THE GREATER GOOD? CAN THE *GOOD V. UNITED STATES* COURT BE ANY FURTHER OFF?

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I. INTRODUCTION

Consider for a moment the following tale concerning the Smiths. The Smiths are a pleasant couple, one their neighbors respect and admire. They have lived in the suburbs with their three children for the past fifteen years or so and are ready to head upstate where they can enjoy a little more peace and quiet.

The Smiths began shopping around for some land just outside the hustle and bustle of the city and eventually decided on a quaint forty-acre tract. The land looked perfect for the kids and suitable for the couple to grow old on after the nest emptied. Mr. Smith bought the property but did not plan to move his family for another year and a half, and so he had not planned to begin development for at least another year.

In the meantime, Congress passed the Endangered Species Act (ESA). About a month before Mr. Smith planned to break ground, he received notice from the United States Environmental Protection Agency (EPA) that very recently an extremely rare species of beetle was found inhabiting land just three miles from his property. Thus, his development would have to be postponed until an EPA investigation could determine that his construction would not interfere with the future existence of the beetles.

Unfortunately for Mr. Smith, the EPA's investigation found that his property did, in fact, support the beetles and development of the land would put them at risk of becoming extinct. Mr. Smith was told that, pursuant to the ESA, he could not develop his property. Subsequently, Mr. Smith filed suit claiming that his land was taken without just compensation. The court, however, held that because Mr. Smith should have been aware of the growing sensitivity toward environmental issues, he should have anticipated that Congress would enact a statute such as the ESA that might preclude the development of his property. Therefore, the court determined that Mr. Smith was not entitled to compensation for his property.

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Although it may sound far-fetched for a court to rule this way, it is not. This is precisely what the United States Court of Appeals for the Federal Circuit held in *Good v. United States*.[1]

In 1973, Lloyd Good, Jr. purchased a forty-acre tract of land containing thirty-two acres of wetlands.[2] Seven years later, Good hired a land planning and development firm to obtain the requisite federal, state, and county permits to develop his property.[3] Because Good's wetlands were adjacent to navigable waters of the United States, he was required, under the Rivers and Harbors Act of 1899[4] and § 404 of the Clean Water Act,[5] to obtain a permit from the Army Corps of Engineers (Corps) for the dredging and filling of his property.[6] The Corps granted Good a five-year permit.[7] In the meantime, Good was in the process of applying for the necessary state and county permits.[8]

By 1988, Good had yet to receive the required state and county approval and was forced to reapply for a new federal permit.[9] His permit was granted, but "[a]pparently despairing of ever obtaining [county] approval for his 54-lot plan," Good submitted a new, sixteen-lot plan in July of 1990.[10] Between the receipt of the 1988 permit and submission of the 1990 proposal, however, the Lower Keys rabbit was listed as an endangered species under the ESA.[11] Furthermore, shortly after Good's submission of the 1990 proposal, the ESA also listed the silver rice rat as an endangered species.[12]

Upon notification that the two animals were added to the endangered species list, the Corps was required to consult the Fish and Wildlife Service (FWS) to "insure that issuing the requested permit would not place the continued existence of the species in jeopardy."[13] On December 18, 1991, FWS released a biological opinion, "concluding that

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1 Good v. United States, 189 F.3d 1355 (Fed. Cir. 1999).

2 *Id.* at 1357. Good's sales contract stated that "[t]he Buyers recognize that certain of the lands covered by this contract may be below the mean high tide line and that as of today there are certain problems in connection with the obtaining of State and Federal permission for dredging and filling operations." *Id.*

3 *Id.*

4 Rivers and Harbors Act of 1899, 33 U.S.C. § 403 (1994).

5 Clean Water Act, 33 U.S.C. § 1344 (1994).

6 *Good*, 189 F.3d at 1357.

7 *Id.*

8 *Id.*

9 *See id.* at 1358.

10 *Id.*

11 Endangered and Threatened Wildlife and Plants, 50 C.F.R. § 17.11 (2001). *See also* 16 U.S.C. § 1532 (2000) (explaining regulatory guidelines for the determination of endangered and threatened species).

12 50 C.F.R. § 17.11.

13 *Good*, 189 F.3d at 1359.

both the 1988 and 1990 plans jeopardized the continued existence of both the Lower Keys marsh rabbit and the silver rice rat."[14] Based on the FWS biological opinion, the Corps denied Good's 1990 permit application on March 17, 1994, while at the same time informing him that his 1988 permit had expired.[15]

On July 11, 1994, Good filed suit against the United States, claiming that the "Corps' denial of his permit worked an uncompensated [regulatory] taking in violation of the Fifth Amendment."[16] The Court of Federal Claims granted summary judgment in favor of the United States.[17] Good appealed to the Court of Appeals for the Federal Circuit.

The Federal Circuit Court of Appeals analyzed the case by applying the factors set out in *Penn Central Transportation Co. v. New York City*[18] to determine whether a regulatory taking had occurred. Upon consideration of these factors, the court boldly proclaimed,

> In light of the growing consciousness of and sensitivity toward environmental issues, Appellant must also have been aware that [licensing] standards could change to his detriment, and that regulatory approval could become harder to get.
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> We therefore conclude that Appellant lacked a reasonable, investment-backed expectation that he would obtain the regulatory approval needed to develop the property at issue here.[19]

The goal of this Article is to illustrate why a landowner who has been barred from developing land that was purchased prior to the enactment of federal environmental statutes should be entitled to just compensation under the Fifth Amendment of the Constitution.

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[14] *Id.*

[15] *Id.*

[16] *Good*, 189 F.3d at 1359. The relevant portion of the Fifth Amendment reads, "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

It is established that regulations may deprive owners of most or all beneficial use of their property. *See, e.g.*, Hadacheck v. Sebastian, 239 U.S. 394 (1915) (upholding ordinance that caused a diminution in property value when it restricted a brick factory owner from continuing his use after residential growth surrounding the factory made its use harmful to the public); Miller v. Schoene, 276 U.S. 272 (1928) (upholding a statute that ordered destruction of an owner's red cedar trees infected with rust because of the trees' threat to neighboring apple orchards). Until 1922, the Supreme Court had not recognized the doctrine of regulatory takings; however, in 1922 the Court held, as a general principle, that "if regulation goes too far it will be recognized as a taking." Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

[17] *Good*, 189 F.3d at 1359.

[18] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978). The three factors the Court established are (1) "the character of the government action"; (2) "the extent to which the regulation interferes with distinct, investment-backed expectations"; and (3) "the economic impact of the regulation." *Id.*

[19] *Good*, 189 F.3d at 1363.

This article begins with a discussion of the political philosophies and rights theories of several men that profoundly influenced our Founding Fathers in their framing of our Constitution. It then examines our Founding Fathers' views on individual property rights and, in so doing, illustrates what role the Founders intended government to play in private property. Next, this Article examines regulatory takings jurisprudence from its inception in *Pennsylvania Coal Co. v. Mahon*[20] through its current standing in *Good v. United States*.[21] Finally, this Article concludes with a discussion of how, given the current jurisprudence of regulatory takings, the *Good* court overstepped its bounds by wholly misapplying judicial precedent.

II. CIVIL GOVERNMENT & PROPERTY RIGHTS AS THEY WERE MEANT TO BE

Understanding the personal right to private property and the role of our system of government in protecting that right necessarily depends on understanding how those that influenced the Founders of our Constitution viewed government. As Mark Pollot states, "The greatest if not the sole protection against the tendency to sacrifice rights . . . is an adherence to principles. Therefore, any discussion of rights, including property rights, must begin . . . 'with an understanding of principles and an historical perspective.'"[22] It is with this perspective in mind that this Article will briefly examine the political philosophies of Thomas Hobbes and John Locke and the natural rights theories of Sir William Blackstone.

A. Civil Government: A Brief Analysis of Hobbesian and Lockean Theories

Richard Epstein, author and professor of law, suggests, "It may seem odd to find in Hobbes, the defender of absolute sovereign power, one of the fathers of our constitutional system."[23] However, he notes that it was Hobbes who gave us the "account of human nature on which a system of limited government rests."[24] For Hobbes, life without "external authority" to restrain the insatiable "appetites, passions, and ambitions" of "selfish individuals" led only to man engaging in either "actions of aggression against his neighbor or . . . self-defense."[25] This view, in turn, led Hobbes to describe life in the state of nature as being "solitary, poore,

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[20] Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922).

[21] *Good*, 189 F.3d at 1355.

[22] MARK L. POLLOT, GRAND THEFT AND PETIT LARCENY 4 (1993) (quoting CLINT BOLICK, CHANGING COURSE: CIVIL RIGHTS AT THE CROSSROADS xi-xii (1988)).

[23] RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 7 (1985) (noting that this connection can be observed in Walter Berns, *Judicial Review and the Rights and Laws of Nature*, 1982 SUP. CT. REV. 49, 62-63 (1982)).

[24] *Id.*

[25] *Id.*

nasty, brutish, and short."[26] Hobbes wrestled with developing a societal scheme that would enable human beings to avoid the "omnipresent peril of a state of nature and obtain in exchange a fair measure of personal security and social order."[27] His answer was to have one absolute sovereign vested with total control over the society subject to him.[28]

Naturally, our Founding Fathers rejected this model of civil government. However, as Epstein explains, this "crude Hobbesian conception . . . contains two elements central to the understanding of the relationship between private property and our own system of governance."[29] First, Hobbes's theory of man's nature being selfish and greed-ridden made obvious the need to develop a system of civil order.[30] Second, Hobbes's notion that all civilization could contract with one another and "renounce force against each other" in order to move from the state of nature into a civilized society illustrated one method of how civil government could be formed.[31]

John Locke, a philosopher whose works were readily accepted by our Founding Fathers, opposed Hobbes's absolute sovereign form of government. In forming a civil government, Locke sought "a set of institutional arrangements that would allow individuals to escape the uncertainty and risks of social disorder without having to surrender to the sovereign the full complement of individual rights."[32] Thus, Locke proposed a "system of governance that leaves the net benefits of government with the people at large."[33] Richard Epstein notes, "The key elements are his theory of representative government and his prohibition against the taking of private property by the 'supreme power' of the state."[34]

Furthermore, Epstein suggests that Locke's conception of civil government was based on the premise that its authority is taken squarely from those it represents.[35] Thus, the nature of civil government cannot logically be such that it "furnish[es] new or independent rights."[36] Locke, therefore, believed that natural rights, including individual rights to property, were not handed down from government to man but were

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26 THOMAS HOBBES, LEVIATHAN 65 (Prometheus Books ed., 1988) (1651).

27 EPSTEIN, *supra* note 23, at 7.

28 *See id.* at 8.

29 *Id.*

30 *Id.* at 9.

31 *Id.*

32 *Id.* at 10.

33 *Id.* at 12.

34 *Id.*

35 *Id.*

36 *Id.*

instead inherent rights of man.[37] As will be seen, this Lockean theory of the state was adopted by Sir William Blackstone and "was dominant at the time when the Constitution was adopted."[38]

B. Sir William Blackstone: From the Natural Law to the Absolute Right of Property

In his *Commentaries on the Laws of England*, Sir William Blackstone examines the nature of laws.[39] He begins by defining law as something that "signifies a rule of action . . . [a]nd it is that rule of action, which is prescribed by some superior, and which the inferior is bound to obey."[40] Blackstone further notes that

> in those creatures that have neither the power to think, nor to will, such laws must be invariably obeyed, so long as the creature itself subsists, for it's [sic] existence depends on that obedience. But laws, in their more confined sense, and in which it is our present business to consider them, denote the rules, not of action in general, but of *human* action or conduct: that is, the precepts by which man, the noblest of all sublunary beings, a creature endowed with both reason and freewill, is commanded to make use of those faculties in the general regulation of his behaviour.[41]

Blackstone suggests that, as a created being, man must necessarily be a dependent creature, that is, dependent on his Creator.[42] He writes,

> [A] state of dependence will inevitably oblige the inferior to take the will of him, on whom he depends, as the rule of his conduct . . . [a]nd consequently, as man depends absolutely upon his maker for every thing, it is necessary that he should in all points conform to his maker's will.
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> This will of his maker is called the law of nature.[43]

This law of nature has been given to man by God Himself and is thus necessarily superior to any other law.[44] Hence, any law that is divergent from this law of nature must not be valid.[45] According to Blackstone,

> [I]n order to apply this to the particular exigencies of each individual, it is still necessary to have recourse to reason . . . [a]nd if our reason

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[37] *See* JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 16-30 (Thomas P. Peardon ed., MacMillan Publ'g Co. 1952) (1690).

[38] EPSTEIN, *supra* note 23, at 16.

[39] *See* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 38-62 (Garland Publ'g, Inc. 1978) (1783).

[40] *Id.* at 38.

[41] *Id.* at 39.

[42] *Id.*

[43] *Id.*

[44] *Id.* at 41.

[45] *Id.*

> were always, as in our first ancestor before his transgression, clear and perfect . . . we should need no other guide but this [natural law].[46]

However, because our reason is not clear, mankind requires the "divine providence" that reveals God's laws "by an immediate and direct revelation."[47] This divine providence yields the "revealed or divine law," which can be found only in the Holy Scriptures.[48] Therefore, "[u]pon these two foundations, the law of nature and the law of revelation, depend all human laws."[49] Blackstone then terms all human laws "municipal law"[50] and later divides the rights of persons derived from the municipal law into those that are due *from* every citizen and those that are due *to* every citizen.[51]

> Both may indeed be comprized in this latter division; for, as all social duties are of a relative nature, at the same time that they are due *from* one man, or set of men, they must also be due *to* another. . . . [F]or instance, allegiance is usually . . . considered as the duty of the people, and protection as the duty of the magistrate; and yet they are, reciprocally, the rights as well as duties of each other. Allegiance is the right of the magistrate, and protection the right of the people.[52]

Blackstone now arrives at a critical juncture in his *Commentaries*: he concludes that the rights of man that are derived from the municipal law are of two types: absolute and relative.[53] In so doing, he connects his discussion of the natural and revealed law with the absolute rights of man. He defines the absolute rights of man as "those which are so in their primary and strictest sense; such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it."[54]

Thus, in summary, God has established the law of nature (i.e., the natural law). He has also delivered, through divine providence, the revealed law (i.e., the Holy Scriptures). From these two sets of law all human laws must be derived in order for such laws to be valid. These human laws are termed the "municipal law," form which the rights of persons are derived. Finally, the rights of persons include absolute rights, which are those that are so fundamental as to exist even in the state of nature.[55]

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46 *Id.*

47 *Id.* at 41-42.

48 *Id.* at 42.

49 *Id.*

50 *Id.* at 44 (defining "municipal law" as "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong").

51 *Id.* at 123.

52 *Id.*

53 *Id.*

54 *Id.*

55 *See supra* text accompanying notes 39-54.

After having established that absolute rights of man exist, Blackstone begins his discussion of these rights.[56] He clearly and unequivocally announces private property as the third of three absolute rights of man.[57] He states,

> The third absolute right [of man] . . . is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land. The . . . modifications under which we at present find it, the method of conserving it in the present owner, and of translating it from man to man, are entirely derived from society . . . . The laws of England are therefore . . . extremely watchful in ascertaining and protecting this right.[58]

Thus, Blackstone not only recognizes private property as an absolute right but also recognizes the role of government in relation to that right (i.e., the protection of it). This proposition is staunchly supported by Blackstone's statement that "the principal aim of society is to protect individuals in the enjoyment of [their] absolute rights."[59]

C. The Founding Fathers and the Framing of the Constitution

To this point, this Article has examined the ideas and theories of three key political philosophers to whom the Founders looked while framing our Constitution. This historical perspective leads to a critical examination of how the Founders viewed the philosophy of those that had come before them and how they chose to implement that philosophy in framing the Constitution. The Founders' knowledge, understanding, and consideration of early political philosophy was paramount to the

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[56] 1 BLACKSTONE, *supra* note 39, at 129-40. Blackstone characterizes the absolute rights of man as (1) the right to the legal and uninterrupted use and enjoyment of his life, limbs, body, health, and reputation; (2) the right to personal liberty; and (3) the right to private property. *Id.* at 141-44. However, Blackstone also notes that these three inherent, fundamental, and absolute rights would not survive without a means to ensure them. *Id.* Thus, there have been established "other auxiliary subordinate rights . . . which serve principally as outworks or barriers, to protect and maintain inviolate the three great and primary rights." *Id.* at 141.

[57] *Id.* at 138.

[58] *Id.* With regard to Blackstone's use of "law of the land" Epstein states,

> Some question could be raised about Blackstone's meaning, given the last clause, on the "law of the land." But its meaning seems to have been only that regular procedures had to be used to deprive an individual of property, that extraordinary ad hoc procedures could not substitute for adjudication. It makes little sense to read the passage as saying that property was held at the grace of the legislature, even in a system that holds open just that possibility because of the growth of parliamentary supremacy, a development not completed in Blackstone's day.

EPSTEIN, *supra* note 23, at 22.

[59] 1 BLACKSTONE, *supra* note 39, at 140.

creation of our liberties.[60] Mark Pollot comments on the extent of the Founders' historical insight and society's current lack thereof when he writes:

> Civil rights and liberties [including property rights] are not creatures of the last third of the twentieth century but are at the root of our system of government. They have their birth in centuries of political thought and practical experience. To the extent that they have been preserved and their enjoyment enhanced until recent years, it has been because of the keen grasp of history among the Framers of the Constitution, a grasp of history that modern Americans generally lack.[61]

Thus, Pollot notes the following:

> For these reasons it is not appropriate to confine a discussion of rights, particularly property rights, to the specific provisions of the Bill of Rights. To make the discussion complete, we must consider the nature of rights generally, the historical context of the adoption of the Constitution and Bill of Rights, and the general principles they were intended to describe. Neither can we confine our discussion of rights of any stripe to a recitation of modern cases, many of which have drifted far from the principles for whose protection the Constitution was created.[62]

With regard to the general principles the Constitution and the Bill of Rights were intended to describe, Pollot explains, "Just as there are clearly protected areas of speech susceptible to definition by readily applied general principles, there are clearly protected areas of property rights susceptible to definition by principles of general applicability."[63]

To unearth some of these "protected areas of property rights,"[64] one can look directly to the views of the Founding Fathers with respect to government's role in protecting property rights.

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[60] POLLOT, *supra* note 22, at 5.

[61] *Id.* Pollot's comments are affirmed by a reading of St. George Tucker who noted that knowledge of the Constitution and a country's civil history was necessary to constitute a thorough knowledge of that country's laws. *See* ST. GEORGE TUCKER, VIEW OF THE CONSTITUTION OF THE UNITED STATES 16 (1999). Tucker also noted, "In a government founded on the basis of equal liberty among all its citizens, to be ignorant of the law and the constitution, is to be ignorant of the rights of the citizen. Ignorance is invariably the parent of error . . . ." *Id.* at 15. Finally, Tucker observed,

> If an acquaintance with the constitution and laws of our country be requisite to preserve the blessings of freedom to the people, it necessarily follows that those who are to frame laws or administer the government should possess a thorough knowledge of these subjects. For what can be more absurd than that a person wholly ignorant of the constitution should presume to make laws pursuant thereto?

Id. at 16.

[62] POLLOT, *supra* note 22, at 5.

[63] *Id.* at 5-6.

[64] *Id.* at 6.

The Founding Fathers intended that property rights should be afforded full protection against incursion.[65] This assertion is "beyond serious dispute."[66] As evidence of such, James Madison's *Notes of Debates in the Federal Convention of 1787* ("*Notes*")[67] is an ample starting point. Madison's *Notes* reflect clearly the views of many of the men who played an integral role in the formation of our Constitution.

To begin, Gouverneur Morris of Pennsylvania unambiguously believed that the primary role of government was to protect property rights.[68] Madison's *Notes* summarize his view by stating that Morris was of the opinion that

> [a]n accurate view of the matter would nevertheless prove that property was the main object of Society. The savage State was more favorable to liberty than the Civilized and sufficiently so to life. It was preferred by all men who had not acquired a taste for property . . . which would only be secured by the restraints of regular government.[69]

Pierce Butler of South Carolina also viewed government's primary role as being the protection of property rights.[70] Madison notes that Butler strenuously contended that "property was the only just measure of representation. This was the great object of Govern[ment]: the great cause of war; the great means of carrying it on."[71] Madison's *Notes* also clearly indicate that Rufus King of Massachusetts believed that "property was the primary object of society . . . ."[72] In addition, the *Notes* are evidence that Charles Pinckney of South Carolina viewed the primary role of government as being the protection of property rights. According to Madison, Pinckney "desired that . . . property in slaves should not be exposed to danger under a Gov[ernment] instituted for the protection of property."[73]

James Madison held the same view of property rights and the role of government in securing those rights. Many of his ideas are reflected in the *Federalist Papers*.[74] For example, in *The Federalist No. 10*, Madison

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65 *Id.* at 11.

66 *Id.* Pollot also noted that this issue has been examined by several scholars, including DAVID F. EPSTEIN, THE POLITICAL THEORY OF THE FEDERALIST (1984). *Id.* at 200 n.15.

67 JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 (New Indexed ed., Ohio Univ. Press 1987) (1840).

68 *Id.* at 244.

69 *Id.*

70 *Id.* at 247.

71 *Id.*

72 *Id.*

73 *Id.* at 278-79.

74 With regard to the reliability of the *Federalist Papers*, Mark Pollot notes,

states, "The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests. The protection of these faculties is the first object of Government."[75] In *The Federalist No. 54*, Madison's view becomes even clearer in light of his statement that "government is intended . . . to be the guardian of property."[76] Furthermore, Madison stated,

> Government is instituted to protect property of every sort . . . . This being the end of government, that alone is a *just* government which *impartially* secures to every man whatever is his *own*.
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> . . . .
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> That is not [a] just government, nor is property secure under it, where arbitrary restrictions . . . deny to part of its citizens that free use of their [property].[77]

Alexander Hamilton espoused the same view. In *The Federalist No. 1*, Hamilton details the purpose of the papers. He states that one such

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> [R]eliance on the *Federalist Papers* have [sic] been criticized on a number of grounds, including the claim first that they were targeted at a specific audience, the citizens of New York, and second that the papers represented the views of only three men, Hamilton, Madison, and Jay.
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> The first objection makes no sense. It presumes (a) that no one else would read the papers and (b) that the papers' authors did not believe or had no reason to believe that others would read them. This claim attributes a naivete to Madison, Jay, and Hamilton that is not plausible. Such papers were frequently reprinted in the former colonies. For example, "Centinel" Numbers 1 to 18 were printed in the Philadelphia *Independent Gazetteer* and Philadelphia *Freeman's Journal* between October 5, 1787, and April 9, 1788, by Samuel Bryan. Some were reprinted particularly widely. . . . All three authors of the Federalist Papers had to be aware of this tendency for reprinting and wide circulation. It strains credulity to believe that they would have written anything in the Federalist Papers that they believed would offend other states whose votes were needed to ratify the Constitution, although New York was certainly critical. Further, the defense in the Constitution offered in the papers reflected the arguments raised of the convention itself. This fact not only authenticates the *Notes* but also invalidates Leonard Levy's theory that the secrecy of the convention demonstrates that the framers did not intend us to be guided by their intent.
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> The second objection is equally specious. While Madison, Hamilton, and Jay did indeed write the papers, a detailed comparison of both the papers and the convention records shows that the arguments offered by the papers closely parallel those offered in support of the Constitution in convention. Ultimately, of course, the Constitution was ratified by those to whom the papers were directly addressed and to whom they were available, although only upon the condition that a Bill of Rights be added.

Pollot, *supra* note 22, at 14-15.

[75] THE FEDERALIST NO. 10 (James Madison).

[76] *Id.* NO. 54 (James Madison).

[77] JAMES MADISON, *Property*, *in* 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 478-79 (1865).

purpose is to discuss "[t]he additional security, which . . . [the Constitution's] adoption will afford to the preservation of . . . property."[78]

John Adams also held to such a view of the role of government and property rights. As Michael Coffman notes, Adams warned that losing the inalienable right to own land without government interference inevitably results in a tyrannical government.[79] Adams exclaimed, "The moment the idea is admitted into society, that property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence."[80] Adams continued, "Property must be secured, or liberty cannot exist."[81]

In the Declaration of Independence, Thomas Jefferson termed the natural laws as discussed by Blackstone, the "Laws of Nature and of Nature's God."[82] These natural laws of God endowed to men "certain inalienable rights; . . . among [which] are Life, Liberty, and the Pursuit of Happiness."[83] The right to property necessarily falls within the inalienable right to the pursuit of happiness. Jefferson stated that "a right to property is founded in our natural wants, in the means with which we are endowed to satisfy these wants, and the right to what we acquire by those means without violating the similar rights of other sensible beings."[84]

Jefferson believed that the role of government, with respect to all rights, including the right to property, was to provide for the protection of those rights. He stated in the Declaration of Independence that "to secure these [inalienable] Rights, Governments are instituted among Men, deriving their just powers from the Consent of the Governed."[85] Undoubtedly, Jefferson saw government as an instrument that obtains its authority and its life solely from the consent of those over which it is intended to exercise authority. Hence, Jefferson further noted that "[t]he rights of the people to the exercise and fruits of their own industry, can

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78 THE FEDERALIST NO. 1 (Alexander Hamilton) (emphasis omitted).

79 Michael Coffman, *Property Rights: The Foundation of Freedom*, *in* THE IMPORTANCE OF THE U.S. CONSTITUTION AND PROPERTY RIGHTS (1997), *at* http://www.epi.freedom.org/propertyrights.htm (last updated May 30, 1997).

80 6 JOHN ADAMS, THE WORKS OF JOHN ADAMS 9 (Boston, Little & Brown 1851).

81 *Id.* at 280.

82 THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

83 *Id.* at para. 2.

84 Letter from Thomas Jefferson to Pierre Samuel Dupont de Nemours (April 24, 1816), *in* JEFFERSON: POLITICAL WRITINGS 292 (Joyce Appleby & Terence Ball eds., 1999), *available at* http://etext.virginia.edu/jefferson/quotations/jeff6.htm.

85 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

never be protected against the selfishness of rulers not subject to . . . [the people's] control at short periods."[86]

In summary, Jefferson believed government's role was to secure the inalienable rights of the governed, and he believed that property rights were among the inalienable rights to be secured (because such rights fall within the inalienable right to the pursuit of happiness). Thus, it can logically be concluded that Jefferson viewed securing property rights in individuals as one of government's primary functions. This conclusion is illustrated clearly in Jefferson's statement that "[t]he true foundation of republican government is the equal right of every citizen, in his person and property, and in their management."[87]

D. The Founders' Intent for Government Versus the Good *Court's Rationale*

As has been discussed, the United Sates Court of Appeals for the Federal Circuit held in *Good v. United States* that Lloyd Good's property had not been regulated to the extent that a regulatory taking had occurred.[88] The court reasoned that at the time of the purchase of his property, Good should have been aware that regulatory approval for development could become more difficult to obtain because of the growing sensitivity toward environmental issues.[89] Because he purchased the property at a time when he should have been aware that environmental concerns might eventually preclude the development of his property, the court reasoned, Good had no reasonable investment-backed expectation that he would be able to develop his property.[90]

This decision is shocking for several reasons. First, the court is proposing the incredulous notion that property owners who purchase land before Congress has acted (pre-enactment owners) are required to guess what Congress will do next in order to determine whether they should purchase property. Second, the court has opened the door to the possibility that the government will always be able to take pre-enactment owners' property without just compensation because any trend could be a sign that Congress will eventually legislate in that area. Third, the *Good* decision is a culmination of the federal government usurping power not delegated to it. The focus of this Article lends itself particularly to consideration of the final concern.

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[86] Letter from Thomas Jefferson to Isaac H. Tiffany (August 26, 1816), *in* JEFFERSON: POLITICAL WRITINGS 218 (Joyce Appleby & Terence Ball eds., 1999), *available at* http://etect.virginia,edu/jefferson/quotations/jeff6.htm.

[87] Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), *in* JEFFERSON: POLITICAL WRITINGS 212 (Joyce Appleby & Terence Ball eds., 1999), *available at* http://etect.virginia,edu/jefferson/quotations/jeff6.htm.

[88] Good v. United States, 189 F.3d 1355, 1363 (Fed. Cir. 1999).

[89] *Id.*

[90] *Id.*

With an understanding of the historical context[91] of the formation of our Constitution, it is undeniable that our government was established to secure mankind's absolute right to property. Consider again John Locke's political theories, Sir William Blackstone's discourse on the rights of man, and our Founding Fathers' views on government's role in protecting property rights. What one sees is the creation of a government, which is itself governed by a written Constitution, whose primary purpose was to secure the "inalienable rights . . . [of] Life, Liberty, and the Pursuit of Happiness."[92] Therefore, by requiring pre-enactment owners to speculate as to what Congress will do in the future necessarily makes the absolute rights of man in property *absolutely* subject to the very government that was created to protect those rights. Our absolute, inalienable rights were never intended to be placed in such subjugation to the federal government. Rather, the Founders made it clear that our government was designed to "secure the Blessings of Liberty to ourselves and our Posterity."[93] This securing, they warned, could only be done with a government designed principally to protect the rights of the governed by placing those rights above the government itself.

III. REGULATORY TAKINGS JURISPRUDENCE: FROM *PENNSYLVANIA COAL* TO *GOOD* – A BAD SITUATION MADE WORSE

Naturally, one would prefer to live within a system where the system functions correctly, thus making life a little easier. However, given that things rarely work the way they were intended (usually because of man's interference),[94] we must, until the system is repaired (whether by our own hands or another's),[95] live within the system as it was developed and as it currently exists.

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91 *See* TUCKER, *supra* note 61, at 16 (commenting on the importance of an understanding of the civil history of our country in order to gain a thorough knowledge of its laws).

92 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

93 U.S. CONST. pmbl.

94 *See Genesis* 3 (describing the fall of mankind).

95 Thomas Jefferson made it abundantly clear that if the need for change arises it is up to the people to bring about such change. He stated:

> [T]hat whenever any Form of Government becomes destructive of these Ends [securing inalienable rights], it is the Right of the People to alter or to abolish it, and to institute new Government, laying its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness.

THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

A. Key Regulatory Takings Cases Culminating in the Three-Part Penn Central *Test*

In 1922, the Supreme Court of the United States heard *Pennsylvania Coal Co. v. Mahon*.[96] The case dealt with a challenge to a Pennsylvania statute that forbade mining anthracite coal in a manner that led to surface subsidence.[97] The Mahons executed a deed in 1878 to purchase their home.[98] The deed conveyed surface rights to the Mahons but expressly reserved in the Pennsylvania Coal Co. the right to remove all the coal under the Mahons' home.[99] The deed also provided that the grantee take the premises with the risk stated, and waive all claims for damages that might arise from the mining of the coal.[100] Subsequent to the Mahons' purchase of their home, Pennsylvania enacted the Kohler Act.[101] Subsequent to the enactment of the Kohler Act, the Pennsylvania Coal Co. decided to commence mining under the Mahons' home. Once the coal company raised "the specter that the risk [the Mahons] had assumed might actually materialize, the Mahons decided that the bargain they had struck was no longer worth it."[102] As a result, the Mahons sued to enjoin the coal company from further mining.[103]

The Commonwealth of Pennsylvania presented the Mahons' key argument:

> All property within the State is held, and all contracts are entered into subject to the future exercise of the police power of the State. Every such agreement was entered into by the parties with full knowledge that whenever the existence of such contracts and the exercise of the license reserved should threaten the life, health or safety of the people, the Commonwealth in its sovereign power might interpose and restrict the use of those contract rights to such extent as might be necessary in the public interest. Owners of coal lands, who saw highways being laid out and improved, railroads and trolley lines built, sewers and gas mains laid, light, telephone and power wires stretched overhead, depots, stores, theaters, hotels and dwellings

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96 Pa. Coal. Co. v. Mahon, 260 U.S. 393 (1922).

97 Kohler Act, PA. STAT. ANN. tit. 52, § 661 (West 1998). The Court explained that the Kohler Act forbade

> the mining of anthracite coal in such a way as to cause the subsidence of, among other things, any structure used as a human habitation, with certain exceptions, including among them land where the surface is owned by the owner of the underlying coal and is distant more than one hundred and fifty feet from any improved property belonging to any other person.

Pa. Coal Co., 260 U.S. at 412-13.

98 *Pa. Coal Co.*, 260 U.S. at 412.

99 *Id.*

100 *Id.*

101 *Id.*

102 POLLOT, *supra* note 22, at 77.

103 *Pa. Coal Co.*, 260 U.S. at 412.

> constructed, and who, perhaps as many of the coal companies did, laid out the surface in building lots dedicating streets and alleys to public use, selling the lots for the purpose of having dwellings erected thereon, – such owners were bound to know that whenever the time should come when the exercise of the license which they had reserved would threaten the welfare of the communities upon the surface, the police power of the State might be interposed to restrict their rights.[104]

The coal company defended on the grounds that the Kohler Act constituted a taking of their property without just compensation.[105] In the Court's decision, Justice Holmes flatly rejected the Mahons' argument and stated,

> Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution.[106]

Justice Holmes then arrived at the oft-repeated conclusion of the Court when he stated, "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[107] With that, Justice Holmes and the Supreme Court gave birth to the doctrine of regulatory takings.

The early concerns of the Court, with regard to takings, revolved around imposing upon one or a few individuals, "the cost of advancing the public convenience"[108] in an arbitrary and unreasonable exercise of police power. One of the first cases the Court heard was *Village of Euclid v. Ambler Realty Co.*, which involved a challenge to a comprehensive municipal zoning ordinance by a real estate company.[109] The plaintiff alleged that the ordinance reduced the value of its land from $10,000 per acre to $2,500 per acre because it prevented development of the land.[110] Acknowledging that zoning was of recent origin, the Court observed that it must find its justification in the police power and be evaluated by the

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[104] *Id.* at 409 (Argument for Pennsylvania). Ironically, as can be seen in the above argument, the *Good* court's contemptible reasoning was alive and well 77 years before their decision. The only difference between then and now is that in 1922, the Court, led by Justice Holmes, rejected such ludicrous thinking, whereas now, the courts are offering it up as the law of the land. With regard to the Mahons' argument, Mark Pollot states, "That this argument was seriously advanced is chilling." POLLOT, *supra* note 22, at 78.

[105] *See* POLLOT, *supra* note 22, at 77.

[106] *Pa. Coal Co.*, 260 U.S. at 413.

[107] *Id.* at 415.

[108] Nashville, Chattanooga & St. Louis Ry. v. Walters, 294 U.S. 405, 429 (1935).

[109] Vill. of Euclid v. Amber Realty Co., 272 U.S. 365, 384 (1926).

[110] *Id.*

constitutional standards applied to exercises of the police power.[111] The Court concluded that the public interest was best served by segregating land uses not compatible with one another, and thus the ordinance was valid.[112] The Court added that, in any given case, whether such an ordinance would be held unconstitutional, and thereby not be allowed to diminish property values, would depend on a finding that the ordinance was "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[113]

Just two years after the Court's ruling in *Village of Euclid*, it heard *Nectow v. Cambridge*.[114] In *Nectow*, the Court invalidated a zoning ordinance to a tract of land because it would have rendered the land nearly worthless, and to exempt the tract would not impair any significant municipal interest.[115] Over the next fifty years, property was increasingly being regulated through zoning and environmental regulations. In 1962, the Supreme Court, in *Goldblatt v. Town of Hempstead*, even admitted that it had never developed a "set formula to determine where regulation ends and taking begins."[116] In fact, one commentator remarked that the Court's regulatory takings jurisprudence resembles a "crazy quilt pattern" of decisions.[117] Thus, in 1978, the Supreme Court in *Penn Central* finally formulated "general principles" for deciding regulatory takings cases.[118]

In *Penn Central*, the Court was faced with the question of "whether a city may . . . place restrictions on the development of individual historic landmarks . . . without effecting a 'taking' requiring the payment of 'just compensation.'"[119] The Court answered the question in the affirmative.[120] In arriving at its decision, the Court used a three-part test that considers (1) "the character of the government action"; (2) "the extent to which the regulation interferes with distinct, investment-backed expectations"; and (3) "the economic impact of the regulation."[121]

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[111] *Id.* at 386-87.

[112] *Id.* at 390, 397.

[113] *Id.* at 395.

[114] Nectow v. Cambridge, 277 U.S. 183 (1928).

[115] *Id.* at 188-89.

[116] Goldblatt v. Town of Hemptead, 369 U.S. 590, 594 (1962).

[117] Allison Dunham, Griggs v. Allegheny County *in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63 (1962).

[118] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

[119] *Id.* at 107.

[120] *Id.* at 138.

[121] *Id.* at 124. In 1992, the Supreme Court handed down its decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), which again amended the face of regulatory takings jurisprudence. In *Lucas*, the Court established a new rule for "categorical takings" for use when the state regulation being challenged permits no economically beneficial use of the land. *Id.* at 1015. This new rule holds that any

Hence, the Court's analysis in *Penn Central* provides the general guidelines by which courts, including the *Good* court, have decided regulatory takings cases for the past twenty-five years. It is from this three-part test, specifically part two (i.e., the extent to which regulation interferes with investment-backed expectations), that the court in *Good* arrived at its decision. Thus, the next section of this Article focuses on part two of the test.

B. Investment-Backed Expectations: The Crux of the Matter

Because the current system of government tells us that regulatory takings cases should be decided using the three-part *Penn Central* test, this Article analyzes the *Good* decision as decreed. As noted above, the court in *Good* held that Good was not entitled to just compensation for his property because the government regulation at issue did not regulate Good's property *enough*.[122] The court arrived at this decision by applying the *Penn Central* test and concluding that Good failed to meet part two of the test (i.e., he had no reasonable investment-backed expectations).[123] The court reasoned that, at the time of the purchase of his property, Good should have been aware that regulatory approval for development could become more difficult to obtain because of the growing sensitivity toward environmental issues.[124] This supposed foreseeablity, the court stated, was sufficient evidence that Good "could not have had a

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"categorical taking" is a *per se* taking and therefore requires just compensation with no additional consideration of investment-backed expectations required. *Id.* at 1027. Note however, that in the *Good* case, the amended takings jurisprudence set forth in *Lucas* did not supplant the standard three-part test set forth in *Penn Central* because the taking in *Good* was considered a "non-categorical" takings case. Thus, in *Good*, the proper test to use remained that of *Penn Central*. *See* Palm Beach Isles Assocs. v. United States, 231 F.3d 1365, 1367 (Fed. Cir. 2000) (Gajarsa, J., dissenting). In his dissent in *Palm Beach Isles*, Justice Gajarsa stated,

> The Supreme Court makes clear that the takings analysis introduced by *Lucas* applies only in the "relatively rare" and "extraordinary circumstance when no productive or economically beneficial use of land is permitted. . . ." Since *Lucas*, it has consistently been the law of this court that the standard three-part *Penn Central* regulatory takings analysis is proper in all non-categorical, or partial takings cases. *See e.g.* Good v. United States, 189 F.3d 1355, 1360 (Fed. Cir. 1999); Avenal v. United States, 100 F.3d 933, 937 (Fed. Cir. 1997). Finally, the Supreme Court has recently reiterated that the proper regulatory takings analysis for non-categorical cases involves the three-part inquiry set forth in *Penn Central*. *See* Phillips v. Washington Legal Foundation, 524 U.S. 156, 176 (1998) . . . .

Id. at 1367.

[122] Good v. United States, 189 F.3d 1355, 1363 (Fed. Cir. 1999).

[123] *Id.* at 1360, 1363.

[124] *Id.* at 1363.

reasonable expectation that he would obtain approval to [develop his land]."[125]

Playing by the rules, and therefore applying the *Penn Central* test, requires that lower courts follow the Court's intent in creating the test. This means that a court must know what the individual parts of the test mean in order to apply the test correctly. Defining part two of the test, then, requires examining how the courts have interpreted what the *Penn Central* Court meant by "investment-backed expectations."

The best court to start with is the Court of Appeals for the Federal Circuit, which decided *Good.* In 1994, that court clearly defined what was meant by "investment-backed expectations" not once, but twice. In June of 1994, the court decided *Loveladies Harbor, Inc. v. United States.*[126] The court unambiguously stated that "interference with distinct investment-backed expectations, was a way of limiting takings recoveries to owners who could demonstrate that they bought their property in reliance on a state of affairs that did not include the challenged regulatory scheme."[127] Thus, the court in *Loveladies Harbor* defined "investment-backed expectations" as requiring only that a pre-enactment owner have purchased the property relying on the fact that the regulatory scheme at issue did not exist *at the time* of the purchase.[128]

Just five months later, in *Creppel v. United States,*[129] the Federal Circuit Court of Appeals had another chance to define what is meant by "investment-backed expectations." In *Creppel,* the court defined "investment-backed expectations" exactly as it had in *Loveladies Harbor,* presumably solidifying the court's interpretation of what is meant by that term.[130] The court stated that "the extent to which the regulation interferes with the property owner's expectations – limits recovery to owners who can demonstrate that they bought their property in reliance on the nonexistence of the challenged regulation."[131] Here again, the court's intentions are clear: to limit recovery to pre-enactment owners who bought their land in reliance on the *nonexistence* of the regulatory scheme at issue.

If the Court of Appeals for the Federal Circuit's own interpretation was insufficient, it might have taken a look at the Supreme Court's interpretation of "investment-backed expectations." In *Concrete Pipe & Products v. Construction Laborers Pension Trust,* the Court held that the

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[125] *Id.* at 1361-62.

[126] Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994).

[127] *Id.* at 1177.

[128] *See id.*

[129] Creppel v. United States, 41 F.3d 627 (Fed. Cir. 1994).

[130] *Id.* at 632.

[131] *Id.*

petitioner had voluntarily negotiated and entered into a pension plan with respondent and that the plan was within the strictures of the Employee Retirement Income Security Act (ERISA).[132]

Petitioner claimed to have withdrawn from the plan in August of 1979, approximately nine months before the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA) was enacted.[133] The MPPAA provided for liability for withdrawing from an ERISA pension plan prematurely.[134] Petitioner claimed that because they had withdrawn from the plan prior to the enactment of the MPPAA, the MPPAA had created a regulatory taking of their property.[135] The Court disagreed and held that "[a]t the time Concrete Pipe . . . began its contributions to the Plan, pension plans had long been subject to federal regulation [under ERISA] . . . ."[136]

In explaining its decision in *Concrete Pipe*, the Court quoted from its decision in *FHA v. Darlington, Inc.*[137] It stated, "[T]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end."[138] Some would say that this statement applies directly to *Good* because Good purchased his land in 1973, one year after the enactment of the Clean Water Act (CWA),[139] and therefore did business in a regulated field. Remember, however, that Good was not precluded from developing his property because of the CWA, but rather because of the Endangered Species Act (ESA).[140] The significance of this distinction is profound. The statement in *FHA* and *Concrete Pipe* that "those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end" applies only to *amendments* to *existing* legislative schemes. In *Concrete Pipe*, this was exactly the case because the MPPAA was an amendment to ERISA - a legislative scheme already in existence when petitioner entered into the pension plan. This, however, was not the case in *Good*. The ESA is not an amendment to the CWA, but rather a wholly new and separate piece

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[132] Concrete Pipe & Prods. v. Constr. Laborers Pension Trust, 508 U.S. 602, 605 (1993).

[133] *Id.* at 614; *see* Employee Retirement Income Security Act of 1974 (codified as amended in scattered sections of 29 U.S.C.).

[134] *Id.* at 609; *see* Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208 (codified as amended in scattered sections of 29 U.S.C.).

[135] *Id.* at 636.

[136] *Id.* at 645.

[137] FHA v. Darlington, Inc., 358 U.S. 84 (1958).

[138] *Concrete Pipe*, 508 U.S. at 645 (quoting *Darlington Inc.*, 358 U.S. at 91). *See also* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15-16 (1976); Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 226 (1986).

[139] Clean Water Act, 33 U.S.C. § 1344 (2000).

[140] Endangered Species Act, 16 U.S.C. § 1533 (2000).

of legislation – making Good a *bona fide pre-enactment owner* with regard to the ESA and distinguishing his case from those in line with the Court's opinion in *Concrete Pipe*. The distinction between these two very different cases is quite clear and any attempt to blend the two should fail. Thus, the Supreme Court in *Concrete Pipe* interprets the rule surrounding interference with "investment-backed expectations" as one which limits recovery to those *pre-enactment owners* who bought their land in reliance on the *nonexistence* of the entire legislative scheme at issue and not merely on the nonexistence of amendments buttressing an already existing legislative scheme.[141]

Finally, if neither its own language nor that of the Supreme Court were sufficient to remind the Federal Circuit Court of Appeals what is meant by "investment-backed expectations," the court could have looked to a case very similar to *Good*. In *Ciampitti v. United States*, the United States Claims Court (now the United States Court of Federal Claims) held that a landowner who purchased wetlands with knowledge that the regulatory structure made the requisite permit for development of such land "virtually impossible to get" had no reasonable investment-backed expectation.[142] The owner in *Ciampitti* was precluded from developing his land because the regulatory structure that barred his development

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[141] Unfortunately the *Good* court neglected to take note of this distinction not once, but twice. In *Deltona Corp. v. United States*, 657 F.2d 1184 (Ct. Cl. 1981), the plaintiff purchased a 10,000 acre parcel of land in 1964. *Id.* at 1188. At the time of the purchase, development of the land was regulated by the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. §§ 401, 403, 404, 406- (1994). The plaintiff, understanding that the Rivers and Harbors Act required him to obtain a permit for development, sought and received a permit for a particular tract of his land in 1964. *Deltona*, 657 F.2d at 1188. By 1973, the plaintiff was ready to begin seeking permits for various other tracts of his land. *Id.* However, one year earlier, the Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act), 33 U.S.C. §§ 1341-45 (1994), was enacted and greatly tightened the requirements for obtaining a permit by requiring consideration of protecting the nation's wetlands. *Deltona*, 657 F.2d at 1187. The plaintiff's 1973 permit applications were subsequently denied. *Id.* at 1188-89.

The plaintiff filed suit claiming that the property was taken without just compensation. *Id.* at 1189. The court, in rejecting the plaintiff's argument, and almost as an aside, noted that the plaintiff, though he had every reason to believe he would obtain the necessary permits when he purchased the property, "also must have been aware that the standards and conditions governing the issuance of permits could change." *Id.* at 1193. At the conclusion of the *Good* court's opinion, the court analogizes that case with *Deltona*. Good v. United States, 189 F.3d 1355, 1363 (Fed. Cir. 1999). The court states, "Here, as in *Deltona*, Appellant 'must have been aware that the standards and conditions governing the issuance of permits could change.'" *Id.* (quoting *Deltona*, 657 F.2d at 1193). Quite simply, the *Good* court's use of *Deltona* in this instance is misapplied because just as *Concrete Pipe* is distinguishable from *Good*, so too is *Deltona*. Specifically, the plaintiff's permits in *Deltona* were denied because the legislative scheme in existence at the time of purchase was buttressed by amendments to that scheme, not because legislation, related to but wholly separate from the existing law, precluded approval.

[142] Ciampitti v. United States, 22 Cl. Ct. 310, 314 (1991).

was present at the time of his purchase; hence, he was not a pre-enactment owner. It was this regulatory structure that led to the denial of the permit to develop his land.[143] *Good* is distinguishable from this case in two ways: (1) Good was a pre-enactment owner and (2) the CWA, which Good knew about, was not the regulation that precluded him from developing his land; rather it was the ESA, enacted approximately seventeen years after Good bought his property.

Given that the Federal Circuit Court of Appeals has itself recently defined "investment-backed expectations" as requiring the pre-enactment owner to have relied on the *nonexistence* of the regulatory scheme at issue, its ruling was erroneous. By redefining "investment backed expectations" to include requiring pre-enactment owners to guess what wholly new pieces of legislation Congress might enact in the future, the court overstepped even the bounds it had set for itself twice in the five years preceding its decision. However, if this was not sufficient for the court, it could have looked to the U.S. Supreme Court for guidance. A sound reading of Supreme Court precedent on the meaning of "investment-backed expectations" should have kept the *Good* court on track. Unfortunately, it did not. Finally, the *Good* court could have looked to the U.S. Court of Claims for guidance if they still felt the need for clarification of the issue.

C. The Repercussions of the Good *Court's Decision*

A decision like that in *Good v. United States* can lead to one of two things: (1) a decision overruling it or (2) more bad law. Unfortunately, in the case of *Good*, the latter has happened. Since the *Good* court's decision, one case in particular stands out as illustrative of the harm that a bad decision like *Good* can create.

In *District Intown Properties Ltd. Partnership. v. District of Columbia*, the appellant, District Intown, purchased a fee simple lot in the District of Columbia in 1961.[144] The appellant did nothing with the lot until 1988 when it subdivided the lot into nine different lots on which it intended to construct eight new townhouses.[145] The appellant's permits were approved on March 7, 1989, five days after a local group filed a petition for an historic landmark designation on the very lots appellant was seeking to develop.[146] On May 17, 1989, the District of Columbia's Historic Preservation Review Board (Review Board) approved the landmark designation petition. Because the petition was pending when

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[143] *Id.*

[144] District Intown Props. Ltd. P'ship. v. District of Columbia, 198 F.3d 874, 877 (D.C. Cir. 1999).

[145] *Id.*

[146] *Id.*

the permits were approved, the Review Board had the authority to review the prior approval of the permits.[147] The Review Board recommended that the permits be denied.[148] Sometime later, appellant refiled its permit applications, which were again referred to the Review Board and subsequently denied because construction would be "incompatible" with the property's historic landmark status.[149]

As absurd as the facts of this case are, the court's opinion regarding them is worse. In essence, the court affirmed the district court's grant of summary judgment in favor of the District of Columbia and against the appellant,[150] but in doing so, it took the *Good* court's already flawed reasoning and ran wild with it.

Specifically, the court in *District Intown*, in addressing the reasonableness of the appellant's investment-backed expectations, notes that "[a]t the time of purchase, [appellant] could have reasonably expected [current D.C. statutory law] to affect its rights of development."[151] Left alone, this statement is understood and serves as a given. However, the court did not leave it alone but rather saw fit to equate the appellant's reasonably expecting current law to affect its rights of development with appellant's never having any reasonable investment-backed expectations of development at all. Specifically, the court stated, "[The appellant] purchased and subdivided its property subject to an existing regulatory regime that establishes that [the appellant] could have had *no* reasonable expectations of development *at the time it made its investments.*"[152]

In sum, the *Good* court's cavalier approach to the issue of investment-backed expectations has already enabled the *District Intown* court to greatly expand on existing flawed reasoning. The law of takings moved drastically in this latest case. The *Good* court, without precedent, required pre-enactment owners to guess what wholly new pieces of legislation government might enact. Now, the *District Intown* court has adopted the unbelievable notion that not only must a pre-enactment owner guess what amendments and new statutes will be created but also, if there is *any* law that has the potential to restrict the development of property, that owner does not have a reasonable investment-backed expectation for Fifth Amendment purposes.

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147 *Id.*

148 *Id.*

149 *Id.* at 877-78.

150 *Id.* at 884.

151 *Id.* at 883.

152 *Id.* (emphasis added).

IV. CONCLUSION

The Federal Circuit Court of Appeals has essentially required that pre-enactment property owners guess what moves Congress might make in the future in order to satisfy the "reasonable-investment-backed expectation" portion of the regulatory takings analysis test. Such a requirement on property owners cuts against everything for which our system of government was designed. It places the absolute property rights of men at the whim of the federal government, a government designed primarily to secure and protect the absolute, inalienable rights of man, not to infringe upon them.

Given the history of regulatory takings jurisprudence, it is clear that the *Good* court has wholly misconstrued the term "investment-backed expectations." The Federal Circuit Court of Appeals itself, along with the United States Supreme Court and the U.S. Court of Claims, have all interpreted "investment-backed expectations" to limit recovery to pre-enactment owners who purchased land in reliance on the *nonexistence* of the regulatory scheme at issue. The *Good* court's decision however, redefined established precedent and, in so doing, paved the way for later courts, such as in *District Intown*, to add to the absurdity of existing bad reasoning and erode even further the property rights afforded the men and women of this country. Undoubtedly, the *Good* court, by its incongruous rationale, must be held responsible for taking our nation ever closer to dissolution of our absolute right to property.