Roberge* opinion, yielding a diversified harvest of citations. Things quickly became complicated.

statute referred to as 'advance copies' of opinions in 'pamphlet installments.'" (citing Act of July 1, 1922, Pub. L. 67-272, §§ 1, 4, 42 Stat. 816, 816, 818)).

108. *Roberge*, 278 U.S. at 121.

109. See Wash. *ex rel.* Seattle Title Tr. Co. v. *Roberge*, 49 S. Ct. 50, 52, 73 L. Ed. 210, 213 (1928); see also Lazarus, *supra* note 1, at 553–54 ("Private companies published both those original opinions and, later on, the final opinions appearing in the bound *United States Reports*. The Lawyers Co-operative Publishing Company began publishing *Lawyers' Edition* in 1882, and West Publishing Company commenced publishing its competing *Supreme Court Reporter* one year later in 1883.").

110. E-mail from Catherine R. Romano, Research Librarian, Supreme Court of the United States, to author (Oct. 2, 2008, 17:30 EDT) (on file with author).

D. The Replication Begins: No Harm, No Foul

Soon after the release of the *Roberge* slip opinion, commentators and courts repeated the error. Luckily, these early authorities did not place any special substantive emphasis on the improper *t*.

The February 1929, issue of *Notre Dame Lawyer* featured in its “Notes on Recent Cases” section a summary of *Roberge* by D.M. Donahue.¹¹¹ While the discussion of the holding paraphrased Justice Butler’s words, Donahue chose to replicate verbatim (though without quotation marks) the sentence with the error.¹¹² The major focus of Donahue’s discussion, like Justice Butler’s, was on the improper delegation.¹¹³

Similarly, a summary in the *American Bar Association Journal* written by the editor-in-chief, Edgar Bronson Tolman, quoted generously from the Court’s opinion, including the improper *t*.¹¹⁴ The former President of the Illinois State Bar Association,¹¹⁵ Tolman did not compound the error by placing any special emphasis on the word “property.”

This pattern was repeated on December 20, 1929, when the Supreme Court of Illinois announced its ruling in *Spies v. Board of Appeals*.¹¹⁶ Albert P. Spies’s plans to build a store in an “A” residential zone in Decatur were frustrated by an approval scheme similar to that invalidated in *Roberge*:

[T]he zoning ordinance did not permit a store building to be erected in that district without the written consent of the owners of seventy-five per cent of the property within a radius of 300 feet of the proposed building, and the application for the permit was not accompanied by such written consent.¹¹⁷

Before ruling in favor of the landowner, Justice Frank K. Dunn explained that this was neither a frontal assault on the zoning ordinance nor the assertion of a yet-unrecognized property right:

This case does not involve the constitutionality of the Zoning law or of this particular ordinance except in respect to the one paragraph of section 3 which compels the appellant to hold the right, essential to the free and complete enjoyment of his property, of establishing and

111. D.M. Donahue, Note, *Constitutional Law—Zoning Ordinances Must Find Their Justification in Police Power Exerted in the Interest of the Public*, 4 NOTRE DAME LAW. 334, 334–35 (1929).

112. *Id.* at 335.

113. *See id.*

114. *See* Edgar Bronson Tolman, *Review of Recent Supreme Court Decisions*, 15 A.B.A. J. 26, 28 (1929).

115. *Past ISBA Presidents*, ILL. STATE BAR ASS’N, <https://www.isba.org/leadership/pastpresidents> [<https://perma.cc/UH2D-X665>].

116. 169 N.E. 220 (Ill. 1929).

117. *Id.* at 220.

erecting on it a community store subject to the arbitrary, uncontrolled will of the owners of neighboring property.¹¹⁸

Justice Dunn summarized and quoted extensively from *Roberge*, including the improper *t.*¹¹⁹ As for Justice Butler's statement that "[t]he delegation of power so attempted is repugnant to the due process clause of the Fourteenth Amendment," Justice Dunn commented: "This language is perfectly applicable *mutatis mutandis* to the present case."¹²⁰ Following a review of Illinois decisions concerning problematic consent provisions, the *Spies* court concluded that *Roberge* was "decisive that the ordinance of the city of Decatur is repugnant to the constitutional prohibition of deprivation of property without due process of law."¹²¹

These early examples were harmless errors. Before too long, judges, advocates, and commentators would read much more into a seemingly insignificant mistake.

III. TWO STREAMS DIVERGE

Since the late 1920s, hundreds of judges, commentators, attorneys, and other writers have cited or quoted *Roberge*. Not surprisingly, given the major focus of the ruling, most citations and quotations concern the legitimacy of a delegation of power to nongovernmental actors. A *Shepard's* search yielded 341 cases citing *Roberge*, 212 of which discuss the legality of delegation, with 432 out of 679 total references discussing the topic. The numbers for a similar search using Westlaw identified 243 out of 327 cases, and 840 out of 1,243 total references.

Included among these delegation cases are a few Supreme Court opinions. A notable example is *City of Eastlake v. Forest City Enterprises, Inc.*,¹²² in which the Court answered "no" to the question of "whether a city charter provision requiring proposed land use changes to be ratified by 55% of the votes cast violates the due process rights of a landowner who applies for a zoning change."¹²³ Chief Justice Burger explained that "the standardless delegation of power to a limited group of property owners condemned by the Court in *Eubank [v. Richmond]*¹²⁴ and *Roberge* is not to

118. *Id.* at 221.

119. *See id.* ("The right of the trustee to devote its land to any legitimate use is property [*sic*] within the protection of the [C]onstitution.")

120. *Id.* at 222 (quoting *Wash. ex rel. Seattle Title Tr. Co. v. Roberge*, 278 U.S. 116, 122 (1928)) (*italics added*).

121. *Spies*, 169 N.E. at 222.

122. 426 U.S. 668 (1976).

123. *Id.* at 670.

124. 226 U.S. 137, 140 (1912) (invalidating a provision allowing two-thirds of property owners abutting a street to establish a "building line" with which future construction must comply).

be equated with decisionmaking by the people through the referendum process.”¹²⁵ The Justices also invoked *Roberge* in other delegation cases not involving land use regulation,¹²⁶ and in cases in which improper delegation was not at issue.¹²⁷ The same rough division of delegation- and non-delegation-related cases appears in hundreds of state and lower federal court opinions, some of which were reviewed, or decided on remand by, the Court,¹²⁸ as well as in a larger number of other sources such as briefs,¹²⁹ law review articles,¹³⁰ and treatises.¹³¹

Because the judges and lawyers writing the overwhelming majority of these opinions and other materials did not quote the *Roberge* language

125. *Eastlake*, 426 U.S. at 678.

126. See *McGautha v. California*, 402 U.S. 183, 272 n.22 (1971) (Brennan, J., dissenting) (“[W]e have indicated that due process places limits on the manner and extent to which a state legislature may delegate to others powers which the legislature might admittedly exercise itself.”), *reh’g granted and vacated*, 408 U.S. 941 (1972); *Currin v. Wallace*, 306 U.S. 1, 15–16 (1939) (“This is not a case . . . where a prohibition of an inoffensive and legitimate use of property is imposed not by the legislature but by other property owners . . .”); *Old Dearborn Distrib. Co. v. Seagram-Distillers Corp.*, 299 U.S. 183, 194 (1936) (“We find nothing in this situation to justify the contention that there is an unlawful delegation of power to private persons to control the disposition of the property of others . . .”); *Carter v. Carter Coal Co.*, 298 U.S. 238, 311–12 (1936) (“The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question.”).

127. See, e.g., *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’t Prot.*, 560 U.S. 702, 735 (2010) (Kennedy, J., concurring) (“And this Court has long recognized that property regulations can be invalidated under the Due Process Clause.”); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 279 (1932) (“And it is plain that unreasonable or arbitrary interference or restrictions cannot be saved from the condemnation of that [Fourteenth] Amendment merely by calling them experimental.”).

128. See, e.g., *Ass’n of Am. R.R. v. U.S. Dep’t of Transp.*, 721 F.3d 666, 672 (D.C. Cir. 2013) (“Government enforcement power did not save . . . the power of private landowners in [*Roberge*] to impose a zoning restriction on a neighbor’s tract of land.”), *vacated*, 575 U.S. 43 (2015); *First Eng. Evangelical Lutheran Church v. Cnty. of L.A.*, 258 Cal. Rptr. 893, 900 n.8 (1989) (noting that “two opinions of [the *Euclid v. Ambler*] era [*Roberge* and *Nectow v. City of Cambridge*, 277 U.S. 183 (1928)] disapproved specific provisions not remotely resembling the instant ordinance and its public safety concerns”), *on remand from* 482 U.S. 304 (1987).

129. See, e.g., Brief for Respondents at 16, *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985) (No. 84-468), 1985 WL 668980, at *16 (“In zoning cases in particular, it is critical not to permit such stereotyped attitudes to prevail through deference to residents’ opinions.”); Brief for Appellees at 83, *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984) (No. 83-141), 1984 WL 987633, at *83 (“[D]ue process forbids the state from delegating absolute, standardless authority over the right to invoke its eminent domain power to private parties, who are neither legally nor politically accountable to those over whom they may exercise authority or to the public for the criteria that guide their decisions.”).

130. See, e.g., Michael Heller & Rick Hills, *Land Assembly Districts*, 121 HARV. L. REV. 1465, 1499 & n.83 (2008) (“In one view, imposition of new restrictions by neighbors violates the landowners’ right to an impartial decisionmaker, as the neighbors might be directly interested in the restriction that they are imposing.”); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1438 n.239 (2003) (“In two cases [*Roberge* and *Eubank*], both involving zoning ordinances that allowed property owners to impose restrictions on neighboring property, the delegations were struck down as violating due process.”).

131. See, e.g., DANIEL R. MANDELKER & MICHAEL ALLAN WOLF, *LAND USE LAW* § 6.04 n.13 (6th ed. 2018); 8 EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 25:83 n.11 (3d ed. 2018).

regarding the right to devote one's land "to any legitimate use," these materials are outside the scope of this Article. The subset of cases and other materials citing *Roberge* that are most pertinent are those that quote ("any legitimate use is properly") or misquote ("any legitimate use is property") Justice Butler's words.

A. The "Properly" Authorities

Scores of writers have quoted the "any legitimate use" sentence from *Roberge* in opinions, articles, books, briefs, motions, and oral argument to support assertions regarding the validity of a wide range of property regulations. Generalizing about the "properly" authorities, that is, those documents that correctly quote or cite *Roberge*, is difficult. In most instances the authority is either summarizing the holding or employing the language in support of a ruling or argument regarding the validity of a zoning or other land use mechanism. In contrast, many of the "property" authorities highlight the *Roberge* Court's efforts to bolster private property rights. These authorities often push for an expansion of the nature of the "property" that is protected by the Due Process Clause beyond the land itself, to include a proffered fundamental right to governmental approval of land development. Examples drawn from both streams allows the reader to appreciate the real-world impact of a stray keystroke.

Most of the fourteen reported opinions in which judges correctly quoted the "properly" language¹³² were routine challenges brought by landowners seeking to make more intensive use of property than permitted under the applicable zoning classification.¹³³ While judges often cited *Roberge* in

132. Richter v. City of Des Moines, 2013 U.S. App. LEXIS 17191, at *6–7 (9th Cir. Aug. 19, 2013) (Ikuta, J., dissenting); Harris v. Cnty. of Riverside, 904 F.2d 497, 503 (9th Cir. 1990); Hardesty v. Sacramento Metro. Air Quality Mgmt. Dist., 307 F. Supp. 3d 1010, 1026 (E.D. Cal. 2018), *aff'd in part, rev'd in part sub nom.* Hardesty v. Sacramento Cnty., 824 F. App'x 474 (9th Cir. 2020); Kamaole Pointe Dev. LP v. Cnty. of Maui, 2008 U.S. Dist. LEXIS 96388, at *31 (D. Haw. Nov. 25, 2008); Wilson v. City of New Orleans, 2002 U.S. Dist. LEXIS 1283, at *8 (E.D. La. Jan. 17, 2002); LaSalle Nat'l Bank v. Cnty. of DuPage, 1991 U.S. Dist. LEXIS 3200, at *28 (N.D. Ill. Mar. 15, 1991); State *ex rel.* Henry v. Mia., 158 So. 82, 84 (Fla. 1934) (Davis, C.J., concurring); Davis v. Sails, 318 So. 2d 214, 221–22 (Fla. Dist. Ct. App. 1975) (quoting Watson v. Mayflower Prop., Inc., 177 So. 2d 355, 359 (Fla. Dist. Ct. App. 1965)); William Murray Builders, Inc. v. Jacksonville, 254 So. 2d 364, 366 (Fla. Dist. Ct. App. 1971) (citing Henry, 158 So. 82); Mayflower Prop., Inc., 177 So. 2d at 359 (quoting 35 FLA. JUR., Zoning Laws § 10); Burritt v. Harris, 166 So. 2d 168, 175 (Fla. Dist. Ct. App. 1964) (Rawls, J., dissenting) (citing Henry, 158 So. 82), *rev'd*, 172 So. 2d 820 (Fla. 1965); Williams v. Bd. of Cnty. Comm'rs, 308 P.3d 88, 103, 109 (Mont. 2013) (Rice, J., dissenting, & McKinnon, J., dissenting); Forest City Enters., Inc. v. City of Eastlake, 324 N.E.2d 740, 745 (Ohio 1975), *rev'd*, 426 U.S. 668 (1976); Smith v. Troy, 1934 Ohio Misc. LEXIS 1002, at *10–11 (Ohio Ct. App. Dec. 3, 1934) (no source cited).

133. Harris v. Cnty. of Riverside, 904 F.2d at 498 ("[Harris] claims that by rezoning his property as residential and imposing bureaucratic roadblocks to his ability to comply with County land use procedures, the County has taken his property in violation of his [F]ifth [A]mendment rights and violated his [F]ourteenth [A]mendment rights to procedural and substantive due process, including depriving him of his liberty to pursue a livelihood."); LaSalle, 1991 U.S. Dist. LEXIS 3200, at *28 (dismissing takings,

support of the allegedly victimized landowner,¹³⁴ sometimes the government prevailed.¹³⁵

Only a few of the “properly” opinions centered on (im)proper delegation of land use regulatory authority. The best example was the 1975 decision of the Supreme Court of Ohio in *Forest City Enterprises, Inc. v. City of Eastlake*,¹³⁶ which attempted to invalidate the city’s charter provision “provid[ing] that no ordinance changing land use becomes effective until ratified by 55 percent of the voters in a city-wide election.”¹³⁷ As noted above, a year later the Supreme Court reversed this ruling.¹³⁸

equal protection, and substantive due process claims brought by landowner who was denied a planned unit development permit); *Henry*, 158 So. at 84 (Davis, C.J., concurring) (“Legislators may not, under the guise of the police power, impose restrictions that are unnecessary or unreasonable upon the use of private property or upon the pursuit of useful activities.”); *Davis*, 318 So. 2d at 221–22, 226 (affirming the lower court’s order to rezone property to allow for more density); *William Murray*, 254 So. 2d at 366 (holding that agricultural designation was arbitrary and unreasonable); *Watson*, 177 So. 2d at 359 (finding that residential zoning designation was arbitrary and unreasonable); *Burritt*, 166 So. 2d at 175 (Rawls, J., dissenting) (“[P]laintiff has been deprived of the use of his property through the arbitrary fiat of the legislative body and such a confiscation of an individual’s property under the guise of the police power should not be allowed to stand.”); *Smith*, 1934 Ohio Misc. LEXIS 1002, at *10–11 (unsuccessful attempt to operate a barbershop in a residential zone).

134. See, e.g., *Harris*, 904 F.2d at 503 (“We must also determine whether the County’s decision deprived Harris of a protected property interest prior to applying procedural due process. We find that it did. ‘The right of [an owner] to devote [his] land to any legitimate use is properly within the protection of the Constitution.’” (alterations in original) (quoting *Wash. ex rel. Seattle Title Tr. Co. v. Roberge*, 278 U.S. 116, 122 (1928))).

135. See, e.g., *LaSalle*, 1991 U.S. Dist. LEXIS 3200, at *29 (“The plaintiffs have not offered a separate constitutional violation, but have merely restated the standard for substantive due process that is the theory of their case. Consequently, the plaintiffs have not fulfilled the Seventh Circuit’s requirement that a separate constitutional violation be alleged to support a substantive due process argument in a property context.”).

136. 324 N.E.2d 740 (Ohio 1975), *rev’d*, 426 U.S. 668 (1976).

137. *Id.* at 743; see *Henry*, 158 So. at 83; see also *Williams*, 308 P.3d at 99 (“We agree with the District Court that the protest provision . . . which allows property owners representing 50 percent of the agricultural and forest land in a district to block zoning proposals, is an unconstitutional delegation of legislative power.”).

138. See *City of Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668, 672 (1976).

Much like in the case law, there are various reasons for including the “properly” language in articles,¹³⁹ books,¹⁴⁰ and briefs.¹⁴¹ Not surprisingly, most of the citations are in connection with discussions of the rights of property owners subject to zoning and other land use regulations.

For example, in 2018 the Court of Appeals of Texas ruled against a business owner who claimed that the application of a zoning ordinance to his automobile repair business was illegally retroactive, a deprivation of property without due process of law, and an illegal taking.¹⁴² The court explained:

When Hinga [Mbogo] purchased the property he knew “the rules” governing “the play,” meaning he knew operating an automotive repair shop on Ross Avenue was a nonconforming use. It was at his own risk that he continued investing money in the automotive business despite knowing his use was nonconforming and the City could establish a compliance date at any time.¹⁴³

Undaunted, Mbogo sought relief from the Supreme Court of Texas.

139. See, e.g., David Della Porta, *Procedural Due Process Under the District of Columbia Historic Preservation Act*, 33 CATH. U. L. REV. 1107, 1109 n.15 (1984) (“While this interest in property is subject to the restrictions of the state’s police power, courts have long recognized that any legitimate use is properly within the protection of the Constitution.”); Christopher R. Bryant, Comment, *Zoning Out Due Process Rights: W.J.F. Realty Corp. v. Town of Southampton*, 73 ST. JOHN’S L. REV. 565, 583–87 (1999) (discussing circuit split regarding whether landowners bringing due process claims need to show a “strict entitlement” to the relief sought); Kathryn A. Dunwoody, Note, *Arnel Development Co. v. City of Costa Mesa: Rezoning by Initiative and Landowners’ Due Process Rights*, 70 CALIF. L. REV. 1107, 1130 & 171 n.140 (1982) (“[I]t has seldom been questioned that landowners have due process rights where contemplated administrative action would curtail profitable use of their lands.”); Lawrence Geller, Note, *Expiring Use Restrictions: Their Impact and Enforceability*, 24 NEW ENG. L. REV. 155, 172 & n.151 (1989) (discussion of Takings Clause in article discussing federal affordable housing legislation).

140. See, e.g., 7 FLA. JUR. 2D, *Building, Zoning, and Land Controls* § 185 (2020) (citing *Burritt v. Harris*, 172 So. 2d 820 (Fla. 1965) and *William Murray Builders, Inc. v. Jacksonville*, 254 So. 2d 364 (Fla. Dist. Ct. App. 1971)) (“The right of owners to devote their land to any legitimate use is properly within the terms of the United States Constitution, and the legislature may not, under the guise of the police power, impose unnecessary or unreasonable restrictions on that use.”).

141. See, e.g., Petitioners’ Brief on the Merits at 22, *Mbogo v. City of Dall.*, 2019 Tex. LEXIS 880 (Aug. 30, 2019) (No. 18-0738), 2019 WL 1317801 (noting, in a zoning challenge, that “[t]he U.S. Supreme Court, this Court, and courts around the country have all recognized that property owners possess constitutionally protected interest in the use of land”); Plaintiff/Appellee, *Hillcrest Property, L.L.P.’s Answer Brief at 34, Hillcrest Prop., L.L.P. v. Pasco Cnty.*, 915 F.3d 1292 (11th Cir. 2019) (No. 17-14790), 2018 WL 1007904 (noting, in a challenge to a transportation corridor, that “[t]he United States Supreme Court likewise recognizes the fundamental nature of the rights at issue in this case”).

142. See *Mbogo v. City of Dall.*, No. 15-00879-CV, 2018 WL 3198398, at *1 (Tex. Ct. App. June 29, 2018).

143. *Id.* at *7.

The section of Mbogo's brief on the merits asserting that "It Is Well-Established That Property Owners Possess a Constitutionally Protected Vested Right in Continuing a Legitimate Use" opened by invoking *Roberge*:

The U.S. Supreme Court, this Court, and courts around the country have all recognized that property owners possess constitutionally protected interest [*sic*] in the use of land. The federal courts have recognized this right for decades: "The right of the [property owner] to devote its land to any legitimate use is properly within the protection of the Constitution."¹⁴⁴

The overwhelming majority of state high courts have approved the use of amortization periods to phase out nonconforming uses and buildings;¹⁴⁵ the state high court declined to review the case.¹⁴⁶ The position of Mbogo and other landowners aggrieved by arguably onerous regulations would have been stronger if only the *Roberge* Court had been even more aggressive in their protection of property rights—or if the Court had never corrected the improper *t.*

B. The "Property" Authorities: Three Advantages for Property Owners

What if the U.S. Supreme Court had actually ruled that a landowner's right "to devote its land to any legitimate use" was "*property* within the protection of the Constitution"? *Roberge* was a challenge based on the Fourteenth Amendment's Due Process Clause—"nor shall any State deprive any person of life, liberty, or property, without due process of law."¹⁴⁷ Accordingly, as the owner denied permission to make a legitimate use of its property by building a more expansive Galland Home, Seattle Trust would have *automatically* satisfied the threshold requirement as one "deprive[d]" of "property." The next step would then have been to determine if Seattle Trust had received "due process of law."

The first advantage of the "property" wording would have been that *all* owners seeking to make *any* legitimate use of property (that is, a use that is not "inconsistent with public health, safety, morals or general welfare")¹⁴⁸

144. Petitioners' Brief on the Merits at 22, *Mbogo v. City of Dall.*, 2019 Tex. LEXIS 880 (No. 18-0738), 2019 WL 1317801 (alteration in original).

145. MANDELKER & WOLF, *supra* note 131, at § 5.80. For the minority position, see *id.* at § 5.81; see also *Pa. Nw. Distribs., Inc. v. Zoning Hearing Bd.*, 584 A.2d 1372, 1375 (Pa. 1991).

146. *Mbogo v. City of Dall.*, 2019 Tex. LEXIS 880, at *1 (Aug. 30, 2019).

147. U.S. CONST. amend. XIV, § 2. Of course similar language appears in the Fifth Amendment, applicable to the federal government ("nor [shall any person] be deprived of life, liberty, or property, without due process of law"). *Id.* amend. V.

148. *Wash. ex rel. Seattle Title Tr. Co. v. Roberge*, 278 U.S. 116, 121 (1928).

would meet the threshold, articulated in *Board of Regents v. Roth*,¹⁴⁹ for bringing a procedural due process challenge. *Mathews v. Eldridge*¹⁵⁰ instructs the courts to consider

three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.¹⁵¹

Defendants typically meet procedural due process requirements by providing adequate and timely notice and a meaningful hearing.¹⁵²

The second advantage of the improper *t* would come in the area of substantive due process. Property owners have been frustrated for decades because of the predominant pattern of judicial deference to local and state lawmakers exercising police power authority. The stakes can be much higher for local governments whose zoning and other regulations of land reduce the value of property, because unlike states, cities, counties, and other political subdivisions are potentially subject to budget-busting damages under § 1983.¹⁵³ A significant barrier facing landowners claiming that they have been deprived of their property by local governments without due process of law (that is, by arbitrary, capricious, and unreasonable regulation) is the “entitlement rule,” derived from Justice Stewart’s statement in *Roth*: “To have a property interest in a benefit, a person clearly must have *more than an abstract need or desire for it*. He must have more than a unilateral expectation of it. He must, instead, have a *legitimate claim of entitlement* to it.”¹⁵⁴ There are dozens of reported decisions in which landowners and developers who unsuccessfully sought rezonings, special use permits, subdivision approval, and other forms of development permission have come up against this barrier, because judges viewed their cases as frustrations of desires rather than denials of entitlements.¹⁵⁵ If, however, the right to make a (currently unpermitted) legitimate use of property were *itself* deemed “property” in a constitutional sense, the

149. *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972) (“To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.”).

150. 424 U.S. 319 (1976).

151. *Id.* at 335.

152. *See id.* at 348–49.

153. 42 U.S.C. § 1983 (2012).

154. *Roth*, 408 U.S. at 577 (emphasis added).

155. *See Mandelker, supra* note 31, at 76–85.

landowner could try to convince the court that it had been arbitrarily and unreasonably abused by land use regulators.

The highly confusing realm of takings law is the setting for the third advantage of the “property” version. A developer denied a rezoning from, say, residential to commercial use has rarely if ever suffered a partial regulatory taking under the balancing approach of *Penn Central Transportation Company v. New York City*,¹⁵⁶ because the property still retains “reasonable beneficial use.”¹⁵⁷ This developer will also be unable to demonstrate that it has been victimized by a government-compelled permanent physical occupation taking¹⁵⁸ or that its property is devoid of all use or value *à la Lucas v. South Carolina Coastal Council*.¹⁵⁹ The improper *t*, however, would create an intriguing opportunity, because the Court has recognized that the total deprivation of one of the essential sticks in the bundle of rights collectively known as private property, if not accompanied by just compensation, can amount to a Takings Clause violation.¹⁶⁰ That is, if a local government should totally destroy the developer’s right to make a legitimate use of its property, by denying a rezoning to a more intensive and lucrative use for which the property was suitable, a court could find that the developer was entitled to compensation (most likely the difference between the fair market value of the parcel zoned commercial versus residential).¹⁶¹

Judges, commentators, and counsel have relied on the *Roberge* error to advance all three grounds upon which disgruntled landowners seek relief—procedural due process, substantive due process, and takings.

1. Opinions

As illustrated in Figure 5 below, since 1929, fourteen reported federal and state cases have included opinions featuring the improper *t*. The cases originated in New England, the Midwest, and the South, including eight

156. 438 U.S. 104 (1978).

157. *Id.* at 138.

158. *See, e.g., Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005) (“[W]here government requires an owner to suffer a permanent physical invasion of her property—however minor—it must provide just compensation.”).

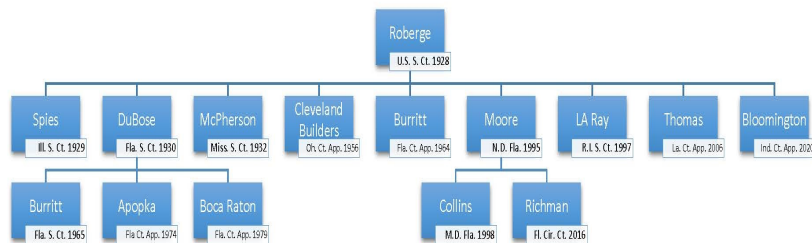
159. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992) (“[T]here are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.”).

160. *See Hodel v. Irving*, 481 U.S. 704, 716 (1987) (“[T]he regulation here amounts to virtually the abrogation of the right to pass on a certain type of property—the small undivided interest—to one’s heirs.”); *see also Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979) (“[T]he ‘right to exclude,’ so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation.”) (footnote omitted).

161. *See, e.g., U.S. v. 50 Acres of Land*, 469 U.S. 24, 25–26 (1984) (“The Fifth Amendment requires that the United States pay ‘just compensation’—normally measured by fair market value—whenever it takes private property for public use.”) (footnote omitted).

cases from federal and state courts in Florida. There are three generations of reported cases that include the error, beginning with the West Publishing and Lawyers Co-operative versions of *Roberge*, followed by nine cases directly quoting the improper *t*,¹⁶² two of which have spawned their own progeny (three cases from one, two from another).¹⁶³ The latest reported decision appeared in January 2020.¹⁶⁴

Figure 5



In a few opinions, the inclusion of the improper *t* is harmless error. In the earliest decision, for example, the Supreme Court of Illinois, in *Spies v. Board of Appeals*,¹⁶⁵ invalidated a provision requiring consent from 75 percent of neighboring owners before the owner of a property in a residential zone could secure a permit to erect a store on the site.¹⁶⁶ The court spent several paragraphs explaining the facts and reasoning of

162. The opinions directly misquoting *Roberge* are as follows: *Moore v. City of Tallahassee*, 928 F. Supp. 1140, 1145–46 (N.D. Fla. 1995); *State ex rel. Helseth v. Du Bose*, 128 So. 4, 7 (Fla. 1930); *Burritt v. Harris*, 166 So. 2d 168, 172 (Fla. Dist. Ct. App. 1964), *rev'd*, 172 So. 2d 820 (Fla. 1965); *Spies v. Bd. of Appeals*, 169 N.E. 220, 221–22 (Ill. 1929); *Bd. of Zoning Appeals v. UJ-Eighty Corp.*, 141 N.E.3d 869, 876 (Ind. Ct. App.), *reh'g denied*, No. 19A-PL-457 (Ind. Ct. App. 2020); *Thomas v. New Orleans Redevelopment Auth.*, 942 So. 2d 1163, 1169 (La. Ct. App. 2006); *Jackson v. McPherson*, 138 So. 604, 610 (Miss. 1932) (Ethridge, J., dissenting); *Cleveland Builders Supply Co. v. Garfield Heights*, 136 N.E.2d 105, 109 (Ohio Ct. App. 1956); *L.A. Ray Realty v. Town Council*, 698 A.2d 202, 216 (R.I. 1997) (Flanders, J., concurring in part and dissenting in part).

163. The opinions misquoting *Roberge* through *Du Bose* are as follows: *Burritt v. Harris*, 172 So. 2d 820, 823 n.2 (Fla. 1965) (with citations to both cases); *Orange Cnty. v. Apopka*, 299 So. 2d 652, 655 (Fla. Dist. Ct. App. 1974); *City of Boca Raton v. Boca Villas Corp.*, 371 So. 2d 154, 158 (Fla. Dist. Ct. App. 1979).

The opinions misquoting *Roberge* through *Moore* are as follows: *Collins & Co. v. City of Jacksonville*, 38 F. Supp. 2d 1338, 1342–43 (M.D. Fla. 1998) (citing both cases); *Richman Grp. of Fla., Inc. v. Pinellas Cnty.*, 2016 Fla. Cir. LEXIS 4713, at *27, 2016 WL 8376580, at *10 (Fla. Cir. Ct. June 29, 2016), *rev'd*, 253 So. 3d 662 (Fla. Dist. Ct. App. 2017).

164. *UJ-Eighty Corp.*, 141 N.E.3d at 876.

165. 169 N.E. 220 (Ill. 1929). See *supra* notes 116–121 and accompanying text.

166. 169 N.E. 220 (Ill. 1929).

Roberge, and included a long quotation from the opinion, including the improper *t*.¹⁶⁷ The *Spies* court concluded by noting that, because of the similarity of the two zoning provisions, *Roberge* was “decisive that the ordinance of the city of Decatur is repugnant to the constitutional prohibition of deprivation of property without due process of law.”¹⁶⁸

In similar fashion, the Court of Appeals of Indiana in 2020 characterized as an unconstitutional delegation a provision in the Bloomington zoning ordinance “that contained the definition of a fraternity or sorority house and required students to be enrolled in Indiana University and sanctioned by the university, through whatever process the university chose, as members of a fraternity or sorority.”¹⁶⁹ The trial court had placed *Roberge* at the center of its analysis, and the appellate panel’s majority agreed: “After acknowledging ‘the right of the [landowner] to devote its land to any legitimate use is property within the protection of the Constitution,’ the *Roberge* Court struck down the ordinance.”¹⁷⁰ The misquoted language was not necessary to the resolution of the case, which was decided on delegation grounds.

In the other opinions featuring the improper *t*, judges have attempted to make it easier for property-owning plaintiffs to gain relief from procedural due process, substantive due process, or takings violations.

a. Procedural Due Process

The improper *t* appears in *Thomas v. New Orleans Redevelopment Authority*,¹⁷¹ in which the Court of Appeal of Louisiana in 2006 considered a procedural due process challenge brought by former owners of blighted property expropriated by public officials. The court, misquoting *Roberge*, found that the owners, who claimed that the notice provided by the Authority was deficient, “clearly have a protected property interest in 831-33 Sixth Street, that is, the right to devote the property to any legitimate use. Thus, the plaintiffs were entitled to constitutional procedural due process before NORA could deprive them of that property interest.”¹⁷² Nevertheless, because public officials “made all reasonable efforts to ascertain the plaintiffs’ respective addresses,”¹⁷³ the court concluded that plaintiffs’ due process rights had not been violated.

167. *See id.* at 221.

168. *Id.* at 222.

169. *UJ-Eighty Corp.*, 141 N.E.3d at 870.

170. *Id.* at 876 (alteration in original) (misquoting *Wash. ex rel. Seattle Title Tr. Co. v. Roberge*, 278 U.S. 116, 121 (1928)).

171. 942 So. 2d 1163 (La. Ct. App. 2006).

172. *Id.* at 1169 (citation omitted) (citing *Roberge*, 278 U.S. at 121).

173. *Id.*

b. Substantive Due Process

In 1930, the Supreme Court of Florida, in *State ex rel. Helseth v. Du Bose*,¹⁷⁴ relied on the improper *t* to support a finding that a city's zoning-based denial of a building permit to a county wishing to build a jail was "arbitrary and unreasonable." The court explained:

The right of an owner to devote his land to any legitimate use is property within the terms of the Constitution, and the Legislature may not under the guise of the police power impose unnecessary or unreasonable restrictions upon such use. . . .

In its general scope the ordinance under attack is not shown to be violative of the state or Federal Constitution. But, on the showing made here as to the lands of appellant, we think it is arbitrary and unreasonable.¹⁷⁵

The *Du Bose* court's use of the improper *t* was in turn quoted in *Boca Raton v. Boca Villas Corporation*,¹⁷⁶ in which the district court of appeal in 1979 affirmed the trial court's conclusion that the city's attempt to control growth by capping the number of residential units was invalid.¹⁷⁷

The best example of a judge waxing poetic about fundamental private property rights while invoking the improper *t* is the dissenting opinion of Justice William N. Ethridge, Jr., of the Supreme Court of Mississippi in *City of Jackson v. McPherson*,¹⁷⁸ a 1932 case in which the majority ruled that the owner of a lot zoned for residential use would not be able to secure a permit for a gasoline service center.

Justice Ethridge could not resist the urge "to state a few fundamental principles underlying our system of government."¹⁷⁹ Invoking the letter and

174. 128 So. 4, 7 (Fla. 1930).

175. *Id.* at 7 (citation omitted). The *Du Bose* court's language was cited as dictum in a Florida appellate case involving three cities desiring to build an airport that unsuccessfully claimed to be immune from the county's zoning ordinance. *Orange Cnty. v. Apopka*, 299 So. 2d 652, 655 (Fla. Dist. Ct. App. 1974) ("In holding that the application of the city zoning ordinance to the county property was arbitrary and unreasonable based on the facts of the case, the [*DuBose*] court noted the rule that the right of an owner to devote his land to any legitimate use is a property right which may not be unnecessarily or unreasonably restricted under guise of the police power.").

176. 371 So. 2d 154, 158 (Fla. Dist. Ct. App. 1979).

177. The appellate court "affirm[ed] the trial court's holding that the charter amendment and implementing ordinances bear no rational relationship to a valid municipal purpose." *Id.* at 159.

178. 138 So. 604 (Miss. 1932).

179. *Id.* at 606 (Ethridge, J., dissenting).

spirit of the Declaration of Independence and the Virginia Constitution of 1776, he emphasized that

[t]he use of property is the greatest thing concerning it. When a man acquires property he acquires the right to its use, and it is only when that use, whatever it may be, interferes with the rights of some other person that the government may restrain that use, and then only to the extent that it infringes upon public health, public morals, or the public safety.¹⁸⁰

Among several other cases in support of this proposition, Justice Etheridge proffered *Roberge*. In fact, he considered the improper *t* so nice that he used it twice:

In [*Roberge*], the United States Court held . . . that the right to devote real estate to any legitimate use is property within the protection of the Constitution. . . . The court in the *Roberge* Case further said: “Legislatures may not, under the guise of the police power impose restrictions that are unnecessary and unreasonable upon the use of private property or the pursuit of useful activities. The right of the trustee to devote its land to any legitimate use is property within the protection of the Constitution.”¹⁸¹

Evidently his colleagues in the majority were more cavalier when it came to the protection of fundamental property rights.¹⁸²

In 1964, the District Court of Appeal of Florida was faced with a landowner’s due process challenge brought because a county refused to rezone his property from residential to industrial use, costing him over \$30,000 in potential value.¹⁸³ Citing *Roberge* and two Florida decisions, the court acknowledged that “there are certain principles pertinent to the disposition of this appeal,” and noted that the first of those principles was that “the right of an owner to devote his land to any legitimate use is property within the terms of both the Federal and State Constitutions, and

180. *Id.*

181. *Id.* at 610 (Etheridge, J., dissenting) (citations omitted).

182. In a 1997 decision of the Supreme Court of Rhode Island, Justice Robert Flanders asserted that subdivision developers whose plans were frustrated by an improper referendum had a constitutionally protected property interest even though they lacked permits. *L.A. Ray Realty v. Town Council*, 698 A.2d 202, 216 (R.I. 1997) (Flanders, J., concurring in part and dissenting in part) (misquoting *Wash. ex rel. Seattle Title Tr. Co. v. Roberge*, 278 U.S. 116, 121 (1928)) (“[B]oth the trial justice and this court have held that the developer plaintiffs were deprived of a constitutionally protected property interest when the local governmental authorities arbitrarily and irrationally refused to award a permit for their residential subdivision plans. I believe this result accords with long-standing federal constitutional principles that recognize that ‘[t]he right of [an owner] to devote [his or her] land to any legitimate use is property within the protection of the Constitution.’”) (alterations in original).

183. *See Burritt v. Harris*, 166 So. 2d 168, 170–71 (Fla. Dist. Ct. App. 1964), *rev’d*, 172 So. 2d 820 (Fla. 1965).

zoning authorities may not, under the guise of the police power, impose unnecessary or unreasonable restrictions upon such use.”¹⁸⁴ Nevertheless, the court ruled against the landowner, concluding that he had “failed to carry the burden of showing that the character of his property has so changed as to make a refusal by the zoning Board to alter its zoning classification, confiscation of his property,” and had not “establish[ed] that the action of the appellees, acting as the Zoning Board, in continuing the residential-use character of his property, was, under the circumstances as reflected in the testimony and evidence before the chancellor, either arbitrary, unreasonable or discriminatory.”¹⁸⁵ So far, the use of the improper *t* was harmless error.

A year later, however, the Supreme Court of Florida reversed, emphasizing nuisance-like negative externalities that negatively affected the parcel: “The uncontradicted testimony . . . shows the property to be unsuitable for residential use because of the noise from the airport and the obnoxious odor from a nearby pulp and paper plant.”¹⁸⁶ In justifying its reversal of the two lower courts, the state high court, citing *Roberge and Du Bose*, paraphrased the idea represented by the improper *t*: “The constitutional right of the owner of property to make legitimate use of his lands may not be curtailed by unreasonable restrictions under the guise of police power.”¹⁸⁷ The court added, for good measure, “If the zoning restriction exceeds the bounds of necessity for the public welfare, as, in our opinion, do the restrictions controverted here, they must be stricken as an unconstitutional invasion of property rights.”¹⁸⁸ The court came to this conclusion even though the record indicated “that the value of his property [zoned for residential use] actually increased from its purchase price of \$23,500 to \$32,500, between the date of purchase in June of 1957 to the date of the final hearing herein on June 3, 1963.”¹⁸⁹ This increase in value signals that residential use of the parcel was legitimate. However, the supreme court could employ the improper *t* to support the conclusion that because industrial use, too, was a legitimate use of the property, the county had violated the landowner’s rights.

Florida remained the setting in the 1990s for one of the most fruitful examples of the invocation of the improper *t*. Between 1987 and 1995, Devoe L. Moore attempted to develop a 28.6-acre parcel in Tallahassee that at the time of purchase “was zoned for service, commercial and industrial

184. *Id.* at 172.

185. *Id.* at 173.

186. *Burritt v. Harris*, 172 So. 2d 820, 822 (Fla. 1965).

187. *Id.* at 823, 823 n.2.

188. *Id.* at 823.

189. *Burritt v. Harris*, 166 So. 2d 168, 173 (Fla. Dist. Ct. App. 1964), *rev’d*, 172 So. 2d 820 (Fla. 1965).

uses.”¹⁹⁰ Negotiations with the city regarding the location of a sewer line dragged on, as did Moore’s attempt to secure a development permit, leading the landowner plaintiff to suspect “that Defendant [city] subjected them to this extended delay so that Defendant could eventually acquire the Land from Plaintiffs at as low a price as possible.”¹⁹¹ Adding insult to injury, Moore asserted that he lost a \$5.25 million offer to purchase his property because of limitations that the city imposed on the purchaser’s development plans.¹⁹² In March, 1995, Moore sold more than 25 acres to the state of Florida for \$3.615 million and contracted with the state to sell the remaining acreage for \$385,000.¹⁹³

Moore sued the city for damages under § 1983,¹⁹⁴ owing to the alleged violation of his substantive due process rights and in inverse condemnation “as a result of Defendant’s acts which amounted to a temporary deprivation of [Moore’s] use of [his] property.”¹⁹⁵ Federal district court Judge Maurice M. Paul denied the city’s motion for summary judgment for both claims.¹⁹⁶

After identifying the first count “an ‘as applied’ arbitrary and capricious due process claim,”¹⁹⁷ Judge Paul explained that Moore was required to make two demonstrations: “First, the claim must be shown to involve a constitutionally protected or fundamental interest; second, the claim must be shown to represent an abuse of government power sufficient to raise an ordinary tort to the stature of a constitutional violation.”¹⁹⁸

The improper *t* appeared in the discussion of how Moore, despite realizing a multi-million dollar return on his investment, had easily passed the deprivation of property threshold. The sentences preceding the improper *t* read: “The Court finds that a constitutionally protected interest is at stake in this litigation—namely, the right of Plaintiffs to develop and/or sell the Land. Individuals’ ability to own land and put it to lawful use is a fundamental American freedom.”¹⁹⁹ Judge Paul put Moore’s substantive due process claim on the fast track, concluding “that the record contains

190. Moore v. City of Tallahassee, 928 F. Supp. 1140, 1142 (N.D. Fla. 1995).

191. *Id.* at 1143.

192. *See id.* at 1144.

193. *See id.*

194. 42 U.S.C. § 1983 (2012).

195. Moore, 928 F. Supp. at 1142.

196. Judge Paul granted summary judgment to the city on a procedural due process claim based on the allegation that city officials were “biased decisionmakers acting under a clear conflict of interest.” *Id.* at 1144.

197. *Id.* at 1145.

198. *Id.*

199. *Id.* at 1145.

evidence which, if believed, would support Plaintiffs' position that Defendant abused its legitimate powers."²⁰⁰

The *Moore* opinion had a mixed legacy. In 1998, another federal district judge, Ralph W. Nimmons, Jr., granted a city's motion to dismiss a § 1983 due process claim brought by a group of disgruntled developers who lost a sale to the Duval County School Board of a twenty-acre new school site.²⁰¹ The School Board had followed the recommendation of the city of Jacksonville's Environmental Protection Board not to purchase the parcel because of its proximity to a Superfund site.²⁰²

Judge Nimmons declined to follow *Moore*, noting that the decision from another district had no precedential value. In his attempt to explain why the *Moore* court misunderstood *Roberge*, however, Judge Nimmons himself quoted the improper *t*, thereby exacerbating rather than resolving the error:

[*Roberge*] merely holds that the right to utilize real property for legitimate purposes is "property" within the protection of the Constitution and does not distinguish between the substantive and procedural components of due process. Additionally, *Roberge* predates modern Supreme Court due process jurisprudence. Further, both *Roberge* and *Moore* are zoning cases—cases in which the court is called upon to determine whether the local government decision to grant or withhold permission to utilize land in a particular way was exercised free from arbitrariness and caprice. Such cases rely upon a distinct, discrete body of case law in recognizing a substantive due process right in such a context. As with *Roberge*, it is not clear whether such cases survive modern Supreme Court and Circuit due process jurisprudence.²⁰³

Yet the problem is not that *Roberge* is anachronistic; it is that the *Moore* court relied on a mistake.

Unfortunately, *Moore*'s reign of error continued in the Sunshine State. In 2016 a state trial court, in *Richman Group of Florida, Inc. v. Pinellas County*,²⁰⁴ rendered a damages judgment exceeding \$16 million because the Countywide Planning Authority failed to approve a Countywide Land Use Plan Amendment sought by a developer with plans to build an apartment

200. *Id.* at 1146. The court also allowed the inverse condemnation claim to proceed, noting that Moore had "introduced evidence which, if believed, indicates that Defendant's calculated, dilatory tactics prevented them from developing their land for roughly four years." *Id.* at 1147.

201. *Collins & Co. v. City of Jacksonville*, 38 F. Supp. 2d 1338, 1340 (M.D. Fla. 1998).

202. *See id.* at 1340.

203. *Id.* at 1343 (footnote omitted) (citation omitted).

204. No. 14-005608CI-15, 2016 WL 8376580 (Fla. Cir. Ct. June 29, 2016), *rev'd*, 253 So. 3d 662 (Fla. Dist. Ct. App. 2017).

complex with some office space. The court relied on *Moore* to fast-track the due process claim:

Florida has long recognized that a constitutionally protected property right “to own land and put it to lawful use” exists as a “fundamental American freedom.” *Moore v. City of Tallahassee* (citing *State of Washington v. Roberge* (“the right . . . to devote . . . land to any legitimate use is property within the protection of the Constitution.”) To that end, a land-use application that fully complies with existing regulations constitutes a property interest subject to federal due process protection.²⁰⁵

Although the award was reversed a year later (the district court of appeal found that county officials did have a rational basis for the denial of the zoning change),²⁰⁶ the appellate court did note that “[t]he County raise[d] no challenge to the trial court’s finding that Richman [the developer] had a constitutionally recognizable interest in the proposed amendment.”²⁰⁷ The failure by court and counsel to recognize that the *Moore* court’s conclusion was based on a mistaken reading of *Roberge* led to the questionable conclusion that an owner can have a *property* interest not just in the *continued* use of real estate in a permitted fashion, but also in a government regulator’s determination regarding the future, *not-yet-permitted* use of that real estate.²⁰⁸

c. Takings

In 1956, the Ohio Court of Appeals, in *Cleveland Builders Supply Co. v. City of Garfield Heights*,²⁰⁹ delivered good news to a brickmaker that was forced to close business through the Great Depression and World War II. When the company opened a new brick plant in 1951, it learned that the city had amended its zoning ordinance and rezoned the company’s 81-acre parcel for residential use. In response to the company’s claim that it was

205. *Id.* at *10 (citations omitted).

206. *See* *Pinellas Cnty. v. Richman Grp. of Fla.*, 253 So. 3d 662, 674 (Fla. Dist. Ct. App. 2017).

207. *Id.* at 669.

208. A pattern similar to the *Moore* opinion’s reliance on the “property” version of *Roberge* has emerged in the U.S. Court of Appeals for the Ninth Circuit, but *technically* these are not improper *t* cases. *See, e.g., Squaw Valley Dev. Co. v. Goldberg*, 375 F.3d 936, 949 (9th Cir. 2004) (“[W]e have recognized a *constitutionally ‘protected property interest’* in a landowner’s right to ‘devote [his] land to any legitimate use.’ *Harris v. County of Riverside*, 904 F.2d 497, 503 (9th Cir. 1990) (quoting *Wash. ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121, 49 S. Ct. 50, 73 L. Ed. 210 (1928))). Here, presumably, the alleged overzealous and selective regulation of Squaw Valley interferes with its use of its real property.”) (emphasis added). *Abrogated by* *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005).

209. 136 N.E.2d 105 (Ohio Ct. App. 1956).

continuing a nonconforming use, the city asserted that the company had abandoned the prior industrial use.

The appellate court affirmed the ruling in favor of the plaintiff, and Judge Lee E. Skeel cited the (incorrect) headnotes from the *Lawyer's Edition* version of *Roberge* directly after the following defense of the company's property rights:

It is not economically sound for the community to lock from use valuable minerals deposited by nature under the surface of the land to the almost total destruction of its value without any benefit to the people or damage to surrounding territory and where the health, morals, safety and the general welfare or common good of the people is in fact not thereby affected.²¹⁰

As noted previously, the headnotes for the electronic version of the decision on LexisNexis still contain the improper *t*.²¹¹

Although Judge Skeel provided additional justification for his conclusion,²¹² the *Cleveland Builders* court's use of the improper *t*, as in all such cases, would provide fodder for dozens of additional mistakes in briefs, books, articles, and other legal documents for generations to come.

2. *Secondary Materials*

The improper *t* has made its presence felt far beyond case reporters. For example, the inclusion of the improper *t* in the West headnotes for *Roberge* has misled the compilers of at least two important legal encyclopedias. Section 674 of *American Jurisprudence*, devoted to "Real Property" under the general topic of "Constitutional Law," instructed its wide readership that "[t]he right to devote real estate to any legitimate use is property within the protection of the Constitution . . ." ²¹³ Section 462 of *New York Jurisprudence*, the "land use" section comprising part of the discussion of "What Constitutes Property" for due process purposes, begins by (mis)informing its readers that "[t]he right to devote real estate to any legitimate use is property within the protection of the due process clause."²¹⁴ This treatise, like so many other West Publishing secondary sources, relies on the key numbering and digest system. In this way, the seminal, uncorrected error in the key number found in the original *Supreme Court*

210. *Id.* at 109.

211. *See supra* note 17.

212. *See Cleveland Builders*, 136 N.E.2d at 111 ("The location of the property, contiguous to and abutting along a railroad, and other property zoned for commercial use, and its topography, make any possible use of the property in the classification as zoned exceedingly doubtful . . .").

213. 12 AM. JUR. *Constitutional Law* § 674 (1938) (citing *Roberge*).

214. 20 N.Y. JUR. 2D *Constitutional Law* § 462, Westlaw (database updated Nov. 2020).

Reports version of *Roberge* (and still on Westlaw)²¹⁵ has spawned a legacy of misrepresentation.²¹⁶ Authors of articles, books, and continuing legal education materials have also doubled down on the error in support of arguments regarding the availability of relief on procedural due process, substantive due process, and takings grounds.

a. Procedural Due Process

The most curious appearance of the improper *t* is in a 1995 law review article by Professor Gregory Stein—“Regulatory Takings and Ripeness in the Federal Courts.”²¹⁷ In this provocative article, Professor Stein has proposed a procedural due process litigation strategy (to redress “an interim due process violation”²¹⁸) as a more feasible alternative to drawn-out, unnecessarily complex, regulatory takings claims brought by frustrated landowners in federal court. Luckily for Professor Stein, there are a few federal circuits that are more willing to allow these due process challenges to proceed: “These circuits have been unanimous in their unwillingness to bar procedural due process claims solely due to an inability to find a protected property interest. The only issue for these courts seems to be whether the landowner has been deprived of that presumed property interest.”²¹⁹ One of the key cases cited by Professor Stein is the Ninth Circuit’s 1990 ruling in *Harris v. County of Riverside*.²²⁰ Unfortunately, in attempting to correct what he (or his editors) perceived to be an error in the *Harris* court’s quotation from *Roberge*, the article actually introduces the reader to the improper *t*.²²¹

215. The reader will recall that the LexisNexis headnotes also contain the error, despite the fact that the text reads “properly.” See *supra* note 17.

216. Even the “Notes of Decisions” for the Due Process Clause of the Fourteenth Amendment found in West’s *United States Code Annotated* (USCA) include the improper *t* (as the first note in § 7452 (“Property interest—Generally”), under heading LXXIX “Zoning”).

217. Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 VAND. L. REV. 1 (1995).

218. *Id.* at 86.

219. *Id.* at 83 (footnote omitted).

220. 904 F.2d 497 (9th Cir. 1990). Professor Stein writes that the *Harris* court “agreed to hear a procedural due process claim even though plaintiff’s regulatory takings and substantive due process claims were not yet ripe. The court noted that any injuries arising from the questionable procedures had already occurred and thus did not depend on the outcome of the process.” Stein, *supra* note 217, at 76–77 (footnote omitted).

221. See Stein, *supra* note 217, at 83 n.284 (“*Harris*, 904 F.2d at 503 (quoting *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121 (1928): ‘The right of [an owner] to devote [his] land to any legitimate use is properly [sic; “property” in original] within the protection of the Constitution.’”)) (alterations in original).

b. Substantive Due Process

The most famous author to use the improper *t* as a building block for judicial activism to protect fundamental property rights was Bernard Siegan. The longtime law professor at the University of San Diego and failed Ninth Circuit nominee,²²² Siegan was well known for, among other libertarian causes, his advocacy of *Land Use Without Zoning*.²²³ In 2003, Siegan published a chapter on “The Benefits of Non-Zoning” in a collection of essays by various urban experts.²²⁴ Siegan insisted that “[t]he *Roberge* decision should be interpreted as a limitation upon the *Euclid* ruling,” and complained that “to the best of my knowledge, neither the judiciary nor the major constitutional law casebooks have acknowledged this.”²²⁵

A key component of Siegan’s misunderstanding of *Roberge* lay in his reliance on the improper *t*:

In contrast to the deferential level of scrutiny of *Euclid*, the Supreme Court stated that legislatures must not under the guise of the police power, “impose restrictions that are unnecessary and unreasonable upon the use of private property or the pursuit of useful activities.” Delegation of the police power to a group of property owners violated the Constitution. The court asserted that the right of the plaintiff “to devote its land to any legitimate use is property within the protection of the constitution.”²²⁶

Siegan was far from alone among authors who compounded the *Roberge* error.

c. Takings

Fans of the Supreme Court’s pro-owner decision in *Lucas v. South Carolina Coastal Council*²²⁷ invoked the improper *t* to bolster Justice Scalia’s finding that the state’s Beachfront Management Act may have affected a total taking of Lucas’s two beachfront parcels.²²⁸ Professor

222. See Margalit Fox, *Bernard Siegan, 81, Legal Scholar and Reagan Nominee*, N.Y. TIMES, Apr. 1, 2006, at B8.

223. BERNARD H. SIEGAN, *LAND USE WITHOUT ZONING* (D.C. Heath & Co. 1973).

224. Bernard H. Siegan, *The Benefits of Non-Zoning*, in *REGULATING PLACE: STANDARDS AND THE SHAPING OF URBAN AMERICA* 203 (Eran Ben-Joseph & Terry S. Szold eds., 2005); see also Bernard H. Siegan, *The Benefits of Nonzoning*, in *HOUSING AMERICA: BUILDING OUT OF A HOUSING CRISIS* 33 (Benjamin W. Powell & Randall G. Holcombe eds., 2009).

225. Siegan, *The Benefits of Non-Zoning*, *supra* note 224, at 212.

226. *Id.* (footnote omitted).

227. 505 U.S. 1003 (1992).

228. See *id.* at 1030 (“When, however, a regulation that declares ‘off-limits’ all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it.”).

Robert Washburn explained in a 1993 article that “Lucas’s right to build on his property is entitled to constitutional protection,” quoting the improper *t* sentence for support.²²⁹

A second post-*Lucas* piece quoting the improper *t* is a portend of future litigation. The author was James Burling, a leading property rights advocate for the Pacific Legal Foundation (PLF),²³⁰ who, in a 1995 CLE contribution, included *Roberge* in a footnote as one of three 1920s due process challenges to zoning that did not discuss regulatory takings.²³¹

Burling and the PLF are important players in the private property rights movement, an alliance of academic lawyers and practitioners who have pursued an anti-regulatory agenda in the land use and environmental realm for several decades.²³² The best examples of their handiwork,²³³ though, can be found in briefs and other court documents that also feature, sometimes prominently, the improper *t*.

3. Briefs and Trial Documents

As early as 1931, a Supreme Court brief featured the improper *t* in a discussion of the due process threshold requirements. The case, *Texas & Pacific Railway v. United States*,²³⁴ was ultimately a successful challenge to the Interstate Commerce Commission’s attempt to impose commodity rate differentials on shippers to gulf coast destinations. The brief for railroads challenging the ICC rate orders included *Roberge* as one of several cases in support of the proposition that the Court had “repeatedly held that the right to use and enjoy the use of property comes within the protection of the due process clause of the Fifth Amendment as to the federal government and the

229. Robert M. Washburn, *Land Use Control, the Individual, and Society: Lucas v. South Carolina Coastal Council*, 52 MD. L. REV. 162, 214 n.353 (1993).

230. James S. Burling, PAC. LEGAL FOUND., https://pacificlegal.org/staff/james-burling/?gclid=CjwKCAjw8J32BRBCEiwApQEKgRKIXx2GNQxjFdisbxhKz9xRaOMO4pqntbDNx-jarDQzITNRaETBoCrl8QAvd_BwE [https://perma.cc/62MQ-62JB].

231. See James S. Burling, *Of Nuisances and Public Trusts—Can Lucas Be Evaded?*, C997 ALI-ABA 259, 269 n.12 (May 4, 1995).

232. See Douglas T. Kendall & Charles P. Lord, *The Takings Project: A Critical Analysis and Assessment of the Progress So Far*, 25 B.C. ENV’T AFFS. L. REV. 509, 510 (1998) (finding “a large and increasingly successful campaign by conservatives and libertarians to use the federal judiciary to achieve an anti-regulatory, anti-environmental agenda”). On the activities of PLF and Burling, see *id.* at 540–42, and on the NAHB, see *id.* at 545. See also James Pollack, Note, *The Takings Project Revisited: A Critical Analysis of this Expanding Threat to Environmental Law*, 44 HARV. ENV’T L. REV. 235, 262–63 (2020) (footnote omitted) (“Organizations like PLF thrive not only because they have a set of beliefs, but also because they get cases in front of the U.S. Supreme Court.”).

233. See, e.g., Petition for Writ of Certiorari at 14–15, *Kittery Retail Ventures, L.L.C. v. Town of Kittery*, 544 U.S. 906 (2005) (No. 04-943), 2005 WL 79245 (Burling was one of two named Counsel of Record from the PLF).

234. 289 U.S. 627 (1933).

Fourteenth Amendment as to the state governments.”²³⁵ The challengers prevailed, but not on due process grounds.²³⁶

Over the last several decades, in an interesting array of disputes in federal and state courts, counsel representing property owners and *amici curiae* have featured the improper *t* in several dozen briefs and trial documents designed to convince courts that private property owners were deserving of more robust protection from confiscatory and unreasonable land use regulations.²³⁷ Some *Roberge* misquotations appear somewhat innocuously in discussions of the delegation of regulatory power to neighbors and other citizens (the main focus of the 1928 decision).²³⁸ Yet by the close of the twentieth century, the error-based assertion that the owner’s right “to devote its land to any legitimate use is *property*,” and thus deserving of special constitutional protection, had become a recurrent theme in court filings seeking to supercharge substantive due process and other constitutional challenges. This is a fascinating, real-world experiment in the development of legal doctrine through advocacy, even though that advocacy is based on a foundational flaw.

The number of briefs submitted by organizations and prominent attorneys identified with the private property rights movement is noteworthy. The PLF filed three amicus briefs, the National Association of Home Builders (NAHB) filed four amicus briefs, and James Burling and Gideon Kanner²³⁹ were each listed as counsel of record in two separate

235. Brief on Behalf of the Texas & Pacific Railway Co., Appellant at 239, 241, *Tex. & Pac. Ry. Co. v. U.S.*, 289 U.S. 627 (1933) (No. 1), 1931 WL 67628.

236. See *Tex. & Pac.*, 289 U.S. at 631 (“The Commission found that export and import rates on fourteen commodities from or to points in Arkansas, Texas, Oklahoma, Southern Kansas, and Louisiana west of the Mississippi river were unduly prejudicial to Galveston and unduly preferential of New Orleans.”).

237. Westlaw and LexisNexis searches turned up forty-two appellate briefs (from thirty-five different cases, twenty-three of which were filed in the U.S. Supreme Court) and sixteen trial documents (from fifteen cases) that included the improper *t*. Because neither service can claim universal coverage, especially of trial court documents, readers should consider these as a representative set of documents.

238. See, e.g., Answer to Petition for Review at 18, *Vaquero Energy, Inc. v. Cnty. of Kern*, 2020 Cal. LEXIS 1513 (No. S259887) (company unsuccessfully asserted that oil and gas permitting ordinance that depended on surface owner’s consent was invalid delegation); Brief for Appellants at 49–50, *Gant v. Okla. City*, 289 U.S. 98 (1933) (No. 547), 1932 WL 33481 (failing to demonstrate that requiring sureties to post bond before acquiring oil and gas drilling license constituted unconstitutional delegation); see also Brief for Defendant-Appellee at 31–32, *Campbell v. U.S.*, 45 F. App’x 50 (2d Cir. 2002) (No. 01-6270), 2002 WL 32317658 (succeeding in defense against taxpayer challenge to allegedly unconstitutional deduction provisions in a brief by James B. Comey, then-U.S. Attorney for the Southern District of New York).

239. Kanner is a legendary eminent domain attorney. In fact, he and fellow property rights advocate Toby Brigham grace the name of the “Brigham-Kanner Property Rights Prize,” awarded annually to an outstanding expert in the field by William and Mary Law School in honor of the pair’s “lifetime contributions to private property rights, their efforts to advance the constitutional protection of property, and their accomplishments in preserving the important role that private property plays in protecting individual and civil rights.” *Bob Ellickson ‘66 Awarded Brigham-Kanner Property Rights*

cases. To date, the track record for those asserting that the right to make use of property for any legitimate use is *itself* property has been mediocre. With the infusion of libertarians and other conservatives on the federal courts during the Trump Administration,²⁴⁰ the prospects of success might have been brighter, except for the fact that this Article has now exposed a very weak link in this advocacy chain.

a. Procedural Due Process

Many appellate briefs have featured the improper *t* in a combined discussion of procedural *and* substantive due process (discussed in 3b below), but only one focused solely on the procedural variety, a party brief in a case involving a society that was denied a special use permit because local officials did not consider the group to be a church.²⁴¹ Counsel argued that the Michigan trial court had improperly ruled that the society's procedural due process rights were not violated, because of "the bias of Township officials"²⁴² and because those officials applied unconstitutionally vague standards.²⁴³ The improper *t* appeared in a footnote to the first proposition, preceded by this sentence: "There can be no doubt that the Church has a constitutionally protected interest in the use of its property for religious worship."²⁴⁴ The society's counsel had made nearly the exact procedural due process argument in a motion in opposition to the township's motion for partial summary judgment, including verbatim the quoted sentence preceding the misquotation from *Roberge*.²⁴⁵ The Court of Appeals of Michigan was not convinced, rejecting all of the society's constitutional claims.²⁴⁶

Prize, YALE L. SCH. (Sept. 5, 2008), <https://law.yale.edu/yls-today/news/bob-ellickson-66-awarded-brigham-kanner-property-rights-prize> [<https://perma.cc/J62K-MED6>].

240. See, e.g., *Judicial Confirmations Update*, SENATE RPC (June 24, 2020), <https://www.rpc.senate.gov/policy-papers/judicial-confirmations-update> [<https://perma.cc/8Y7S-NF35>] ("The Senate has worked diligently to cement President Trump's legacy on the federal courts. With this week's confirmation of Cory Wilson to the 5th Circuit Court of Appeals, the Senate has confirmed 200 Trump-appointed judges to Article III judgeships.")

241. See Plaintiff/appellant Great Lakes Society's Brief in Opposition to Application for Leave to Appeal, *Great Lakes Soc'y v. Georgetown Charter Twp.*, 761 N.W.2d 371 (Mich. Ct. App. 2008) (No. 270031), 2007 WL 6454942.

242. See *id.* at 48.

243. See *id.* at 49.

244. *Id.* at 48 n.29.

245. Memorandum in Opposition to Defendants' Motion for Partial Summary Disposition of All Counts Asserting a Violation of the United States or Michigan Constitution at 20 n.18, *Great Lakes Soc'y v. Georgetown Charter Twp.*, 761 N.W.2d 371 (Mich. Ct. App. 2008) (No. 03-45966-AA), 2007 WL 6695088.

246. See *Great Lakes Soc'y v. Georgetown Charter Twp.*, 761 N.W.2d 371, 390 (Mich. Ct. App. 2008).

A little digging turned up a trial brief filed in another religious rights-related case, this one filed in a California federal court a few months before the motion in the Michigan case.²⁴⁷ Alameda County officials had denied a conditional use permit that would have allowed Redwood Christian Schools “to build a 650-student combined junior-senior high school.”²⁴⁸ The bias argument, the *Roberge* misquotation, and the preceding sentence are nearly identical.²⁴⁹ While local counsel differed, what the two plaintiffs’ teams had in common was participation by attorneys from The Becket Fund for Religious Liberty, a well-respected advocate for religious rights. Apparently, zealous warriors for all kinds of rights are equally susceptible to making mistakes.

Perhaps the most intriguing of the trial briefs is a plaintiffs’ filing in *Hardesty v. Sacramento Metropolitan Air Quality Management District*,²⁵⁰ a case that initially resulted in a \$100+ million judgment for due process violations that in the summer of 2020 was remanded by the U.S. Court of Appeals for the Ninth Circuit for a reduction in damages.²⁵¹ One set of plaintiffs—the Schneider family, whose members mined on their ranch from the nineteenth century until prohibited to do so by county officials in 2009²⁵²—alleged that

the defendants violated their 14th Amendment due process rights by: revoking their land use entitlements, prohibiting their liquidation of stockpiled inventory, and levying fines and mandates on Plaintiffs without providing notice of the basis for the decisions, without any articulated standard of conduct the Plaintiffs were accused of violating, without an opportunity for Plaintiffs to rebut the charges against them in a meaningful way and at a meaningful time and without credible explanation of the basis for the decisions.²⁵³

The first source cited to demonstrate that the Schneiders had met the threshold requirement was *Moore v. City of Tallahassee*,²⁵⁴ including the *Roberge* misquotation.

247. Plaintiff’s Trial Brief, *Redwood Christian Schs. v. Cnty. of Alameda*, 2007 WL 781794 (N.D. Cal. 2007) (No. C-01-4282 SC ADR), 2007 WL 617426 [hereinafter *Redwood Trial Brief*].

248. *Redwood Christian Schs. v. Cnty. of Alameda*, 2007 WL 781794, at *1 (N.D. Cal. Mar. 8, 2007).

249. See *Redwood Trial Brief*, *supra* note 247, at 23 n.41.

250. *Schneider Plaintiffs’ Trial Brief* at 7, *Hardesty v. Sacramento Metro. Air Quality Mgmt. Dist.*, 2020 WL 4816361 (9th Cir. Aug. 19, 2020) (No. 2:10-cv-02414-KJM-KJN) [hereinafter *Schneider Brief*].

251. See *Hardesty v. Sacramento Cnty.*, 824 F. App’x 474, 476 (9th Cir. 2020).

252. See *Schneider Brief*, *supra* note 250, at 1.

253. *Id.* at 7.

254. See *id.* (quoting *Moore v. Tallahassee*, 928 F. Supp. 140, 1145–46 (N.D. Fla. 1995)); see *supra* notes 28–45 and accompanying text.

The plot thickens on the next page, in the discussion of the substantive due process count: “The Due Process Clause prohibits government officials from arbitrarily depriving a person of her constitutionally protected property or liberty interests. This includes the right to devote land to any legitimate use, and to pursue a given profession.”²⁵⁵ The 1990 case cited in support of the “legitimate use” right is the Ninth Circuit decision in *Harris v. County of Riverside*,²⁵⁶ a highly cited decision that correctly quoted the (“properly”) language from *Roberge*, but, in a problematic move, introduced that quotation by stating, “[w]e must also determine whether the County’s decision deprived Harris of a *protected property interest* prior to applying procedural due process. We find that it did.”²⁵⁷ In *Harris*, the court reversed a summary judgment in favor of the defendant county on a landowner’s claim that he was denied procedural due process (lack of notice) when the county downzoned for residential use property that he was already using for commercial purposes.²⁵⁸

Hardesty, like *Harris*, involved landowners who were conducting a legal use (which could be deemed a vested right), whom the government subsequently subjected to more rigorous regulation. In other words, these plaintiffs were seeking to *continue* a legitimate use; they themselves, unlike the plaintiffs in the two church cases, were not seeking government permission to make more intensive use of their properties.

Meanwhile, one year after *Harris*, the Supreme Court would be faced with a substantive due process challenge, based squarely on the misquotation from *Roberge*, that involved a landowner prevented from making a new and more lucrative use of its property. Even though the landowner failed, its attempt (and its reliance on the improper *t*) would continue to inspire due process challenges for decades to follow.

b. Substantive Due Process

In the 1930s and 1940s, attorneys seeking relief in the Supreme Court deployed the improper *t* to attack allegedly arbitrary or confiscatory land regulations governing outdoor advertising,²⁵⁹ warehouse storage,²⁶⁰ rent

255. Schneider Brief, *supra* note 250, at 8 (citations omitted).

256. 904 F.2d 497 (9th Cir. 1990); *see supra* notes 133–134.

257. *Harris*, 904 F.2d at 503 (emphasis added).

258. *See id.* at 498, 504.

259. *See* Brief of Appellants upon Appellees’ Motions to Dismiss for Want of Jurisdiction at 19, Gen. Outdoor Advert. Co. v. Hoar, 297 U.S. 725 (1936) (Nos. 102, 103, 104), 1935 WL 32619.

260. *See* Appellants’ Brief at 132, *Indep. Warehouses v. Scheele*, 331 U.S. 70 (1947) (No. 83), 1946 WL 50200.

control,²⁶¹ and the operation of trailer parks.²⁶² The Justices frustrated all of these attempts, either rejecting the due process claims²⁶³ or choosing not to hear the case.²⁶⁴ For four decades, the improper *t* did not make an appearance in Supreme Court briefs involving the due process threshold. That period of desuetude ended with a vengeance in 1991, when a case that temporarily drew the attention of the Court, *PFZ Properties, Inc. v. Rodriguez*,²⁶⁵ set the tone for a sustained effort by counsel championing private property rights to weaponize the improper *t*, an effort that lasts to this day.

i. PFZ Properties, Inc. v. Rodriguez

Roberge first appeared near the latter stages of litigation pitting a developer with ambitious plans for a hotel and residential development against Puerto Rican officials whose actions and attitudes shifted from cooperative, to dilatory, to antagonistic. According to the federal district court that, in granting the defendants' motion to dismiss, "accept[ed] the allegations in the amended complaint as true,"²⁶⁶ PFZ had owned 1,358.65 cuerdas (each .97 of an acre) of property in Vacía Talega, Puerto Rico.²⁶⁷ In 1976 the Puerto Rico Planning Board granted PFZ permission to create several thousand residential and hotel units in two phases (a decision that withstood a state court challenge brought by local residents),²⁶⁸ and five years later officials of the Puerto Rico Regulations and Permits Administration (ARPE) approved preliminary plans for the first section of the development.²⁶⁹

After a few years of administrative give-and-take, things turned sour in 1986, when two senators, concerned about the ecological impact of the

261. See Brief for Appellees at 6, *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138 (1948) (No. 486), 1947 WL 44360.

262. See Motion of Appellant to Set Aside Per Curiam Order Entered May 29, 1950, Sustaining Motion to Dismiss Appeal for Want of a Substantial Federal Question and Brief in Support at 7–8, *Glissmann v. Omaha*, 339 U.S. 960 (1950) (No. 792), 1950 WL 78443.

263. See *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 142–43 (1948) (upholding federal rent control statute); *Indep. Warehouses v. Scheele*, 331 U.S. 70, 71–72, 80–82, 89 (1947) (affirming state supreme court decision upholding warehouse storage ordinance).

264. *Glissmann v. City of Omaha*, 339 U.S. 960, 960 (1950) (per curiam) (dismissing challenge, for want of substantial federal question, brought by lessee who wished to open trailer park), *dismissing appeal from* 39 N.W.2d 895, 831 (Neb. 1949); *Gen. Outdoor Advert. Co. v. Callahan*, 297 U.S. 725, 725 (1936) (dismissing challenge to outdoor advertising restrictions), *dismissing appeal from* 193 N.E. 799, 803 (Mass. 1935).

265. 928 F.2d 28 (1st Cir. 1991), *cert. dismissed as improvidently granted*, 503 U.S. 257 (1992).

266. *P.F.Z. Props., Inc. v. Rodriguez*, 739 F. Supp. 67, 69 (D.P.R. 1990), *aff'd*, 928 F.2d 28 (1st Cir. 1991).

267. *Id.* at 69 & n.3.

268. *Id.* at 69 n.5.

269. See *id.* at 69.

development, proposed a bill designed “to conserve for scientific, ecological and passive recreation purposes the Vacia Talega area, an area known for its mangrove-rich lands.”²⁷⁰ Adding insult to injury, ARPE’s enthusiasm for the development cooled off considerably, and in the closing months of 1987 newspapers “reported that the Governor was reevaluating public policy on the environmentally sensitive coastal area of Vacia Talega and that no permit decision would be made until a new public policy could be determined.”²⁷¹ Faced with ARPE resistance and gubernatorial opposition, PFZ filed suit on December 28, 1987,²⁷² and in its amended complaint asserted that by “deliberately delay[ing] processing of the construction drawings and illegally refus[ing] to process construction drawings pursuant to Puerto Rico law, ARPE’s regulations and practices,” agency officials’ “deliberate actions have deprived PFZ of its constitutional rights to procedural and substantive due process and equal protection.”²⁷³

On the procedural due process threshold issue, U.S. District Judge Hector M. Laffitte assumed without deciding “that PFZ acquired a property interest in obtaining a construction permit for its project.”²⁷⁴ PFZ lost this claim, however, as the court ruled that the developer had “received minimal due process in the form of reconsideration before the agency and appeal before the local courts.”²⁷⁵

The court also gave the cold shoulder to PFZ’s substantive due process claim, despite allegations that ARPE “arbitrarily, capriciously or illegally delayed and denied review of the construction drawings,” and that “the handling of its project was tainted with fundamental procedural irregularities.”²⁷⁶ Judge Laffitte pointed out that “[t]he First Circuit has repeatedly found that controversies surrounding rejections of proposed land development projects and denials of permits [do] not amount to a federal constitutional violation” and “that even where state officials have clearly violated state law in the area of land planning or zoning, this action does not rise to the level of a constitutional deprivation.”²⁷⁷

270. *Id.* at 70.

271. *Id.*

272. *Id.* After the ARPE decided that the 1976 and 1981 approvals were no longer effective and denied PFZ’s request to reconsider, based on the allegation that the agency officials relied on the wrong set of drawings, the developer was unsuccessful in superior court, which affirmed the agency’s decision. *Id.*

273. *Id.* In its original complaint, PFZ alleged that “Defendant’s refusal to approve and issue building permits constitutes an illegal taking of plaintiff’s property without just compensation.” Joint Appendix at 92, *PFZ Props., Inc. v. Rodriguez*, 503 U.S. 257 (1992) (No. 91-122).

274. *P.F.Z. Props.*, 739 F. Supp. at 71.

275. *Id.* at 72.

276. *Id.*

277. *Id.* The court also ruled that “PFZ has failed to state a cause of action for violation of equal protection of the laws.” *Id.* at 74.

Not surprisingly, the U.S. Court of Appeals for the First Circuit, in an opinion written by Judge Levin H. Campbell, affirmed the trial court's triple dismissal.²⁷⁸ Once again, on the threshold question concerning the alleged procedural due process claim, the court *assumed* that PFZ's questionable characterization was satisfactory: "Although we think it far from clear that PFZ's expectation of receiving a construction permit from ARPE constituted a property interest under Puerto Rico law, we may assume, *arguendo*, that the facts alleged in the complaint are sufficient to establish such an interest."²⁷⁹ PFZ's substantive due process claim was equally unpersuasive, as ARPE's alleged actions did not shock the conscience.²⁸⁰ Without any facts indicating "discrimination based on an invidious classification such as race or sex," or "egregious procedural irregularities," PFZ's equal protection claim also fell short on appeal.²⁸¹

So far *Roberge* had not been a factor in either federal court, and that was true also of PFZ's petition for a writ of certiorari directed to the Supreme Court.²⁸² PFZ sought review on two questions, one pertaining to procedural due process²⁸³ and the other, the one that the Justices agreed to hear,²⁸⁴ reading: "Whether an arbitrary, capricious or illegal denial of a construction permit to a developer by officials acting under color of state law can state a substantive due process claim under 42 U.S.C. § 1983."²⁸⁵ PFZ's counsel explained that the Court needed to bring the First Circuit in line with other courts of appeal:

In light of the First Circuit's repeated adherence to its standard that substantive due process rights are not ordinarily implicated in situations involving the denial of a development project or a building permit notwithstanding facially sufficient allegations of arbitrary, capricious and illegal conduct, and the acknowledged widespread disagreement with this standard expressed in the other federal circuits, the Supreme Court should grant the petition to resolve a well-recognized conflict on this constitutional issue.²⁸⁶

278. See *PFZ Props., Inc. v. Rodriguez*, 928 F.2d 28 (1st Cir. 1991), *cert. dismissed as improvidently granted*, 503 U.S. 257 (1992).

279. *Id.* at 30–31.

280. See *id.* at 31–32.

281. *Id.* at 32.

282. Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit, *PFZ Props., Inc. v. Rodriguez*, 503 U.S. 257 (1992) (No. 91-122) [hereinafter *PFZ Cert. Pet.*] (no mention of *Roberge* in entire document).

283. See *id.* at i.

284. *PFZ Properties, Inc. v. Rodriguez*, 502 U.S. 956, 956 (1991) ("Petition for writ of certiorari to the United States Court of Appeals for the First Circuit granted limited to Question 2 presented by the petition.")

285. *PFZ Cert. Pet.*, *supra* note 282, at i.

286. *Id.* at 15.

To the respondents' counter that "[t]he facts of this case . . . afford no occasion to consider an alleged split of authority in the circuits,"²⁸⁷ PFZ asserted that in the view of the First Circuit, an arbitrary, capricious or illegal denial of a building permit "cannot implicate substantive due process, *unless* the improper motivation is accompanied by the deprivation of *another* specific constitutional right."²⁸⁸

On December 27, 1991, six weeks after the Court agreed to consider the substantive due process question, the improper *t* appeared in the petitioner's brief²⁸⁹ and in an amicus brief filed by the NAHB.²⁹⁰ In neither instance was this a minor addition.

PFZ asserted that by dismissing the substantive due process allegation the court of appeals had "ignored this Court's recognition that the *legitimate use of private property is a protected constitutional right*."²⁹¹ The source for this purported right appeared in the argument under a separate heading: "Other Protected Rights—The Right to Devote Private Property to a Legitimate Use."²⁹² PFZ's counsel had first established that "the Due Process Clause includes a substantive component which bars certain 'arbitrary, wrongful' government actions, 'regardless of the fairness of the procedures used to implement them,'"²⁹³ then had noted that "[t]he Court affords fundamental rights extraordinary judicial protection."²⁹⁴ But, PFZ claimed, other non-fundamental rights were protected as well:

The Due Process Clause protects against the deprivation of other rights implicating "life, liberty, or property," as well. Thus, within the context of substantive due process, this Court has expressly recognized that the right of a landowner "to devote its land to any legitimate use is property within the protection of the Constitution."²⁹⁵

Counsel for PFZ then doubled down on the improper *t*, asserting, "[t]his recognition that the substantive component of the Due Process Clause protects the right of a landowner to devote his land to legitimate use is

287. Respondents' Brief in Opposition at 25, *PFZ Props., Inc. v. Rodriguez*, 503 U.S. 257 (1992) (No. 91-122).

288. PFZ Cert. Pet., *supra* note 282, at 12.

289. Brief of Petitioner at 14, *PFZ Props., Inc. v. Rodriguez*, 503 U.S. 257 (1992) (No. 91-122) [hereinafter PFZ Pet. Brief].

290. Motion of the NAHB for Leave to File an Amicus Curiae Brief & Brief in Support of the Petitioner at 2, *PFZ Props., Inc. v. Rodriguez*, 503 U.S. 257 (1992) (No. 91-122) [hereinafter PFZ NAHB Amicus Brief].

291. PFZ Pet. Brief, *supra* note 289, at 10 (emphasis added).

292. *Id.* at 14.

293. *Id.* at 11 (quoting *Zinerman v. Burch*, 494 U.S. 113, 125 (1990)).

294. *Id.* at 14.

295. *Id.* (misquoting *Wash. ex rel. Seattle Title Tr. Co. v. Roberge*, 278 U.S. 116, 121 (1928)).

reflected in numerous decisions of the Court,²⁹⁶ even though none of the cases cited referred to this purported right,²⁹⁷ a right whose characterization as property is based on an error.²⁹⁸

By weaving into its argument the foundation-less notion that the right to devote land to a legitimate use is *itself* property, PFZ was vulnerable to attack—first by the respondents and then, more importantly, by the Justices. Respondents argued that the “denial of a construction permit to petitioner has not deprived it of a constitutional property or ‘liberty’ interest” and has “not placed any unconstitutional restrictions on petitioner’s *asserted* right ‘to devote its land to any legitimate use.’”²⁹⁹ In fact, every time respondents’ counsel referred to this right they expressed skepticism by using the adjective “asserted.”³⁰⁰

Respondents’ counsel carefully examined the inappropriateness of, and difficulties concerning, PFZ’s “asserted right,” explaining that PFZ “cites to the Court’s cases on zoning restrictions on the use of land, and proposes a test to review alleged official misconduct that is incongruous in the context of a Sec. 1983 claim to redress deprivations of federally protected rights.”³⁰¹ PFZ had fallen far short of the demonstration required by Supreme Court precedent:

Its asserted right “to devote its land to any legitimate use” has not been articulated with reliance to traditional concepts of property or liberty. Petitioner suggests that an independent constitutional interest *lurking somewhere* should be recognized in its own right. In light of its reliance on the Due Process Clause itself, PFZ is asserting only a generalized right to be free from arbitrary and capricious governmental conduct.³⁰²

The purported right was indeed “lurking somewhere,” and that somewhere was in the original, uncorrected version of *Roberge*.

296. *Id.* at 15.

297. The phrase “legitimate use” does not even appear in the opinions of the four cases cited at *id.*: *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Vill. of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Nectow v. City of Cambridge*, 277 U.S. 183 (1928); *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

298. Of the amici in support of PFZ, only the NAHB incorporated the improper *t* into its brief, in the first paragraph of the initial section of its argument (“THE FIRST CIRCUIT HAS REFUSED TO RECOGNIZE THAT A LANDOWNER HAS A PROPERTY RIGHT IN THE USE OF ITS LAND”). PFZ NAHB Amicus Brief, *supra* note 290, at 4.

299. Respondents’ Brief at 16, PFZ Props., Inc. v. Rodriguez, 503 U.S. 257 (1992) (No. 91-122) [hereinafter PFZ Resp. Brief] (emphasis added).

300. *See id.* at 16–17, 25, 27–29, 37.

301. *Id.* at 28 (citation omitted).

302. *Id.* at 29–30 (emphasis added).

In oral argument on February 26, 1992, the Justices seemed puzzled by PFZ attorney Thomas Richichi's invocation of his client's right to devote land to a legitimate use:

QUESTION [Justice White]: . . . is the only issue before us is if there is a property right, was it taken?

MR. RICHICHI: I think the only issue is the latter, if there was a property right, was it taken. *This Court has said in the State of Washington v. Roberge that the right to devote one's land to a legitimate use is property within the protection of the Constitution.* The Court has more recently said in the Nollan case that the right to build on one's property is not even remotely something along the lines of a government benefit, that there is a right to build on one's property. And that one arose in the constitutional context.

QUESTION [Chief Justice Rehnquist]: Well, stated that flatly, that there is a right to build on one's property, I mean you have to add any number of qualifications to that. There is not a right to build an 8-story office building on property that's zoned for a single-family residence.

MR. RICHICHI: That is exactly correct, Mr. Chief Justice. The protected right here at issue derives from the ownership of the land since the right to use the land is one of the most basic sticks in the bundle of land ownership. The—Puerto Rico, in the statutes that we have cited, recognizes the right to build on one's property and recognizes the right to make use of one's property.³⁰³

PFZ's counsel had actually *read out loud* the misquotation from a Court precedent, and not one of the Justices corrected this error.

The Takings Clause's last appearance in the litigation had been a claim in the original complaint that PFZ dropped in its amended version. But one couldn't tell from Richichi's argument:

QUESTION [Justice O'Connor]: It sounds like you're trying to make a takings claim dressed up as a due process claim. I'm still confused about what it is you're claiming. It's just, it is totally unclear to me

303. PFZ Oral Argument Transcript, *supra* note 2, at 12–13 (emphasis added); Oral Argument at 12:10, PFZ Props., Inc. v. Rodriguez, 503 U.S. 257 (1992) (No. 91-122), <https://www.oyez.org/cases/1991/91-122> [<https://perma.cc/AG22-ACD3>] [hereinafter PFZ Oral Argument Recording].

what it is you're really claiming here and what property you say has been taken, and what is the nature of the claim.

MR. RICHICHI: Justice O'Connor, we do not allege that any property has been taken. We have alleged that a property right protected by the due process clause has been deprived. Again I would draw the distinction between the taking and the deprivation, I think—

QUESTION [Justice O'Connor]: Is absolute the right to develop the property as proposed by your clients?

MR. RICHICHI: No, it is not an absolute right. It is a right to pursue a legitimate use which is subject to reasonable restrictions under the police power.³⁰⁴

Justice O'Connor had identified the major flaw in PFZ's *Roberge*-based argument. If the right to devote one's land to a legitimate use were indeed *itself* property, then that would either (1) satisfy the threshold for a procedural due process claim or (2) be the basis for a takings claim.³⁰⁵ Both lower courts assumed that there was a property interest but still rejected the procedural due process claim. PFZ dropped its takings claim from the original complaint. All that was left was a substantive due process claim based on the procedural irregularities.³⁰⁶

The bad news came quickly for PFZ. Only a dozen days later, the Justices announced, "The writ of certiorari is dismissed as improvidently granted."³⁰⁷ While the Court did not explain its about-face, an important

304. PFZ Oral Argument Transcript, *supra* note 2, at 19; PFZ Oral Argument Recording, *supra* note 303, at 20:02.

305. PFZ's counsel argued, "The protected right here at issue derives from the ownership of the land since the right to use the land is one of the most basic sticks in the bundle of land ownership." PFZ Oral Argument Transcript, *supra* note 2, at 13; *cf.* Kaiser Aetna v. United States, 444 U.S. 164, 179–80 (1979) (footnote omitted) (holding "that the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation.").

306. *See, e.g.,* PFZ Oral Argument Recording, *supra* note 303, at 23:48 (Justice Kennedy asked, "But what's your best case from this Court, if there is one, indicating that that kind of manipulation constitutes not a procedural due process violation but a substantive due process violation?"). Even respondents' counsel, Vanessa Ramirez, hedged her bets regarding whether the "asserted right" may be property: "The Court has already said it, and I would be in an awful position if I would have to argue to Your Honors that the Court has never recognized a property interest in a landowner's desire or wish to devote his land to any legitimate use." *Id.* at 46:14. None of the Justices corrected her.

307. PFZ Props., Inc. v. Rodriguez, 503 U.S. 257, 257 (1992) (per curiam). The same day as the PFZ oral argument, the Court turned down another § 1983 substantive due process challenge. *Collins v. City of Harker Heights*, 503 U.S. 115 (1992), concerned a sanitation worker whose widow claimed that she lost her husband "because the city customarily failed to train or warn its employees about known hazards in the workplace." *Id.* at 117. Justice Stevens, writing for a unanimous Court, observed that "the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Id.* at 125 (citing to *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225–26 (1985)). The dispute between PFZ and Puerto

clue appears in a Preliminary Memorandum, dated April 24, 1992, that was prepared for the Justices by Ronald J. Tenpas, one of Chief Justice Rehnquist's clerks, in response to PFZ's petition for rehearing.³⁰⁸ Tenpas understood that

the decision to DIG [dismiss the writ as improvidently granted] this case rested on the jelly-like nature of the particular facts in this case (every time you tried to grab them they slipped through your finger, leaving only a sticky residue behind), not any sentiment that the issue was unimportant.³⁰⁹

In 2005, the Court took a big step toward differentiating between takings and substantive due process violations involving property. In a unanimous opinion in *Lingle v. Chevron U.S.A. Inc.*,³¹⁰ Justice O'Connor, who had subjected PFZ's counsel to searing inquiry, put to rest the notion that a property owner could show a violation of the Takings Clause by demonstrating that a challenged regulation did not substantially advance legitimate state interests.³¹¹ The *Lingle* Court clarified that "[t]here is no question that the 'substantially advances' formula was derived from due process, not takings, precedents," and that "this formula prescribes an inquiry in the nature of a due process, not a takings, test, and that it has no proper place in our takings jurisprudence."³¹² Nevertheless, the quest for the holy grail of property rights advocates—the reinvigoration of substantive due process to rescue disgruntled landowners from arbitrary regulators—continued, based in large part on the improper *t.*

Rico over Vacía Talega has still not been resolved. The commonwealth's plan to take the property by eminent domain has led to the latest wrangling over the amount of just compensation to which the frustrated developer is entitled. See, e.g., Eliván Martínez Mercado, *Conectados Costa Serena y el Impuesto de Santini*, CENTRO DE PERIODISMO INVESTIGATIVO (CPI) (Nov. 3, 2012, 2:34 PM), <https://periodismoinvestigativo.com/2012/11/conectados-costa-serena-y-el-impuesto-de-santini/> [<https://perma.cc/HM79-TB9S>] (reporting that Puerto Rico was still litigating to remove PFZ Properties' right to develop the area, the appraised value of which had increased from \$4.9 million to \$32 million, owing to development rights granted through the government's conservation program); *Controversia por Proyecto de Construcción en Piñones*, TELEMUNDO P.R. (June 4, 2015, 6:18 PM), <https://www.telemundopr.com/noticias/local/controversia-por-proyecto-de-construccion-en-pinones/17735/> [<https://perma.cc/34U6-KF4M>] (mentioning that the 2012 litigation over the \$32 million appraised property valuation continues); see also *Consulta de Casos*, PODER JUD. DE P.R., <https://www.ramajudicial.pr/index.php/consulta-de-casos/> [<https://perma.cc/7SGT-DC9C>] (showing the most recent entry in the court docket in the PFZ case as a pre-trial conference on Nov. 18, 2020).

308. Ronald J. Tenpas, Preliminary Memorandum on Petition for Rehearing, PFZ Props. v. Rodriguez (Apr. 24, 1992) (on file with author); see also *Ronald J. Tenpas*, VINSON & ELKINS, <https://www.velaw.com/people/ronald-j-tenpas/> [<https://perma.cc/BJS8-VWTG>].

309. Tenpas, Preliminary Memorandum, *supra* note 308, at 1–2.

310. 544 U.S. 528 (2005).

311. *Id.* at 548.

312. *Id.* at 540.

ii. Post-PFZ

In no fewer than eleven appellate briefs filed between 1992 and 2016, counsel for property owners, undaunted by (or perhaps inspired by) PFZ's failure, relied on the improper *t* to bolster substantive due process claims. In *not one* of those cases did the property owner or owners prevail, as the courts either affirmed a ruling in favor of the regulator or denied certiorari. The cases were, for the most part, run-of-the-mill zoning and land use cases in which owners challenged a downzoning that prohibited mining;³¹³ a rezoning coupled with a moratorium on development;³¹⁴ the denial of permit to demolish a duplex and replace it with a two-unit condominium;³¹⁵ the imposition of grading restrictions on beachfront owners;³¹⁶ a downzoning of a property upon which a purchaser planned to build an apartment complex;³¹⁷ a delay in securing permits for hotel and marina construction;³¹⁸ a zoning amendment applied retroactively to deny a development application;³¹⁹ the denial of a rezoning for commercial use;³²⁰ the denial of an application to build a pedestrian path to the waterfront part of a parcel;³²¹ and the denial of hardship relief from landmark designation.³²²

313. See Brief of Appellant at 37, *Nello L. Teer Co. v. Orange Cnty.*, 993 F.2d 1538 (4th Cir. 1993) (per curiam) (unpublished table decision) (No. 92-2240), 1992 WL 12124760.

314. See Petition for Writ of Certiorari at 24, *Stubblefield Constr. Co. v. City of San Bernardino*, 516 U.S. 913 (1995) (No. 95-114), 1995 WL 17035931; Brief of the NAHB et al. as Amici Curiae in Support of the Petitioners at 12, *Stubblefield Constr. Co. v. City of San Bernardino*, 516 U.S. 913 (1995) (No. 95-114), 1995 WL 17048357.

315. See Brief of the NAHB & the Building Industry Legal Defense Foundation as Amici Curiae in Support of the Petitioners at 4, *Clark v. City of Hermosa Beach*, 520 U.S. 1167 (1997) (No. 96-1278), 1997 WL 33561334.

316. See Brief of the NAHB et al. as Amici Curiae in Support of the Petitioner at 10, *Buckley v. Cal. Coastal Comm'n*, 528 U.S. 816 (1999) (No. 98-1894), 1999 WL 33640424.

317. See Petition for Writ of Certiorari at 21, *Bryan v. City of Madison*, 531 U.S. 1145 (2001) (No. 00-802), 2000 WL 34000545.

318. See Motion for Leave to File Brief Amicus Curiae & Brief Amicus Curiae of PLF in Support of Petitioner at 6, *Yardarm Rest., Inc. v. City of Pompano Beach*, 540 U.S. 1141 (2004) (No. 03-531), 2003 WL 22720974.

319. See Petition for Writ of Certiorari at 14–15, *Kittery Retail Ventures, L.L.C. v. Town of Kittery*, 544 U.S. 906 (2005) (No. 04-943), 2005 WL 79245.

320. See Brief of Appellants at 12 *Hector v. City of Fargo*, 760 N.W.2d 108 (N.D. 2009) (No. 20080177), 2008 WL 5452012.

321. See Appellant's Opening Brief at 24–25, *Richter v. City of Des Moines*, 532 F. App'x 755 (9th Cir. 2013) (No. 12-35370), 2012 WL 3911764.

322. See Petition for Writ of Certiorari at 19–20, *Stahl York Ave. Co. v. City of New York*, 137 S. Ct. 372 (2016) (No. 15-1467), 2016 WL 3162256 (misquoting *Wash. ex rel. Seattle Title Tr. Co. v. Roberge*, 278 U.S. 116, 121 (1928)) (“This Court should confirm that ownership of real property is one of the ‘property’ interests protected by due process. . . . In particular, this Court has acknowledged that the right of a landowner ‘to devote its land to any legitimate use is property within the protection of’ due process.”). There were two atypical challenges as well, one brought by a neighbor who objected to the grant of a rezoning permitting a subdivision, the other brought against a city for refusing to rescind a tax foreclosure sale when the purchasers realized that the property had been illegally subdivided. See

The PLF and the NAHB continued their efforts to advance the law of substantive due process, crafting arguments in amici briefs based in part on what they mistakenly believed was the Court's recognition in *Roberge* of a right as property itself. For example, one amici brief that NAHB, along with other builder and real estate organizations, filed in the Supreme Court attacked the "entitlement rule," calling it "contrary to the decisions of this Court which have held that the property right protected by the Constitution is the right to use land subject, of course, to reasonable regulation."³²³ The misquotation from *Roberge* appeared in a string of excerpts from Supreme Court cases under the heading, "The Courts of Appeals and the State Courts That Have Employed the Entitlement Analysis Have Disregarded Almost a Century of This Court's Analysis of What Constitutes Property."³²⁴ The Justices declined to hear *Stubblefield Construction Company v. City of San Bernardino*, however,³²⁵ leaving in place a decision of the Court of Appeal of California that reversed a jury award exceeding \$11.5 million.

The landowners had contended "that the city violated their substantive due process and equal protection rights by allegedly deliberately inflicting harm 'when [City officials] irrationally and arbitrarily manipulated City processes and procedures, for no legitimate reason, so as to prevent Stubblefield from building a development Project it was unquestionably entitled to build.'"³²⁶ Even though the city had changed the zoning for the site and had imposed a development moratorium, the appellate court concluded, "[t]his is an ordinary dispute between a developer and a municipality and we conclude that the claims asserted simply do not qualify as deprivations of substantive due process."³²⁷ This quoted sentence summarizes the problem faced by NAHB, PLF, and their allies in the property rights movement: judges generally defer to local and state governments when landowners seek to overturn land use regulatory decisions. Persuading the Court to eliminate the "entitlement rule" in the real property context would be a small but significant step in the "rights"

Petition for Writ of Certiorari at 17, *Konrad v. Epley*, 136 S. Ct. 148 (2015) (No. 14-1515), 2015 WL 3878400; see also Brief of Appellants at 31, *Jespersen v. Clark Cnty.*, 399 P.3d 1209 (Wash. Ct. App. 2017) (No. 48653-9-II), 2016 WL 7744966.

323. Brief of the NAHB et al. as Amici Curiae in Support of the Petitioners at 8, *Stubblefield Constr. Co. v. City of San Bernardino*, 516 U.S. 913 (1995) (No. 95-114), 1995 WL 17048357.

324. *Id.* at 10-12.

325. *Stubblefield Constr. Co. v. City of San Bernardino*, 516 U.S. 913, denying cert. to 38 Cal. Rptr. 2d 413 (Cal. Ct. App. 1995).

326. *Stubblefield Constr. Co. v. City of San Bernardino*, 38 Cal. Rptr. 2d 413, 415 (Cal. Ct. App.), cert. denied, 516 U.S. 913 (1995).

327. *Id.* at 427.

direction, which is why, despite these roadblocks, the organizations continued to try to get the Justices' attention.³²⁸

In 2013, the PLF and the National Federation of Independent Business Small Business Legal Center filed an amici brief in the *Hillcrest* litigation discussed previously.³²⁹ In the argument's first paragraph, designed to show how "the Constitution protects Hillcrest's property rights," counsel asserted that "[t]he Supreme Court recognizes that the Constitution protects the right of an owner to develop her property free from arbitrary or irrational requirements," followed by the improper *t*.³³⁰ Counsel then attempted to demonstrate how the requirements imposed by the county's Right of Way Preservation Ordinance violated the rules for exaction takings set out in *Nollan* and *Dolan*,³³¹ and that this somehow, as the trial judge had found, constituted a substantive due process violation.

While the county and the developer had already settled a multi million-dollar takings claim, the substantive due process claim had survived.³³² One brief, filed in the U.S. Court of Appeals for the Eleventh Circuit by Hillcrest's counsel (in support of the district court's finding), prefaced its own *Roberge* misquotation with the following assertion:

[T]his case involves governmental interference with *essential vested* rights in land (i.e., the rights of ownership, legitimate economically beneficial use, possession, exclusion of others and alienation). These rights are not created only by state law. Rather, they are preexisting, natural private property rights that predated and are the express object of the protection of not only the United States Constitution, but also all state constitutions.³³³

In an attempt to bolster this claim, counsel included a footnote to an over-the-top 2008 Florida intermediate appellate court opinion that opined:

328. For other examples of using the improper *t* in an unsuccessful attempt to overturn the "entitlement rule," see Motion for Leave to File Brief Amicus Curiae & Brief Amicus Curiae of PLF in Support of Petitioner at 6, *Yardarm Rest., Inc. v. City of Pompano Beach*, 540 U.S. 1141 (2004) (No. 03-531), 2003 WL 22720974; Brief of the NAHB & the Building Industry Legal Defense Foundation as Amici Curiae in Support of the Petitioners at 4-5, *Clark v. City of Hermosa Beach*, 520 U.S. 1167 (1997) (No. 96-1278), 1997 WL 33561334.

329. Brief Amicus Curiae of PLF & National Federation of Independent Business Small Business Legal Center in Support of Plaintiff/Appellee, Hillcrest Property, L.L.P., and in Support of Affirmance, *Hillcrest Prop., L.L.C. v. Pasco Cnty.*, 754 F.3d 1279 (11th Cir. 2014) (No. 13-12383), 2013 WL 5404726 [hereinafter *Hillcrest* Amicus Brief]; see *supra* notes 3-9 and accompanying text.

330. *Id.* at 5.

331. See *id.* at 8-17.

332. See *supra* note 5 and accompanying text.

333. Answer Brief of Plaintiff-Appellee at 33, *Hillcrest Prop., L.L.C. v. Pasco Cnty.*, 754 F.3d 1279 (11th Cir. 2014) (No. 13-12383), 2013 WL 4648213.

“Private property rights have long been viewed as sacrosanct and fundamentally immune from government interference.”³³⁴

The same record of futility was experienced by many trial counsel who attempted to win substantive due process claims based in part on the improper *t*. The trials in which landowners’ counsel filed memoranda, motions, and other documents involved conditions placed on plat approval for a subdivision;³³⁵ denial of an application for a revised master plan for a subdivision;³³⁶ promulgation of a county Community Plan;³³⁷ and implementation of a short-term rental ban.³³⁸

In at least one case, the court lost its patience with overzealous counsel. Landowners in *Eisenberg Development Corp. v. City of Miami Beach*³³⁹ contended that the city’s order to “install fire sprinklers before operating as a hotel” constituted violations of the Equal Protection and Due Process Clauses, and First Amendment retaliation.³⁴⁰ In their response to the city’s motion for judgment on the pleadings, the plaintiffs had asserted, invoking the improper *t*, that the dispute “involves governmental interference with the Plaintiffs’ fundamental rights in real property. These are pre-existing, natural property rights, such as the rights of ownership, legitimate economically beneficial use, possession, and exclusion of others (including the government)”³⁴¹ The federal district court was so unimpressed that it granted attorneys’ fees and costs to the city, because “[a]ll of Plaintiffs’ federal claims . . . were patently frivolous and brought in bad faith.”³⁴²

334. *Id.* at 33 n.24 (quoting *CNL Resort Hotel, L.P., v. City of Doral*, 991 So. 2d 417, 420 (Fla. Dist. Ct. App. 2008)). The case involved the property now known as the Trump National Doral. Hannah Sampson, *Donald Trump to Buy Doral Resort for \$170 Million*, PALM BEACH POST (Oct. 13, 2011, 1:23 PM), <https://www.palmbeachpost.com/article/20111013/NEWS/812022776> [<https://perma.cc/7NYZ-TQ3U>].

335. *See* Plaintiff’s Brief in Support of Resistance to the City of West Des Moines’ Motion for Summary Judgment at 32–33, *Blumenthal Inv. Trs. v. City of W. Des Moines*, 636 N.W.2d 255 (Iowa 2001) (No. CE 32820), 1997 WL 33828493.

336. *See* Plaintiff’s Amended Response to Defendant’s Motion for Summary Judgment at 26, *Bloomington Dev., L.L.C. v. Hernando Cnty.*, 2009 WL 347786 (M.D. Fla. 2009) (No. 8:07-cv-00575-JSM-MAP), 2008 WL 7192248.

337. *See* Plaintiff’s Response in Opposition to Hillsborough County’s Motion for Summary Judgment at 8, *Dibbs v. Hillsborough Cnty.*, 67 F. Supp. 3d 1340 (M.D. Fla. 2014), *aff’d*, 625 F. App’x. 515 (11th Cir. 2015) (No. 8:12-cv-2851-T-36TGW), 2014 WL 12773672.

338. *See* Plaintiffs’ Motion for Summary Judgment at 39, *Zaatari v. City of Austin*, 615 S.W.3d 172 (Tex. App. 2019) (No. 03-17-00812-CV), 2017 WL 11549951. Atypical cases involved failure to provide winter maintenance on a public road and enforcement of fire safety regulations. The first dispute was settled, and the second resulted in summary judgment in favor of the city along with attorneys’ fees and costs.

339. 95 F. Supp. 3d 1376 (S.D. Fla. 2015).

340. *See id.* at 1379.

341. Plaintiffs’ Response to Defendant City of Miami Beach’s Motion for Judgment on the Pleadings at 16, *Eisenberg Dev. Corp. v. City of Miami Beach*, 95 F. Supp. 3d 1376 (S.D. Fla. 2015) (No. 1:13-cv-23620-CMA), 2014 WL 12781439.

342. *Eisenberg Dev. Corp.*, 95 F. Supp. 3d at 1382.

c. Takings

Several briefs featured the improper *t* in support of arguments that government regulators had violated the Takings Clause by itself or along with procedural or substantive due process violations. Landowners were unsuccessful in obtaining compensation for alleged takings involving a zoning amendment preventing a lessee from opening a trailer park;³⁴³ a rezoning to prohibit mining;³⁴⁴ the county's enforcement of an improperly adopted comprehensive plan;³⁴⁵ an error in the town zoning map;³⁴⁶ the disqualification of a nonconforming use because the owner did not secure a license;³⁴⁷ the imposition of grading restrictions on rear portions of beachfront properties;³⁴⁸ and the city's refusal to approve a development plan.³⁴⁹

The PLF, the NHLB, and other groups and attorneys who worked tirelessly to protect private property rights of landowners submitted several other briefs alleging takings. In 1994 Gideon Kanner's client, the Romona Convent of the Holy Names, unsuccessfully sought Supreme Court review of a city's denial of permission to sell part of a parcel zoned for open space in order to pay for expenses caused by an earthquake.³⁵⁰ Kanner accused the California Court of Appeal of ignoring "the policy which underlies the just compensation clause,"³⁵¹ part of which is that the "Court has consistently recognized that the right to use one's property reasonably is an essential right," as supposedly embodied in the following sentence that featured the

343. See Motion of Appellant to Set Aside Per Curiam Order Entered May 29, 1950, Sustaining Motion to Dismiss Appeal for Want of a Substantial Federal Question & Brief in Support at 7–8, *Glissmann v. Omaha*, 339 U.S. 960 (1950) (No. 792), 1950 WL 78443.

344. See Brief of Appellant at 37, *Nello L. Teer Co. v. Orange Cnty.*, 993 F.2d 1538 (4th Cir. 1993) (unpublished table decision) (No. 92-2240), 1992 WL 12124760.

345. See Appellant's Initial Brief at 26–27, *Rood v. Pinellas Cnty.*, 15 F.3d 1096 (11th Cir. 1994) (unpublished table decision) (No. 92-3168), 1993 WL 13138280.

346. See Plaintiff-Cross-Appellant's Brief in Response to Defendants' Brief & in Support of Plaintiff's Cross-Appeal at 13-14, *Brunelle v. Town of S. Kingstown*, 700 A.2d 1075 (R.I. 1997) (No. 95-0489), 1996 WL 34361740.

347. See Memorandum in Support of Jurisdiction of Appellants Veronica & Gene Stepak at 12, *Castella v. Stepak*, 684 N.E.2d 703 (Ohio 1997) (No. 97-1329), 1997 WL 33758021.

348. See Brief of the NAHB et al. as Amici Curiae in Support of the Petitioner at 10, *Buckley v. Cal. Coastal Comm'n*, 528 U.S. 816 (1999) (No. 98-1894), 1999 WL 33640424.

349. See Brief of Appellant, *MK&K Realty, Inc.* at 17, *MK&K Realty, Inc. v. Worthington City Council*, 2013 WL 6506501 (Ohio Ct. App. 2013) (No. 13 AP 000375), 2013 WL 5410427.

350. See Petition for Writ of Certiorari at 4–6, *Ramona Convent of the Holy Names v. City of Alhambra*, 513 U.S. 927 (1994) (No. 94-84), 1994 WL 16042610 [hereinafter *Roman Convent Amicus Brief*]; see also Brief of the NAHB et al. as Amici Curiae in Support of the Petitioner at 10, *Buckley v. Cal. Coastal Comm'n*, 528 U.S. 816 (1999) (No. 98-1894), 1999 WL 33640424 (including *Roberge* misquotation in support of proposition that "THE USE AND ENJOYMENT OF LAND IS A PROPERTY RIGHT PROTECTED BY THE CONSTITUTION—EXCEPT IN CALIFORNIA").

351. *Roman Convent Amicus Brief*, *supra* note 350, at 21.

improper *t*.³⁵² Kanner also included the following quotation from Justice Scalia's majority opinion in *Nollan v. California Coastal Commission*:³⁵³ "[T]he right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a 'governmental benefit.'"³⁵⁴ It is at best hyperbolic, however, to offer this quoted language out of context to prove that the Supreme Court has established that the Court was speaking about an "essential right."

Only one year later, James Burling, in his PLF amicus brief in support of the plaintiff-appellant in *Ehrlich v. City of Culver City*,³⁵⁵ also employed this faux-*Roberge* + *Nollan* one-two punch in an ineffective effort to demonstrate how the city's imposition of a requirement that a developer pay over \$300,000 in recreational and art fees violated "the *right* to put his property to reasonable use."³⁵⁶ Burling then attempted to push the takings envelope even further, asserting that, in a departure from precedent, "a fundamental right is involved," and citing the problematic "'substantially advance' test of takings jurisprudence" that the court abandoned ten years later in *Lingle*.³⁵⁷

This sampling of briefs suggests that counsel who invoked the improper *t* in an attempt to bolster the purportedly weak judicial protection of the property rights of disgruntled landowners have to date been generally unsuccessful. The hard right turn in the federal judiciary effected by Trump appointments to district and appellate courts could very well favor those making pro-property rights (and, in turn anti-government regulation) arguments. That is one more reason why it is time to correct the mistake planted in 1928 that has yielded a long and curious harvest in case law, articles, books, briefs, motions, and other legal documents.

IV. A MISTAKE THAT MATTERS

It would be absurd to think that all "arbitrary and capricious" government action violates substantive due process The judicially created substantive component of the Due Process Clause protects, we have said, certain "fundamental liberty interest[s]" from deprivation by the government, unless the infringement is narrowly tailored to serve a compelling state interest. Freedom from delay in

352. *Id.* at 22.

353. 483 U.S. 825 (1987).

354. *Id.* at 834 n.2 (quoted in *Roman Convent* Amicus Brief, *supra* note 350, at 22).

355. Amicus Curiae Brief of PLF in Support of App[ellants], *Ehrlich v. City of Culver City*, 911 P.2d 429 (Cal. 1996) (No. S033642), 1995 WL 17036308.

356. *Id.* at 6. Burling made two mistakes here—he includes the improper *t* and he refers to the case as "*Roley*," not *Roberge*. *Id.*

357. *See id.* at 6–7; *see supra* notes 310–312 and accompanying text.

receiving a building permit is not among these “fundamental liberty interests.” To the contrary, the Takings Clause allows government *confiscation* of private property so long as it is taken for a public use and just compensation is paid; mere *regulation* of land use need not be “narrowly tailored” to effectuate a “compelling state interest.” Those who claim “arbitrary” deprivations of nonfundamental liberty interests must look to the Equal Protection Clause

Justice Antonin Scalia³⁵⁸

[N]o distinction between permanent and temporary flooding was material to the result in *Sanguinetti*.³⁵⁹ We resist reading a single sentence unnecessary to the decision as having done so much work. In this regard, we recall Chief Justice Marshall’s sage observation that “general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.”

Justice Ruth Bader Ginsburg³⁶⁰

The opposing jurisprudence and deep friendship between the late authors of these two passages are legendary, but that is not the reason their words introduce this discussion. The Justices’ important points help us to understand the implications of efforts to use the *Roberge* error to advance due process and takings law beyond their current limitations. The improper *t* matters for two reasons. First, the narrower legacy of this simple error can help us to understand how current Due Process, Equal Protection, and Takings Clause doctrines work in tandem to protect property rights while maintaining the proper deference to legislative and administrative officials. Second, in the broader context, the tale of the improper *t* exposes the vulnerability of our system of constitutional lawmaking that, if judges are not mindful, can be tied too rigidly to the strictures of *stare decisis*.

358. *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 200 (2003) (Scalia J., concurring) (alteration in original) (citations omitted) (quoting *Wash. v. Glucksberg*, 521 U.S. 702, 721 (1997)).

359. *Sanguinetti v. United States*, 264 U.S. 146, 149 (1924) (“[I]n order to create an enforceable liability against the Government, it is, at least, necessary that the overflow be the direct result of the structure, and constitute an actual, permanent invasion of the land, amounting to an appropriation of and not merely an injury to the property.”).

360. *Ark. Game & Fish Comm’n v. United States*, 568 U.S. 23, 35 (2012) (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821)).

A. *Covering All the Bases*

There are two verities shaping the texture of land use regulation law, indeed the law of any government regulation that negatively affects property value: (1) private property rights are not absolute, and (2) government regulators are humans who sometimes make mistakes, are corrupt, or abuse their power. Even Justices Scalia and Thomas, staunch defenders of landowners' rights,³⁶¹ acknowledge the first truth, as illustrated by the quotation above from the concurrence in the *Cuyahoga Falls* case.³⁶² Government can take one's private property for a public use upon the payment of just compensation, they remind us, and "mere regulation of land use" is not subject to the strict scrutiny protecting fundamental individual rights. If the second proposition were not true, that is, if governmental regulators were infallible, there would be no need for the constitutional protections afforded by the Takings, Due Process, and Equal Protection Clauses and their judicial glosses.

Judges, authors, and advocates have attempted to employ the improper *t* to supercharge the Takings Clause and to elevate the ownership of property to fundamental rights status. If the Court had already done the former, then property owners would not have to jump through so many procedural and substantive hoops while maneuvering through the jurisprudential swamp of takings law, in order to recover just compensation for regulations that reduce or eliminate the value of property. If the Court had already done the latter, then property owners would benefit from elevated judicial scrutiny, forcing government officials to demonstrate a close fit between the goals of their regulations (ends) and the specific methods employed to realize those goals (means).³⁶³ But, as we now know, the Supreme Court *never said* that the purported right to devote land to any legitimate use is in itself property.

Is there nothing private property rights advocates can do to redress government abuses? To answer "yes" would ignore three important changes over the last few decades. First, several states have passed takings statutes to augment purportedly weak Supreme Court protections.³⁶⁴ While these

361. See, e.g., *Kelo v. City of New London*, 545 U.S. 469, 505–23 (2005) (Thomas, J., dissenting); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992) (featuring Justice Scalia's majority opinion).

362. See *City of Cuyahoga Falls*, 538 U.S. at 200 (Justice Thomas joined Justice Scalia's concurrence).

363. See *id.*

364. See, e.g., James E. Krier & Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 WM. & MARY L. REV. 35, 78 (2016) ("Six states (Arizona, Florida, Louisiana, Mississippi, Oregon, and Texas) have enacted statutes providing for compensation in certain instances in which it might not be required by Supreme Court doctrine."). See generally John D. Echeverria & Thekla Hansen-Young, *The Track Record on Takings Legislation: Lessons from Democracy's Laboratories*, 28 STAN. ENV'T L.J. 439 (2009).

state legislative efforts have a mixed track record,³⁶⁵ there is evidence that they have at least a chilling effect on government land regulations.³⁶⁶

Second, counsel for landowners who have been victimized by government corruption, ineptitude, or bias have had some success in convincing the Supreme Court to bolster private property rights protections. Since 2000 alone, the Justices recognized an equal protection “class of one” challenge brought against retributive local government officials;³⁶⁷ allowed a lawsuit to proceed in which a landowner alleged that the government improperly sought to extract monetary payments in exchange for development permission;³⁶⁸ and removed a significant ripeness requirement for takings lawsuits brought in federal court.³⁶⁹ In addition, even before all three Trump appointees joined the Court, several Justices recognized the possibility of judicial takings³⁷⁰ and objected to a five-member majority’s reinforcement of the parcel-as-a-whole test for partial and total takings.³⁷¹

Third, state high courts have recognized that their own constitutions provide greater protection than the “property Clauses” in the U.S. Constitution as currently interpreted by the Court. The Supreme Court of New Hampshire, in a case involving the denial of a variance for a halfway house, stated, “As the right to use and enjoy property is an important substantive right, we use our intermediate scrutiny test to review equal protection challenges to zoning ordinances that infringe upon this right.”³⁷² In deeming unconstitutional all amortization schemes for nonconformities, the Supreme Court of Pennsylvania explained,

The Pennsylvania Constitution, Pa. Const. art. I, § 1, . . . protects the right of a property owner to use his or her property in any lawful way that he or she so chooses. If government desires to interfere with the owner’s use, where the use is lawful and is not a nuisance nor is it abandoned, it must compensate the owner for the resulting loss.³⁷³

The Supreme Court of Texas, in declaring rolling easements invalid, opined, “Private property ownership pre-existed the Republic of Texas and the

365. See Krier & Sterk, *supra* note 364, at 78; Echeverria & Hansen-Young, *supra* note 364, at 444–46.

366. See, e.g., Echeverria & Hansen-Young, *supra* note 364, at 462 (“[T]he primary effect of the [Florida] Bert Harris Act has been to discourage governments from adopting new regulatory restrictions.”).

367. See *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000) (per curiam).

368. See *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 619 (2013).

369. See *Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019).

370. See *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’t Prot.*, 560 U.S. 702, 735 (2010).

371. See *Murr v. Wisconsin*, 137 S. Ct. 1933, 1949 (2017); See also *infra* notes 384–385.

372. *Cnty. Res. for Just., Inc. v. City of Manchester*, 917 A.2d 707, 717 (N.H. 2007).

373. *Pa. Nw. Distribs. v. Zoning Hearing Bd.*, 584 A.2d 1372, 1376 (Pa. 1991).

constitutions of both the United States and Texas. Both constitutions protect these rights in private property as essential and fundamental rights of the individual in a free society.”³⁷⁴

If property rights advocates are concerned about the plight of individual landowners who suffer financially at the hands of arbitrary and irrational state and local land use regulators, they have no need to resort to legal chestnuts buried in 1920s zoning cases, especially one that only appears in sources that contain a typographical error. If, as the author and others suspect, zoning law is the stalking horse for a more ambitious rights-based attack on regulations designed for environmental protection, sustainability, climate change resiliency, and the development of alternatives to fossil fuels,³⁷⁵ it is long past time to stop this mistake-based and misguided move dead in its tracks.

B. The Fragility of Stare Decisis

The principle of stare decisis is the leitmotif of American constitutional and common-law decision making.³⁷⁶ Advocates emphasize those precedents that support their client’s position and seek to marginalize potentially damaging language from previous decisions by labeling it “dictum,” often preceded by a dismissive adjective—“mere.”³⁷⁷ Judges, too, feel compelled to pay heed to the rules and doctrines gleaned from previous rulings, even when they craft creative work-arounds, as with Justice Ginsburg’s refusal in *Arkansas Game & Fish Commission v. United States*³⁷⁸ to follow the “letter” of the 88-year-old opinion in *Sanguinetti v. United States*.³⁷⁹ The 1924 case specifically said that “in order to create an enforceable liability against the Government, it is, at least, necessary that the overflow be the direct result of the structure, and constitute an actual, *permanent* invasion of the land,”³⁸⁰ and the facts before the 2012 Court involved “government-induced flooding [that was] *temporary* in

374. *Severance v. Patterson*, 370 S.W.3d 705, 709 (Tex. 2012) (footnote omitted) (citations omitted).

375. *See* Wolf, *supra* note 45 and accompanying text.

376. Professor Lazarus has reminded us:

Supreme Court opinions are cited and quoted frequently, and immediately: by lower courts, by other lawmaking branches, and by legal scholars and teachers. And they are cited in this way and to such an extent for understandable institutional reasons, given the Court’s prestige and the tremendous weight of its precedential authority.

Lazarus, *supra* note 1, at 600.

377. *See, e.g., Bunting v. Mellen*, 541 U.S. 1019, 1023–24 (2004) (Scalia, J., dissenting) (“That constitutional determination is *not* mere dictum in the ordinary sense . . .”).

378. 568 U.S. 23, 35 (2012).

379. 264 U.S. 146, 149 (1924).

380. *Id.* (emphasis added).

duration.”³⁸¹ Nevertheless, Justice Ginsburg, invoking in support the words of a 181-year-old opinion by the Chief Justice in chief—John Marshall—sought to minimize the key word used by Justice Sutherland:

We do not read so much into the word “permanent” as it appears in a nondispositive sentence in *Sanguinetti*. That case, we note, was decided in 1924, well before the World War II-era cases and *First English*,³⁸² in which the Court first homed in on the matter of compensation for temporary takings. That time factor, we think, renders understandable the Court’s passing reference to permanence. If the Court indeed meant to express a general limitation on the Takings Clause, that limitation has been superseded by subsequent developments in our jurisprudence.³⁸³

The passage of time and jurisprudential developments in the interim thus negated the permanence of the rhetoric in *Sanguinetti*.

Labeling troublesome words from previous decisions as not “material to the result” (mere dictum) or as “superseded by subsequent developments” (outdated) are but two strategies employed by judges to respect in theory the principle of stare decisis while achieving the opposite outcome suggested by precedent.³⁸⁴ Even if one calls these stratagems or artifices, they still serve the important function of instilling and maintaining respect for the letter and spirit of the written word, the lifeblood of law. It is and should not be easy to depart from the demands of precedent.

The second moral gained from the cautionary tale of the improper *t* lies in our recognition of the fragility of stare decisis. If the error in the original printing of *Roberge* had never been caught and corrected, then an unknowable number of due process and takings cases could have proceeded past motions to dismiss and summary judgments, giving owners and developers who were denied permission to make more lucrative use of their property the upper hand in negotiations conducted in the shadow of a threatened trial. Unquestionably, the pressure just to give in would be great

381. *Ark. Game*, 568 U.S. at 38 (emphasis added).

382. *First Eng. Evangelical Lutheran Church v. Cnty. of Los Angeles*, 482 U.S. 304 (1987).

383. *Ark. Game*, 568 U.S. at 35.

384. For a fascinating duel involving competing rationalizations for departing and adhering to precedent, compare *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2178 (2019) (citation omitted) (alteration in original) (quoting *Janus v. Am. Fed’n State, Cnty., & Mun. Emps.*, 138 S. Ct. 2448, 2478–79 (2018)) (“We have identified several factors to consider in deciding whether to overrule a past decision, including ‘the quality of [its] reasoning, the workability of the rule it established, its consistency with other related decisions, . . . and reliance on the decision.’”), with *id.* at 2189 (Kagan, J., dissenting) (citation omitted) (quoting *Kimble v. Marvel Ent., L.L.C.*, 576 U.S. 446, 456 (2015)) (“[I]t is not enough that five Justices believe a precedent wrong. Reversing course demands a ‘special justification—over and above the belief that the precedent was wrongly decided.’”).

as, thanks to the development of § 1983³⁸⁵ and regulatory takings jurisprudence³⁸⁶ beginning in the 1970s and 1980s, government officials who refused to recognize that the landowner's right to make any legitimate use of property was *itself* constitutionally protected *property* would proceed at their peril, and at the risk of losing their positions.

If the original error in *Roberge* had never been corrected in the official reporter, if the right to make *any* legitimate use of property (even if that use required a permit) were *itself* property protected by the Due Process and Takings Clauses, then various types of conditional permitting—sought by those eager to develop or extract resources from wetlands, forests and other critical habitats, floodplains, beachfront parcels containing sand dunes, mountainsides and canyons, historic landmarks, and the like—would today be even more at risk of invalidation. Would there be a Justice Ginsburg to point out that the sentence containing the now-proper *t* was not “material to the result” in *Roberge* (which was after all an improper delegation case)³⁸⁷ or was “superseded by subsequent developments” in real property jurisprudence?³⁸⁸ What a difference a lone letter can make in our wonderfully quaint and curious world of *stare decisis*.

CONCLUSION: REINING IN ERROR

For more than a century, law review students checking citations for others' work and quoting sources for their own notes and comments, interns and externs helping to prepare trial and appellate briefs, research assistants working on articles and books for their professors, and judicial clerks drafting or proofreading opinions and orders are taught to check original and official sources, especially if those sources are cases and statutes. Relying on electronic case services, unofficial reporters, headnotes, syllabi, and other shortcuts is (at least officially) verboten. This Article shows what happened when this best practice was not followed, as a one-letter mistake (“property” instead of “properly”) in the middle of an unremarkable 1928 Supreme Court opinion has appeared uncorrected dozens of times in

385. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978) (“Local governing bodies . . . can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers.”) (footnote omitted).

386. *See supra* notes 128, 156–157, 382, and accompanying text (discussing *Penn Central* and *First English*).

387. *See supra* notes 94, 103, 359, and accompanying text.

388. *See supra* notes 26, 383–384, and accompanying text; *see also* *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 340 (2002) (“We would create a perverse system of incentives were we to hold that landowners must wait for a taking claim to ripen so that planners can make well-reasoned decisions while, at the same time, holding that those planners must compensate landowners for the delay.”).

reported opinions in state and federal courts, headnotes, articles, books, briefs, and Supreme Court oral argument. Because this Article has exposed how by chance the mistake actually changed the substantive meaning of the true language in the decision, the strong property rights arguments made by many authors and advocates during this reign of error are weakened as a result.

There are two morals from this cautionary tale of the improper *t*. First, there are three constitutional clauses—Due Process, Equal Protection, and Takings—that already provide robust protections for the private property rights of landowners who allege that government officials have passed and enforced arbitrary and confiscatory land use regulations. In several jurisdictions, these protections are supplemented by takings statutes and by a more vigorous interpretation of protections afforded by state constitutions. And, if even that is not enough, advocates can lobby state lawmakers for additional measures or seek to convince the newly restocked and right-leaning federal courts to shore up any perceived weaknesses in the perceived private property rights bulwark. Thanks to the findings in this Article, from now on they will have one less precedential arrow in their quiver.

The second moral from the saga of the improper *t* is that we must always remember the fragility of a system of judicial decision-making that is based on the doctrine of stare decisis. One sentence, one word, even one *letter* can affect the outcome of future cases, or can force counsel and courts cautiously to offer persuasive arguments for marginalizing those undesired or errant written legacies imparted by our legal past.