SIGN AMORTIZATION LAWS: INSIGHT INTO PRECEDENT, PROPERTY, AND PUBLIC POLICY

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INTRODUCTION

When cities or counties enact zoning regulations, they seek to create a better city by regulating the use of property. Often, these regulations change the permitted use of property, making illegal a use of property that preexisted the regulation. Sometimes these regulations permit these preexisting uses to continue. These grandfathered uses may continue for many years. Some communities, impatient for change, require that preexisting signs be terminated immediately or at some date certain in the future. Governments often use this termination approach when the preexisting use is a sign. The effect of these ordinances is to require removal of preexisting signs.[1] Rather than require the immediate removal of signs, these laws usually amortize the signs,[2] permitting them to remain standing for a fixed period of time until they are required to be removed.[3]

For decades these ordinances and laws have been challenged as a violation of the First Amendment,[4] and they are also challenged as a violation of the Takings Clause[5] of the Fifth Amendment.[6] Most courts reject these Takings Clause challenges. This Article investigates the current validity of these cases.

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[1] *See, e.g.*, N. Ohio Sign Contractor's Ass'n v. City of Lakewood, 513 N.E.2d 324, 325 (Ohio 1987).

[2] *E.g.*, Beals v. Douglas Co., 560 P.2d 1373, 1374 (Nev. 1977).

[3] *E.g.*, Sumney Outdoor Adver., Inc. v. County of Henderson, 386 S.E.2d 439, 441 (N.C. Ct. App. 1989).

[4] *E.g.*, Lawless v. Lower Providence Twp., No. CIV.A. 02-7886, 2002 WL 31356304, at *3–4 (E.D. Pa. 2002) (finding the government interests of aesthetics and safety were insufficient to justify an ordinance that regulated the display of political signs challenged by a candidate for elective office alleging violation of his right to free speech).

[5] U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.").

[6] *See, e.g.*, State Highway Dept. v. Morgan, 584 So.2d 499, 501 (Ala. 1991) (holding the State was not required to pay just compensation for removal of illegal sign erected after cut-off date).

The Supreme Court's 2004–2005 term ended with a trio of Takings Clause cases,[7] *Kelo v. City of New London* being the most talked about. To oversimplify, the Court in *Kelo* held that the "public use" phrase of the Takings Clause meant "public purpose" and that "public purpose" included taking land from one person to transfer the land to another, as long as the transfer promoted the public good.[8] This holding virtually eliminated the argument that the Takings Clause created a limitation on the purposes for which property may be taken. Similarly, in *Lingle v. Chevron U.S.A., Inc.*,[9] the Court rejected an argument that the Takings Clause inherently restricts the purposes for which property may be regulated.[10] In other words, a regulatory takings claim cannot be based solely on the lack of proper purpose. Each case can be cited for the proposition that the Court expanded government power, or at least made challenges to the use of that power more difficult. Certainly, each case apparently helped assure victory for the government.[11]

The question raised by this Article is whether *Lingle* may provide the argument base for overruling decades of cases, ironically, in favor of the government. The question will be raised whether *Lingle*, *sub silentio*, overruled cases upholding the validity of sign amortization laws, in particular, and amortization laws in general.

This Article will (1) briefly overview Takings Clause jurisprudence; (2) state a paradigmatic fact pattern; (3) review how the Takings Clause has been applied to sign amortization codes by the United States Supreme Court; (4) review paradigmatic cases from Florida courts and federal courts with Florida jurisdiction; (5) discuss the precedential value of these cases; (6) discuss *Lingle* and whether it requires an overturning of this precedent; and (7) discuss whether failure to overturn these cases serves the purpose of precedential jurisprudence.

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[7] Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005); Kelo v. City of New London, 545 U.S. 469 (2005); San Remo Hotel, L.P. v. City & County of San Francisco, 545 U.S. 323 (2005).

[8] *Kelo*, 454 U.S. at 484–86.

[9] 544 U.S. 528 (2005).

[10] *Id.* at 542.

[11] Given the discussion revolving around statutorily limiting government purposes to take properly, *Kelo* may yet prove to be a Pyrrhic victory.

I. TAKINGS CLAUSE SUMMARY

The Fifth Amendment provides that private property shall not "be taken for public use, without just compensation."[12] The guarantee provided by the Fifth Amendment is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[13] This provision limits governmental power to take private property for public use; it conditions the use of that power.[14] An important purpose of the Takings Clause is to ensure compensation for excessive governmental interference with private property rights.[15]

As with many provisions of the Constitution, the Supreme Court has declined to use the plain language of the Takings Clause as the sole basis for understanding the Clause.[16] If the government takes actual or constructive physical possession[17] of private property, the Supreme Court will generally require compensation be paid, but not always. The Court

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[12] U.S. CONST. amend. V. "No person shall . . . be deprived of life, liberty, or property, without due process the law; nor shall private property be taken for public use, without just compensation." *Id.*

[13] Armstrong v. United States, 364 U.S. 40, 49 (1960). Other, but similar, purposes have been asserted as well. *E.g.*, Christopher Serkin, *The Meaning of Value: Assessing Just Compensation for Regulatory Takings*, 99 NW. U. L. REV. 677, 709 (2005) ("[T]he central purpose of the Takings Clause is to shift the balance of public and private rights to the property owner."); Donald C. Guy & James E. Holloway, *Finding the Development Value of Wetlands and Other Environmentally Sensitive Lands Under the Extent of Interference with Reasonable Investment-Backed Expectations*, 19 J. LAND USE & ENVTL. L. 297, 304 (2004) ("[T]he purpose of the Takings Clause is to prevent some citizens from shouldering a burden that should be borne by the public or community as a whole."). Completely contrary is the position that the purpose of the Takings Clause was limited "to protect[ing] against government's physical appropriation of property." Andrew W. Schwartz, *Reciprocity of Advantage: The Antidote to the Antidemocratic Trend in Regulatory Takings*, 22 UCLA J. ENVTL. L. & POL'Y 1, 38 (2004).

[14] First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 314 (1987).

[15] *Id.* at 315.

[16] The Court applies the First Amendment to actions of the Executive Branch notwithstanding the First Amendment's express limitation to "Congress." *See* N.Y. Times Co. v. United States, 403 U.S. 713, 718–19 (1971) (Black, J., concurring).

[17] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982).

also requires payment of compensation where a government regulation is so oppressive that it effectively takes the property.[18]

A. Actual Taking or Physical Invasions of Private Property for Public Use

The most identifiable[19] form of compensable taking is eminent domain, i.e., "[t]he inherent power of a governmental entity to take privately owned property, esp[ecially] land, and convert it to public use, subject to reasonable compensation for the taking."[20] A prominent example of eminent domain is where the government takes land to build a road, building, or stadium, or perhaps to let private citizens create a new private development.[21] Usually, when the government takes property for a public project it acknowledges that it is taking title to property and pays the owner the fair market value.[22] Sometimes, however, the government essentially takes possession of property through a "practical ouster" of the owner's possession.[23] One example is "where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution."[24] The Court has found the smallest physical invasion of property to constitute a taking.[25]

In *Pumpelly v. Green Bay Co.*,[26] the Court recognized that the government should not be able to avoid paying compensation by not taking

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[18] *See* Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 537 (2005).

[19] Indeed, Professor Schwartz suggested that the only "taking" for which compensation is constitutionally required is eminent domain or other physical control. Schwartz, *supra* note 13, at 38.

[20] BLACK'S LAW DICTIONARY 233 (2nd pocket ed. 2001).

[21] *See, e.g.*, Kelo v. City of New London, 545 U.S. 469, 497–98 (2005).

[22] The term "fair market value" is not intended to set forth the exact legal standard in eminent domain uses, simply to identify a general principle.

[23] *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014 (1992) (citing Legal Tender Cases, 79 U.S. 457, 551 (1871); Transp. Co. v. City of Chicago, 99 U.S. 635, 642 (1879)).

[24] Pumpelly v. Green Bay Co., 80 U.S. 166, 181 (1871) (holding that state authorization of dam construction which permanently flooded private property constituted a taking).

[25] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 421–22 (1982) (holding the installation of a one-half inch diameter cable along the length and roof of an apartment building to be a permanent physical occupation authorized by law and therefore a taking).

[26] 80 U.S. 166.

title.[27] Constitutional taking should not be, according to the Court, construed so narrowly that:

> if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, . . . it is not *taken* for the public use.[28]

On the other hand, the Court in the 19th Century expressly held that without physical invasion of some sort, there would be no compensable taking of property under the Fifth or Fourteenth Amendments.[29] In *Transportation Co. v. City of Chicago*,[30] the Court held that Chicago did not "take" a dock owner's property when the City blocked access by building a dam in front of his dock.[31] The Court held that "acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision."[32]

B. Regulatory Takings

By 1922, the Supreme Court had clearly eliminated the requirement that government must physically invade property before a court could find that the government took property, holding that property could be taken in a constitutional sense without an invasion.[33] According to the Court, a regulation can constitute a taking if the regulation goes "too far."[34] In *Pennsylvania Coal Co. v. Mahon*, the Court noted that making an activity

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[27] *Id.* at 166, 177–78.

[28] *Id.*

[29] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014 (1995).

[30] 99 U.S. 635 (1878).

[31] *Id.* at 642–43.

[32] *Id.* at 642. Proving universality of holdings is hazardous in the time of computer research. It would have been impossible in the 19th Century. More important, the statement of universality is misleading. By 1879, a number of courts had already held that a law would violate due process if it overregulated property. *See, e.g.*, Bradshaw v. City of Omaha, 1 Neb. 16, 37, 49 (1871) (declaring an illegal tax void as violating the Takings Clause); City of St. Louis v. Allen, 53 Mo. 44, 56 (1873).

[33] Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

[34] *Id.*

commercially impracticable to perform (i.e., mining coal) has the same constitutional effect as appropriating or destroying the coal to be mined.[35] Thus, under Takings Clause jurisprudence, the economic impact of the regulation matters.

Takings jurisprudence did not go "too far" in the half century after *Pennsylvania Coal.* During that time, the Court regularly rejected takings claims even where regulations substantially devalued property.[36] Then, in 1978, the Court reawakened *Pennsylvania Coal* in *Penn Central Transportation Co. v. City of New York*,[37] a case won, ironically, by the government.[38] In that case, the Court identified several factors to be considered when determining if a restriction on the use of private property will be found to be invalid for failure to pay just compensation.[39] The factors included: (1) the economic impact on the property owner; (2) the extent to which the regulation interfered with the property owner's distinct investment-backed expectations; and (3) the character of the government action.[40] In a later case,[41] the Supreme Court defined as a taking a "regulation [which] denies all economically beneficial or productive use of land."[42] A taking will not be found if such a regulation permits reasonable, beneficial use of the property.[43] Additionally, the resulting restriction on use of the property must be substantially related to a legitimate public purpose.[44]

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[35] *Id.* at 414.

[36] *See, e.g.*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 385, 396–97 (1926) (holding a 75% diminution of value is not a taking).

[37] 438 U.S. 104 (1978).

[38] *Id.* at 105.

[39] *Id.* at 124.

[40] *Id.*

[41] Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

[42] *Id.* at 1015. "[T]he Fifth Amendment is violated when land-use regulation 'does not substantially advance legitimate state interests *or denies an owner economically viable use of his land*.'" *Id.* at 1016 (quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)).

[43] *See, e.g.*, *Penn Central*, 438 U.S. at 138. The Court provides further guidance on this point in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), in which the Court held that the takings claim based on *Lucas* was not supported. *See id.* at 629–32. The regulation in question prohibited the filling of wetlands and prevented the property from being developed into a beach club. *Id.* at 614–15. However, a portion of the property was suitable for building a substantial residence, and thus the regulation did not deprive the property owner of all economic use of the property. *Id.* at 616.

[44] *Lucas*, 505 U.S. at 1016.

The Supreme Court found the substantial relation element lacking in *Nollan v. California Coastal Commission*,[45] and held that the California Coastal Commission (CCC) could not require the property owners to grant an easement parallel to the Pacific Ocean across the ocean side of their property as a precondition to receiving a permit to rebuild.[46] CCC wanted the easement across the property to connect two separate public beaches.[47] The Court noted that the State could have exercised its power of eminent domain and required the property owners to grant an easement across their property to increase public access to the beach.[48] This would have required compensation.[49] The Court found the easement to be more than a "mere restriction" on the use of the property in that granting public access across the lot constituted a "permanent physical occupation."[50] The Court found no nexus between the condition of requiring the easement and the purpose of withholding of the building permit, declaring the condition to be extortion—an attempt to gain an easement without paying compensation.[51] Even though California had a legitimate interest in providing public access to the beach, the State could not compel individual property owners to subsidize the cost, thereby requiring just compensation.[52]

In addition to requiring a connection between the state interest and the permit condition, the Supreme Court held the Constitution requires a reasonable relationship or "rough proportionality" between the required dedication and the impact of the proposed development.[53] In *Dolan v. City of Tigard*, the city required the property owner to set aside portions of her property for floodplain management and bicycle/pedestrian paths.[54] The required set asides were a condition to receiving a permit to redevelop the property.[55] The Court found the condition to be related to legitimate public purposes[56] but held that the city was required to show a reasonable relationship between the amount of property to be set aside and the impact

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[45] 483 U.S. 825 (1987).
[46] *Id.* at 841–42.
[47] *Id.* at 828.
[48] *Id.* at 831.
[49] *Id.*
[50] *Id.* at 831–32.
[51] *Id.* at 837.
[52] *Id.* at 841–42.
[53] Dolan v. City of Tigard, 512 U.S. 374, 391 (1994).
[54] *Id.* at 380.
[55] *Id.* at 379.
[56] *Id.* at 387.

of the development on the problems the set asides were intended to alleviate.[57] Underlying this ruling on Fifth Amendment takings issues is basic fairness.[58] The Fifth Amendment is designed "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[59]

One of the most bizarre aspects of *Nollan* and *Dolan* is that there was no question that the government was going to acquire title or require "permanent physical invasion," and yet, the Court did not find the taking of title or physical invasion to be a per se taking.[60] In light of the invasion cases,[61] the Court could have easily found a taking and asked not whether there was a taking but whether the permits offered to the property owners could be considered compensation and, if so, whether that compensation was "just."

The Supreme Court again held that a taking may not always be a taking in *Lucas v. South Carolina Coastal Council*.[62] The trial court found that a regulation rendered Lucas's property valueless.[63] This finding met Justice Holmes' "too far" standard,[64] but the Court expressly added one caveat.[65] The Court held that a regulation that destroyed the value of property is not a taking if the regulation had the proper justification.[66] At least one proper justification was that the regulation was enacted to prevent havoc, as defined by the common law, at the time the landowner acquired title to the property.[67] Landowners, then, are burdened by common law extant at the time of acquisition. They may or may not be burdened, however, by statutes that exist at the time of acquisition.[68]

The Supreme Court once again held that a regulation that goes "too far" is not a taking, at least, where the government notifies the landowner

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[57] *Id.* at 395.

[58] *See id.* at 384.

[59] *Id.* (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

[60] *See id.* at 384; Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 831 (1987).

[61] *See supra* part I.A.

[62] 505 U.S. 1003 (1992).

[63] *Id.* at 1009.

[64] *Id.* at 1014.

[65] *Id.* at 1028–30.

[66] *Id.*

[67] *Id.* at 1027.

[68] Palazzolo v. Rhode Island, 533 U.S. 606, 630 (2001).

that it will go too far but only for a limited time.[69] In this case, *Tahoe-Sierra Preservation Council Inc. v. Tahoe Regional Planning Agency*, the Court returned, as it so often does, to *Penn Central*.[70] In particular, the Court turned to the part of *Penn Central* that held that "in the analysis of regulatory takings claims . . . [the Court] must focus on 'the parcel as a whole.'"[71] The Court noted that it had previously rephrased (and therefore modified) the whole parcel concept in *Andrus v. Allard*,[72] "affirm[ing] that 'where an owner possesses a full "bundle" of property rights, the destruction of one "strand" of the bundle is not a taking.'"[73] The Court held that time is but one strand in an owner's bundle of rights.[74] Consequently, a government may impose a moratorium on development of property—preventing all development and eliminating all use—and the moratorium is not a per se taking as long as the moratorium has a termination date.[75] Instead of creating a per se rule, the Court held that the question whether a moratorium is a taking should be reviewed under the "familiar" *Penn Central* approach.[76]

The Court also turned to *Penn Central* in *Palazzolo v. Rhode Island*,[77] declaring that regulatory takings are divided into two categories.[78] First, a taking may occur if the regulations "eliminat[e] all economically beneficial use."[79] Second, even if a "parcel retains significant worth,"[80] a takings claim may still exist under *Penn Central*.[81]

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[69] *See* Tahoe-Sierra Pres. Council Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 332 (2002). Others may disagree with this characterization of *Tahoe-Sierra* and suggest that a moratorium is not a taking because it "merely" prohibits use for a limited period of time.

[70] *Id.* at 326–27.

[71] *Id.* at 327 (quoting Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 131 (1978)).

[72] Andrus v. Allard, 444 U.S. 51 (1979).

[73] *Tahoe-Sierra Pres. Council*, 535 U.S. at 327 (quoting *Andrus*, 444 U.S. at 65–66).

[74] *Id.* at 337.

[75] *See id.* at 337–42.

[76] *Id.* at 342.

[77] 533 U.S. 606 (2001).

[78] *Id.* at 617.

[79] *Id.*

[80] *Id.* at 632.

[81] *Id.*

C. Takings Principles Not Limited to Real Property

The Supreme Court has not limited the protection of the Fifth Amendment to real property. The exact words of the Takings Clause refer to "private property."[82] Therefore, interest earned on private funds deposited in an interpleaded registry is the property of the owner of the principal and is "taken" when a state appropriates that interest.[83] So too is interest earned on funds deposited in Interest on Lawyers' Trust Accounts (IOLTA), private property, for takings analysis.[84] The Court followed long established common law, holding that interest "follows the principal."[85] As the principal in the trust account was private property, the interest earned on the deposited funds is private property and not the property of the state.[86] Furthermore, in *Eastern Enterprises v. Apfel*,[87] the Court found the Coal Act's allocation of retroactive liability to fund health benefits to affect a taking and to violate the Fifth Amendment.[88] The Court applied traditional takings analysis and concluded the Coal Act's allocation scheme imposed a considerable financial burden on petitioners and substantially interfered with petitioner's reasonable investment-backed expectations.[89] Additionally, the lack of proportionality of the allocation implicated principles of fairness: "Eastern cannot be forced to bear the expense of lifetime health benefits for miners based on its activities decades before those benefits were promised."[90]

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[82] U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

[83] Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164–65 (1980). A Florida statute authorized the county to take the accrued interest of funds deposited in the court's interpleader fund, in addition to charging a fee for "services rendered." *See id.* at 156 n.1, 157. The Court found that the interest "follows the principal" and is the property of the owner of the principal deposited. *Id.* at 162. Florida could not change the nature of the property from private to public because the court held it in the registry for a brief time. *Id.* at 164.

[84] Phillips v. Wash. Legal Found., 524 U.S. 156, 172 (1998).

[85] *Id.* at 165.

[86] *Id.* at 164.

[87] 524 U.S. 498 (1998).

[88] *Id.* at 504. "[L]egislation might be unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience." *Id.* at 528–29.

[89] *Id.* at 529–37.

[90] *Id.* at 537.

D. Takings Law Summary

The Constitution does not prohibit the government from taking private property for public use. However, the Constitution conditions the use of this power. Government may take private property, but it must pay for it. Fundamental fairness requires that costs for government actions taken for the good of the public be borne by the public and not disproportionately by the few. Property, not limited to real property, may be taken by actual physical invasion, by acquisition, or by regulation. The regulation must be related to a legitimate purpose and must be proportionate. Temporary or minute interference with property rights can affect a taking. Government cannot change the nature of property from private to public by seizing it without compensation.

II. TYPICAL SIGN AMORTIZATION CODES

Even though every case has its own distinctions, for the purposes of this Article, the typical and most relevant facts can be stated as follows. The persons hurt by sign codes are landowners (Landowners), sign owners (Sign Owners), and advertisers (Advertisers). Sign Owners are either: (1) sign companies that erect and maintain signs as well as put the advertising copy (i.e., the words and pictures) on the signs; or (2) the landowners. More often than not, the sign company Sign Owners will use signs for both noncommercial and off-site (or off-premises) commercial advertising, i.e., advertising goods or services not delivered on the site of the sign. Landowner Sign Owners usually advertise their own businesses, i.e., on-site or on-premises advertising.

At some point after the erection of the signs, the local government will enact an ordinance restricting the size, number, and placement of signs on each parcel of property. These regulations will often also prohibit off-site commercial advertising. (Hereinafter, all such ordinances will be referred to as Sign Codes.)

The net result of the Sign Codes will be that, as of the effective date, it will be (1) illegal for anyone to erect a sign to engage in off-site, commercial advertising; (2) illegal to convert an on-site commercial sign into an off-site commercial sign; (3) illegal to erect any sign larger than a specific square footage; and (4) illegal for anyone to engage in off-site advertising. The Sign Codes will also require the removal of many of the nonconforming signs at some point in the future. (Hereinafter, Sign Codes requiring removal of signs will be referred to as Sign Amortization Codes.) In all probability, the Sign Codes will not require removal of signs located along federal interstate and federal-aid primary highways (collectively

referred to as FAP signs) because the Highway Beautification Act[91] mandates that any government that requires removal of an off-site commercial FAP sign must pay just compensation to the owner.[92]

A review of a pair of Florida cases more than six decades old demonstrates that sign taking claims are not recent claims. These 1941 companion cases demonstrate decades of paradigmatic Taking Clause claims related to signs throughout the United States.[93] In each case, the plaintiffs were Landowners and Advertisers,[94] and the cases concerned the constitutionality of a statute requiring removal of off-site billboards from within fifteen feet of the right of way.[95] The factual allegations in *John H. Swisher & Son v. Johnson*[96] coupled with the factual allegations in *Hav-A-*

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[91] 23 U.S.C. § 131 (2000).

[92] *See id.* § 131(g). Because the Highway Beautification Act protects only off-site, commercial advertisements, the Act raises significant First Amendment speech questions. *See id.* § 131(c). The question would be whether that protection is unconstitutionally content based. *See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 516 (1981). In *Metromedia*, the Supreme Court held that San Diego violated the First Amendment by protecting on-site commercial signs, but not protecting noncommercial signs. *Id.* at 521. The question raised was whether there is a constitutional difference between discriminating against noncommercial advertising by protecting off-site commercial rather than on-site commercial advertising. *Id.* at 517.

[93] *See* Hav-A-Tampa Cigar Co. v. Johnson, 5 So. 2d 433 (Fla. 1941); John H. Swisher & Son, Inc. v. Johnson, 5 So. 2d 441 (Fla. 1941).

[94] *Hav-A-Tampa*, 5 So. 2d at 433; *Swisher & Son*, 5 So. 2d at 442.

[95] *See Hav-A-Tampa*, 5 So. 2d at 434; *Swisher & Son*, 5 So. 2d at 442.

[96] The allegations were:

> Swisher owns and maintains in the State of Florida 287 advertising signboards within 15 feet of the outside boundaries of public highways. . . .
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> . . . Swisher has placed all its said signboards under uniform written agreements (except as to consideration) with owners of lands abutting public highways.
>
> . . . Plaintiff Frank Jones is the owner in fee simple of a parcel of land on United States Highway No. 1 six and two-tenths miles south of the City of Jacksonville on which one of said signboards has long heretofore been and is being maintained by said Swisher; that he receives a valuable consideration annually for said use of said land; that said land is . . . not useful for agricultural or other revenue producing purposes; that the consideration paid by said Swisher, and additional

(*continued*)

Tampa v. Johnson[97] identify virtually every significant factual allegation that could be made to support a Takings Claim. The factual allegations in sign ordinance challenges have not substantially differed for six decades.

> sums received from other users of highway signboard advertising, constitutes the sole source of revenue from said land.
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> . . . .
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> . . . None of said signboards are dangerous to the public by falling or being blown down, or by being constructed of such material or in such manner as to endanger life or property, or by increasing any fire hazard, or by obstructing the view of travelers on said highways or by having printed or displayed them any obscene characters or words tending to injure or offend public morals.

Swisher & Son, 5 So. 2d at 442.

[97] The bill of complaint alleged

> that plaintiff has, ever since its establishment, continuously and still is, using as a medium of advertising, small signs erected and maintained along the various public highways of the State of Florida, with advertising directing attention of the public to and advertising the cigars manufactured by plaintiff.
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> [T]hat it has expended and has invested at the present time large sums of money in such signs erected and maintained by it along the various public highways in the State of Florida; that it has spent and has invested large sums of money in the purchase, construction, erection and maintenance of said signs; and likewise it has expended and has invested at the present time large amounts of money in the sites on real estate which it has acquired, either by purchase or lease, whereon said signs are constructed, erected and are being maintained, and said signs constitute, and said sites on said real estate whereon the same are erected and maintained, constitute a most valuable asset of plaintiff, and if the said signs are destroyed or displaced or removed, it would seriously impair and cripple plaintiff's business; that in acquiring the sites where said signs are being maintained, plaintiff selected such sites as would be the most valuable locations for such advertising purposes and at the same time, said sites and signs being maintained by the plaintiff do not in any wise interfere with the view of approaching vehicles, and in not way interfere with the traveling public.
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> . . . .
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> [T]hat it owns real estate sites, either by purchase or lease, in Hillsborough County, Florida, of upwards of 75, whereon it has been

(*continued*)

These two cases identify three major categories of owners who would be involved in Takings Clause challenges to typical Sign Amortization Codes: (1) Sign Owners, i.e., owners of sign structures; (2) Landowners, i.e., owners of land who lease their land to Sign Owners; and (3) Combined Owners, i.e., persons who own both land and signs placed upon the land.

These Owners, the plaintiffs noted, have a symbiotic relationship based on the signs, i.e., Sign Owners build their businesses based on the signs, and Landowners earn income based on the signs.[98] In particular, they alleged that income from the signs is the sole source of revenue from the land and that the land has no other productive use other than erection of signs.[99] These Owners, plaintiffs noted, have long years of use and large expenditures of money invested in signs.[100] Finally, these allegations indicated that none of the signs were dangerously constructed or dangerous to highway safety.[101] The allegations of *Hav-A-Tampa* and *Swisher & Son* indicate the depth and breadth of the challenges more than sixty years ago.

> for a long number of years and is now maintaining medium sized signs, advertising the cigars manufactured by plaintiff; that it likewise owns, either by purchase or lease, in various other counties of the State, a large number upwards of 500 similar real estate sites on which there is being now maintained similar signs, and which have been so owned and maintained by plaintiff for a long number of years; that most of said signs so owned, operated and maintained by plaintiff, located in Hillsborough County, Florida, as well as in the other counties of said State , are located on sites, that is to say, real estate, owned by purchase or lease by plaintiff, and said signs situated within 15 feet of the outside boundary of a public highway; the situation and location being such, however, as to in no wise obstruct or interfere with the view of approaching vehicles or the traveling public in any way.
>
> . . . .
>
> [T]hat the only purpose or use to which it can put said real estate or sites on which said signs are being maintained, is for the purpose it is being used, to wit: to maintain sign for advertising purposes.

Hav-A-Tampa, 5 So. 2d at 433–34.

[98] *See supra* notes 96–97.

[99] *See supra* notes 96–97.

[100] *See supra* notes 96–97.

[101] *See supra* notes 96–97.

III. SIGN AMORTIZATION TAKINGS CLAIMS

A. Sign Amortization Takings Claims in the United States Supreme Court

More than thirty years ago in *Markham Advertising Co. Inc. v. Washington*,[102] the Supreme Court rejected, as insubstantial, a takings challenge to a typical Sign Amortization Code.[103] In that case, as explained by the lower court, the state of Washington enacted a statute requiring removal of preexisting, lawfully erected signs.[104] The statute provided no compensation, and the sign owners challenged the statute under the Fourteenth Amendment Takings Clause.[105] The Washington statute was indistinguishable from a typical Sign Amortization Code. A use of land (i.e., sign advertising that was once lawful) was declared unlawful at a future date certain, and the statute provided no compensation.[106] The Washington Supreme Court denied the takings claim, and plaintiffs appealed to the United States Supreme Court.[107] The Supreme Court dismissed the appeal for want of a substantial federal question.[108] Even though this type of dismissal is relatively rare, it is a decision on the merits, and it is not readily distinguishable from a per curium affirmance[109] or affirmance without opinion.[110]

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[102] 393 U.S. 316 (1969) (per curiam).

[103] *Id.* at 316.

[104] Markham Adver. Co. v. State, 439 P.2d 248, 252 (Wash. 1968).

[105] *Id.* at 261.

[106] *See id.*

[107] *Id.* at 263. Significantly, plaintiffs' action in the Supreme Court was an appeal and not a petition for certiorari. *See Markham*, 393 U.S. at 316.

[108] *Markham*, 393 U.S. at 316.

[109] *See, e.g.*, Richard B. Cappalli, *What is Authority? Creation and Use of Case Law by Pennsylvania's Appellate Courts*, 72 TEMP. L. REV. 303, 363 (1999); Pennsylvania v. Tilghman, 673 A.2d 898, 904 (Pa. 1996).

[110] When the Supreme Court dismisses an appeal for want of a substantial federal question, such action is a decision on the merits, and lower courts are bound by such decisions "'until such time as the Court informs [them] that [they] are not.'" Hicks v. Miranda, 422 U.S. 332, 345 (1975) (quoting Doe v. Hodgson, 478 F.2d 537, 539 (2d Cir. 1973) (alteration in original)). Lower courts are bound "even if a theory not raised in the earlier case would lead to a different result." Hatten v. Rains, 854 F.2d 687, 690 n.3 (5th Cir. 1988); *see also* Hardwick v. Bowers, 760 F.2d 1202, 1213 (11th Cir. 1985) (Kravitch, J., concurring in part, dissenting in part), *rev'd*, 478 U.S. 186 (1986). As stated by Justice White writing for a plurality in *Metromedia, Inc.*, "the California Supreme Court was quite right in relying on our summary decisions as authority." 453 U.S. 490, 500 (1981).

There is no doubt that in *Markham*, the Washington Supreme Court rejected the takings claim and the United States Supreme Court branded the takings claims as insubstantial.[111] In presenting the constitutional issues to the Supreme Court, the jurisdictional statement in *Markham* included the claim that the Washington statute, which required preexisting billboards to be removed, constituted a due process claim for denial of just compensation.[112] Even though this precedent seems, at best, weak, a plurality of the Court, in *Metromedia, Inc. v. City of San Diego*, described *Markham* as the Court's "own decision[]."[113] Indeed, on at least four occasions within *Metromedia*, the plurality relied on *Markham* as authority for various propositions.[114] Not only did the Court cite to *Markham*, both before and after *Markham*, the Court rejected takings challenges to laws requiring the removal of preexisting property four times.[115]

Supreme Court precedent related to Takings Clause challenges to Sign Amortization Codes is very straightforward, but leaves interested persons (e.g., lawyers, judges, commentators) a little uncomfortable. Those who rely on or attempt to predict application of law tend to prefer somewhat more concrete precedent that consists of decisions with opinions and analysis. That being said, it remains true that the Supreme Court precedent, as indicated above, unquestionably supports the constitutionality of Typical Sign Amortization Codes. The question to be addressed later is whether that precedent has continuing vitality.

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[111] *See Markham*, 439 P.2d at 256–57; *Markham*, 393 U.S. at 316; *see also* Howard v. State Dep't of Hwys., 478 F.2d 581, 584 (10th Cir. 1973).

[112] *Markham*, 439 P.2d at 252; *Howard*, 478 F.2d at 584; *accord*, Sullivan Outdoor Adver., Inc. v. Dep't of Transp., 420 F. Supp. 815, 820 (N.D. Ill. 1976).

[113] *Metromedia, Inc.*, 453 U.S. at 511.

[114] *Id.* at 499, 509 n.14, 510 n.15, 511.

[115] *See* State v. Joyner, 211 S.E. 2d 320, 326 (N.C. 1975) (terminating use as a junkyard after three-year grace period is not a taking), *appeal dismissed for want of substantial federal question*, Joyner v. North Carolina, 422 U.S. 1002 (1975); City of University Park v. Benners, 485 S.W. 2d 773, 779 (Tex. 1972) (giving retail business twenty-five years to conform to residential zoning is not a taking), *appeal dismissed for want of substantial federal question, sub nom*, 411 U.S. 901 (1973); Stuckey's Stores, Inc. v. O'Cheskey, 600 P.2d 258, 267 (N.M. 1979) (terminating a preexisting sign use upon failure to review permit is not a taking), *appeal dismissed for want of substantial federal question*, 446 U.S. 930 (1980); Metromedia, Inc. v. Pasadena, 30 Cal. Rptr. 731, 735 (Cal. Ct. App. 1963) (terminating preexisting roof signs five years after enactment of ordinance is not a taking), *appeal dismissed for want of substantial federal question*, 376 U.S. 186 (1964).

B. Sign Amortization Takings Claims in the Florida Supreme Court, a Prototypical Approach

While the United States Supreme Court precedent regarding Sign Amortization takings claims is virtually nonexistent but binding, Florida Supreme Court precedent exists in the form of actual court decisions, but the analysis within the decisions is virtually nonexistent.[116] As noted above, *Hav-A-Tampa* and *Swisher & Son* contained a variety of allegations concerning (1) the different types of property interests involved; (2) the value of the signs involved; (3) the expense in establishing or erecting the signs involved; and (4) the lack of harm caused by the signs involved. When the Florida Supreme Court reviewed these extensive facts it avoided the discussion of the initial allegations.

1. The Florida Supreme Court has Rejected Takings Challenges to Typical Amortization Sign Codes

As noted before, the Florida Supreme Court, in *Hav-A-Tampa* and *Swisher & Son*, rejected any number of challenges to typical Sign Amortization Codes. In particular, the court expressly rejected a Takings Clause challenge.[117] An obvious concern about this precedent is its continuing vitality, i.e., its age. This concern is at least partially overcome by two factors. First, the breadth of the opinion is significant. Second, the lower Florida courts have relied on these opinions to reject similar takings claims. The question raised is whether there are other, more significant concerns with this precedent.

2. The Breadth of the Florida Takings Challenge Decisions

Hav-A-Tampa and *Swisher & Son* contain a plethora of arguments. Even though this Article focuses on the Takings Clause, the breadth of the claims made in these cases demonstrates a significant and well-considered challenge to the validity of these laws. The court in *Swisher & Son* identified no fewer than seven constitutional claims.[118]

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[116] *See* Hav-A-Tampa Cigar Co. v. Johnson, 5 So. 2d 433 (Fla. 1941); John H. Swisher & Son, Inc. v. Johnson, 5 So. 2d 441 (Fla. 1941).

[117] *Hav-A-Tampa*, 5 So. 2d at 438; *Swisher & Son*, 5 So. 2d at 446.

[118] *Swisher & Son*, 5 So. 2d at 442.

> Unless restrained by a court of competent jurisdiction, the defendant will, as he is required to do by said statute, on and after September 23, 1941, proceed to remove or obliterate all said signboards, and thereby

(*continued*)

In *Hav-A-Tampa*, the plaintiff added two allegations of constitutional violations—illegal and unlawful discrimination and a violation of equal protection—and both allegations were based on the statute permitting on-site signs to remain but requiring off-site signs to be removed.[119] The fact that the plaintiffs raised a multitude of arguments indicates that the plaintiffs made a full assault on the statutes involved.

On the other hand, the Florida Supreme Court narrowed the plethora of arguments to two essential categories. In *Swisher & Son*, the Florida Supreme Court asked the question that provides the foundation for all the various claims made: "The essential question to be adjudicated is whether the advertising signboards of a cigar manufacturer [which are physically sound and safe] . . . may be required to be removed under a statutory enactment . . . ."[120] The court distilled plaintiffs' arguments down to two essential claims—the statute violated plaintiffs' rights because it made unlawful what was once lawful[121] and because it distinguished between off-site and on-site signs.[122] Even though the Florida court rejected both

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> deprive plaintiffs of their property without compensation, contrary to and in violation of section 12 of the Declaration of Rights of the constitution of the State of Florida, and section 1 of the Fourteenth Amendment to the constitution of the United States; and will deny plaintiffs the right of acquiring possession and protecting property guaranteed to them by section 1 of the Declaration of Rights of the constitution of the State of Florida; and will impair the obligation of said contract between plaintiffs, contrary to and in violation of section 17 of the Declaration of Rights of the constitution of the State of Florida and section 10 of article 1 of the constitution of the United States, and will abridge plaintiff Swisher's right of freedom of speech, contrary to and in violation of article 1 of the Amendments to the constitution of the United States . . . .

Id.

[119] *Hav-A-Tampa*, 5 So. 2d at 435.

[120] *Swisher & Son*, 5 So. 2d at 444.

[121] *See id.* at 445–46. It is in the sense that the law is ex post facto. Due to the nature of plaintiffs' signs, they could be subject to criminal penalty for doing nothing. They lawfully constructed property, i.e., signs. These signs were designed to remain in place. But once the law changed, plaintiffs were subject to criminal penalties for doing nothing. They were to be punished for the result of their past conduct.

[122] *Id.* at 445.

challenges for one basic reason, safety,[123] the concurring opinion relied on the public purpose of protecting beauty.[124]

3. Florida Supreme Court Justification for the Sign Amortization Codes

In *Hav-A-Tampa* and *Swisher & Son*, the Florida Supreme Court did not extensively discuss each constitutional claim individually and rejected all constitutional challenges, relying on the rationale that protecting public safety sufficiently justified the law.[125] To the court, the sign code obviously protected public safety:

> A purpose and intent of the statute is to prevent commercial and other advertising signboards being maintained near the public highways so as to attract the attention of drivers of rapidly moving motor vehicles and others on the public highways in the State, thereby distracting the attention of such drivers and others from necessary continuing attention and care in operating vehicles on the highways. Such signboards obviously increase the hazards and risks of public travel on the highways and clearly justify the statutory regulations under the police power which are here challenged.[126]

In *Swisher & Son*, the words were different, but the result was the same.[127] The court went so far as to hold that even though signs may not be a

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[123] *Id.* at 446.

[124] *Hav-A-Tampa*, 5 So. 2d at 438–42 (Brown, C.J., concurring).

[125] *Id.* at 437–38 (majority opinion); *Swisher & Son*, 5 So. 2d at 445–46.

[126] *Hav-A-Tampa*, 5 So. 2d at 438 ("Modern highways and motor vehicles together with the enormous increase in travel and transportation in speedy vehicles make it necessary to conserve the safety of highway travel and those who may go upon the highways by all reasonable and appropriate means within the judgment of the lawmakers.").

[127] *See Swisher & Son*, 5 So. 2d at 445 ("Travel and transportation over the public highways in the State by the operation thereon of modern motor vehicles of high speed, heavy weight and technical mechanism, make it essential to the safety of human life and limb and of property in transit over the public highways, that there be no unnecessary signboards erected and maintained near the highways to obstruct vision or to divert the attention of drivers of rapidly moving vehicles on the highways, thereby greatly increasing the hazards of travel and transportation over the highways.").

nuisance per se, the legislature could declare them to be nuisances.[128] The majority then focused on public safety as a justification for the statutes, finding that traffic safety is a valid or legitimate public purpose.[129]

Rather than relying on public safety, the concurring justice in *Hav-A-Tampa* expressly called for recognition of aesthetics as a valid public purpose.[130] He stated, "[T]he time has come to make a candid avowal of the right of the legislature to adopt appropriate legislation based upon these so called aesthetic, but really very practical, grounds."[131] The concurring justice articulated the growing societal concern of protecting beauty and natural resources and stated that he would uphold the challenged statute on aesthetic grounds alone.[132]

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[128] *Id.* at 446 ("The advertising signboards in this case may not per se constitute a nuisance, but being located and maintained as alleged, they reasonably may distract the attention of the drivers of rapidly moving motor vehicles from the primary duty of such drivers to keep a steady outlook on the road ahead and from approaching vehicles and other circumstances that affect the safety of travelers, it is within the province of the legislature to provide such statutory measures as will conserve the safety of travelers on the public highways of the State, even to the extent of enacting that signboards which are maintained near highways and contribute to the risks and hazards of the traveling public, may be declared by statute to be nuisance and abated. . . . In this case a statute regulates the maintenance of advertising signboards near highways to conserve the safety of the traveling public.").

[129] *Id.* While the court may not have used the adjective "valid" or "legitimate," either could be properly inferred.

[130] *Hav-A-Tampa*, 5 So. 2d at 439 (Brown, C.J., concurring).

[131] *Id.*

[132] *Id.* In upholding the validity of distinguishing between on-site and off-site advertising, the majority found that the statute "does not operate to cause an unjust discrimination against, or an undue burden" to those who engage in off-site advertising. *Id.* at 437 (majority opinion). (Perhaps Justice O'Connor's "undue burden" test set forth in *Casey* is not as novel as has been suggested. *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 942 (1992).) The majority further stated:

> This is so for the reason that such exceptions have a substantial basis in practical differences that inhere in the subject regulated; and the exceptions harmonize with the policy and purpose of the enactment under the police power of the State to conserve public safety, which enactment regulates commercial or other advertising, including advertisements of manufactured products, by means of signboards along numerous highways containing matter designed to attract drivers of rapidly moving motor vehicles and others on the highways, thereby

(*continued*)

4. The Florida Supreme Court Reasonableness Test

The Florida Supreme Court provided little analysis in concluding that Florida's Sign Amortization Code did not violate any state or federal constitutional provisions. It held that the police powers of the state sufficiently justified the conclusion that the Sign Amortization Code was constitutional.[133] As stated by the Court in *Hav-A-Tampa*:

> Appropriate and reasonable statutory regulations of commercial and other signboard advertising under the police power to conserve the safety and comfort of the traveling public on the highways, do not violate private property . . . rights . . . . There is in such cases no taking of private property for public use without 'just compensation' . . . .[134]

The court reiterated its conclusion in *Swisher & Son*:

> The rights of the owner of the signboards for its advertising purposes and of the owner of the land for

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> increasing the hazards and risks vitally affecting the safety of public travel and transportation on the highways in the State.

Id. The Court in *Swisher & Son* explained that the signs had different purposes. On-site signs, even though they advertise, are related to information the driver, as a driver, may need, e.g., where or what to eat while traveling. *See Swisher & Son*, 5 So. 2d at 445. Off-site signs, on the other hand, are simply a distraction.

> Necessary signboards giving directions to drivers of motor vehicles and others as to places, distances and other matters, are essential to the use of the highways; but the erection and maintenance of advertising signboards relating to matters and businesses not affecting property on which the signboards are erected or maintained near the highways, greatly add to the hazards of travel and transportation on regulation of the erection and maintenance of such advertising signboards for the primary commercial benefit of others than the owners of the land on which the signboards stand, clearly are within the sovereign police power of the State; and statutes duly enacted to conserve safety and comfort of vehicular travel on the highways should not be adjudged to be unconstitutional, where such enactments do not arbitrarily and unnecessarily impair private rights.

Id.

[133] *Swisher & Son*, 5 So. 2d at 446.

[134] *Hav-A-Tampa*, 5 So. 2d at 438.

> commercial leasing purposes, are under the law subject to reasonable regulation or prohibition for the essential needs of the traveling public for safety on the public highways in the State.[135]

As to takings in particular, the *Swisher & Son* court held: "No property of either of the appellants is 'taken', but the use of property is regulated and restricted under the police power of the State to conserve the safety of highway travelers . . . ."[136] Even though the language of these cases is different from modern Takings Clause cases, the process is similar. The court determined the existence of a reasonable public purpose and held that it superseded any rights that the Sign Owners might have.

5. Unchallenged Precedent

Sixty years later, little has changed other than the recognition by courts of the validity of controlling property for aesthetic beauty.[137] The Florida Supreme Court held outdoor, off-site advertisers were "under the law subject to reasonable regulation or *prohibition*,"[138] and that off-site signboards "*greatly add to the hazards of travel and transportation on the highways; and the prohibition and regulation of the erection and maintenance of such advertising signboards . . . clearly are within the sovereign police power of the State.*"[139] "The advertising signboards in this case may not per se constitute a nuisance, but . . . may be declared by statute to be a nuisance and abated."[140]

Florida courts have continued to support and concur in the holdings and rationale of *Hav-A-Tampa* and *Swisher & Son*. In 1984, the Fifth District Court of Appeals held that an ordinance requiring previously lawful off-site signs to be removed ten years after enactment of the ordinance is not a taking.[141] Florida courts, then, have consistently upheld the validity of Sign Amortization Codes on the back of two principles.

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[135] *Swisher & Son*, 5 So. 2d at 445.

[136] *Id.* at 446.

[137] *See, e.g.*, Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 790 (1984); Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 511 (1981). Even pure environmental regulations such as water quality are justified based on aesthetics. *See* PUD No.1 of Jefferson County v. Wash. Dept. of Ecology, 511 U.S. 700, 716 (1994).

[138] *Swisher & Son*, 5 So. 2d at 445 (emphasis added).

[139] *Id.* (emphasis added).

[140] *Id.* at 446.

[141] Lamar Adver. Assocs. of East Fla., Ltd. v. City of Daytona Beach, 450 So. 2d 1145, 1150 (Fla. Dist. Ct. App. 1984).

First, these Codes are sufficiently justified under the State's power to preserve public beauty and public safety. Second, all use of property is subject to the police power.

6. The Fifth (now Eleventh) Circuit Takings Clause Precedent

In *E. B. Elliott Advertising Co. v. Metropolitan Dade County*,[142] the Fifth Circuit upheld the constitutionality of a Dade County sign ordinance amortizing off-site signs.[143] Previously erected nonconforming signs were allowed to remain for five years before the ordinance required that they be removed.[144] This ordinance was challenged on a number of grounds, including that it was a taking without compensation. The Fifth Circuit stated simply:

> In *Standard Oil Co. v. City of Tallahassee*, it was held a zoning ordinance requiring the discontinuance of a nonconforming use after the expiration of a five-year amortization period did not constitute a deprivation of property without due process of law. Therefore, the requirement contained in the ordinance that all nonconforming signs be removed by March 1, 1968, does not constitute a taking of property for which compensation must be given under the Fourteenth Amendment.[145]

The rationale and result of *E. B. Elliot* are indistinguishable from that in *Hav-A-Tampa* and *Swisher & Son*. Assuming, then, that a federal court in Florida found *Markham* to be inapplicable, it would still be bound by *E. B. Elliot*.

IV. QUESTIONS OF PRECEDENT

The above-discussed cases raise a number of questions about precedent. A few of the questions raised are easy to answer; others may be more difficult. The first question is to determine the precedent. Second,

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[142] 425 F.2d 1141 (5th Cir. 1970).

[143] *Id.* at 1155; *see also* Standard Oil Co. v. City of Tallahassee, 87 F. Supp. 145, 148 (N. D. Fla. 1949), *aff'd*, 183 F.2d 410 (5th Cir. 1950); *accord* Naegele Outdoor Adv. Co. v. Village of Minnetonka, 162 N.W.2d 206, 213 (Minn. 1968); City of Seattle v. Martin, 342 P.2d 602, 604 (Wash. 1959); Grant v. Mayor of Baltimore, 129 A.2d 363, 370 (Md. 1952); City of Los Angeles v. Gage, 274 P.2d 34, 45 (Cal. Dist. Ct. App. 1954); Art Neon Co. v. City & County of Denver, 488 F.2d 118, 122 (10th Cir. 1974).

[144] *E.B. Elliott*, 425 F.3d at 1155.

[145] *Id.* (citations omitted).

we must determine the effect of the precedent on lower courts. The third question concerns the purpose of precedent. Finally, the more important question is raised as to whether the effect of precedent requires anything out of precedent creating courts.

The second question is easily answered—precedent binds the lower courts. As noted above, *Hav-A-Tampa* and *Swisher & Son* are unchallengeable law in Florida state courts.[146] *E. B. Elliot* and *Markham* have never been questioned by another court. Takings law is not new. Indeed, courts accepted the concept of regulatory takings by at least the time of *Pennsylvania Coal Co. v. Mahon*.[147] It was Justice Holmes in *Pennsylvania Coal* who first stated, "[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[148] One of the best arguments supporting the validity of any Sign Amortization Code is that Florida federal courts must follow *E. B. Elliot* and *Markham* and that a reviewing court cannot assume that the Fifth Circuit in *E. B. Elliot* and the Supreme Court in *Markham* ignored *Pennsylvania Coal* and other takings precedents.[149] If the doctrine of stare decisis is accepted, Sign Amortization Takings jurisprudence creates relatively simple black letter law: Sign Amortization Codes do not violate the Takings Clause.[150] Precedent would demand adherence from lower courts. A more interesting question is whether this jurisprudence has an impact beyond black letter law and whether it has left a trail to follow.

A. Sign Amortization Holdings

In some ways the discussion of the binding effect of these precedents is obvious. It is difficult to conceive of our common law system without precedent. A reminder of what is binding about a precedential case, however, is necessary to the understanding of its value and whether the Sign Amortization Takings cases epitomize precedent or flaunt its purpose.

According to the Supreme Court, when it issues an opinion it is bound by "not only the result but also those portions of the opinion necessary to that result."[151] The rationale of a decision is, accordingly, significant to understanding the holding and is binding. Occasionally, however, a court may express a contrary view, that the "doctrine of *stare decisis* concerns

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[146] *See supra* Part III.B.5.

[147] Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

[148] *Id.*

[149] *See* Sign Supplies of Tex. Inc. v. McConn, 517 F. Supp. 778, 782 (S.D. Tex. 1980).

[150] *See, e.g.*, *E. B. Elliot*, 425 F.2d at 1155.

[151] Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 67 (1996).

the *holdings* of previous cases, not the rationales."[152] This statement may not be a disagreement as to what is binding but a poorly worded effort to distinguish between dicta and *ratio decidendi*. If a precedent is limited to the actual result in a case and in no way relates to its explanation, then the Supreme Court's Sign Amortization Taking holding is simple: the government does not take property when it amortizes signs. The holding in the Florida Supreme Court is essentially the same.[153] The facts presented by the Florida Supreme Court perhaps add some more substance to the holding. That court's review of the facts left no doubt as to the extensive economic damage alleged to have been done to the plaintiffs. To the Florida Supreme Court explicitly (as well as to the United States Supreme Court implicitly), it did not matter how much economic harm was caused to the plaintiffs.[154] It did not matter how much they relied upon existing laws. It did not matter what property interest a plaintiff held. The Florida Supreme Court explicitly rejected claims by Landowners and Sign Owners.[155] The United States Supreme Court implicitly did the same thing.[156] At first glance, it would appear that any court reviewing this precedent would be forced to conclude that a Sign Amortization Code is constitutional.

B. Lingle*'s New Takings Jingle*

As with too much in constitutional law, the search for black letter—for easy tests—by courts, lawyers, and commentators often leads to jingles, which are little phrases that often say little. For the Court, Justice Holmes enunciated the "too far" test.[157] *Agins v. City of Tiburon*[158] suggested that a taking occurs when a regulation fails to "substantially advance legitimate state interests."[159] As noted by the Court in *Lingle*: "Through reiteration in a half dozen or so decisions since *Agins*,"[160] the *Agins* court's holding, "has been ensconced in . . . takings jurisprudence,"[161] effectively reducing to jingle-status the words of *Agins*. The Court in *Lingle* concluded that the

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[152] *In re* Osborne, 76 F.3d 306, 309 (9th Cir. 1996).

[153] *See, e.g.*, John H. Swisher & Son, Inc. v. Johnson, 5 So. 2d 441, 446 (Fla. 1942).

[154] *See id.* at 442; Agins v. City of Tiburon, 447 U.S. 255, 259 (1980).

[155] Hav-A-Tampa Cigar Co. v. Johnson, 5 So. 2d 433, 438 (Fla. 1941).

[156] *See Agins*, 447 U.S. at 259.

[157] Pa. Coal Co. v. Mahon, 260 U.S. 393, 415–16 (1922).

[158] 447 U.S. 255 (1980).

[159] *Id.* at 260.

[160] Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 531 (2005).

[161] *Id.* at 532.

Agins takings test "has no proper place in our takings jurisprudence."[162] In authoring *Lingle*, Justice O'Connor departed from the Court's approach used in many cases applying the *Agins* formula, implying it had become a jingle for Takings cases and would no longer be reiterated.[163]

According to *Lingle*, "this test [the *Agins* 'substantially advances' inquiry] . . . is tethered neither to the text of the Takings Clause nor to the basic justification for allowing regulatory actions to be challenged under the Clause."[164] The *Agins* test "is not a valid method of discerning whether private property has been 'taken'" because the "inquiry reveals nothing about the *magnitude or character of the burden* a particular regulation imposes upon private property rights."[165] According to the Court, a regulatory taking test must seek to determine whether government action is "functionally equivalent" to (1) "direct[] appropriat[ion]" or (2) "oust[ing of] the owner from" private property.[166] The only three "tests" to meet these requirements are *Loretto*, *Lucas*, and *Penn Central*.[167] The three categories that flow from these cases are "permanent physical invasion," "complete elimination of a property's value," and the multiple factors in *Penn Central* that focus "in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property."[168]

Two of those three regulatory takings tests are somewhat self-explanatory. The *Penn Central* test is a mess. But one thing is certain: the *Agins* test is now completely inappropriate because it in no way seeks to understand how a regulation affects a particular property or property right. Consequently, *Lingle* declared the *Agins* test dead.

This declaration strikes at the heart of the prototypical case upholding the validity of a law amortizing signs. As noted in both the United States Supreme Court precedent and the Florida Supreme Court exemplar, courts have rejected takings claims solely for the reason that the government

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[162] *Id.* at 540.

[163] *See id.*

[164] *Id.* at 542.

[165] *Id.*

[166] *Id.* at 539.

[167] *Id.* at 538–39 (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 421 (1982); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992); Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978)).

[168] *Lingle*, 544 U.S. at 538–40 (citing *Loretto*, 458 U.S. at 421; *Lucas*, 505 U.S. at 1019; *Penn Central*, 438 U.S. at 124).

would have a legitimate reason for enacting the amortization laws.[169] To reiterate, these courts held that no taking occurred because aesthetics and traffic safety justified the enactment of these laws.

After *Lingle*, these (and all other) justifications for amortization laws are irrelevant. A proper, post-*Lingle* takings claim must focus on the effect an amortization law has on a particular "legitimate property interests."[170]

Lingle creates a new jingle: focus on the property. The question raised is whether *Lingle*'s conclusion affected Sign Amortization Code precedent.

C. The Sign Amortization Cases Rationale

Inasmuch as the holding and precedent in the United States Supreme Court is based on a dismissal of an appeal, there is no rationale given why it is constitutional for the government to require a Landowner to remove a lawfully erected sign without paying compensation.[171] When the Court dismissed the Sign Amortization Taking claim appeal, it gave no analysis for its conclusion that the plaintiffs claim did not even raise a substantial federal, i.e., constitutional, question.[172] Instead, the Court implicitly held that under no theory raised or not raised, could a Sign Amortization Code constitute a taking without just compensation. This decision, however, was issued during the Court's due process era of Takings analysis.[173] At this time the Court had not yet begun focusing on property interests.

Even though the Florida Supreme Court stated at least some reasons for its result, it gave no effective analysis. According to the Florida court, no theory of property mattered, and no ownership interest mattered. To this extent the Florida court's opinion is effectively indistinguishable from the Supreme Court's summary dismissal. The difference between the two courts, with regard to the property analysis, is that the Florida Supreme Court, by discussing the types of property interests involved, made it clear that it considered them all and rejected any such property interests as a

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[169] *See, e.g.*, Markham Adver. Co. v. State, 439 P.2d 248, 262–63 (Wash. 1969); Hav-A-Tampa Cigar Co. v. Johnson, 5 So. 2d 433, 438 (Fla. 1941); John H. Swisher & Son, Inc. v. Johnson, 5 So. 2d 441, 446 (Fla. 1941).

[170] *Lingle*, 544 U.S. at 540.

[171] Markham Adver. Co. v. Wash., 393 U.S. 316, 316 (1969).

[172] *Id.*

[173] That is, *Markham* was decided in 1969, *id.*, long before the *Loretto*, *Lucas*, and *Penn Central* decisions, which "aim[ed] 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." *Lingle*, 544 U.S. at 539.

basis for finding a Takings Clause violation. The Florida court did not, however, attempt any rationalization of its conclusion.

Instead, the court relied solely upon the conclusory rationale that government can require that preexisting signs be removed because the government said (1) the signs created a traffic hazard and (2) the signs were aesthetically displeasing.[174] In a typical due process, rational basis approach, the Florida court did no more than say that it would be rational to accept the legislature's "because we said so" rationale.[175] Signs, and whatever property interest exists therein, could be destroyed or removed because the legislature said that the signs were a traffic hazard and aesthetically displeasing.

The Florida court's analysis provides little more than a summary disposition. The Supreme Court gave no rationale. The Florida Supreme Court gave no analysis to support its rationale that no matter the property interest or investment in signs, the government could simply assert an interest, e.g., safety or aesthetics, and destroy the property or value in it.

D. Sign Amortization Cases Call into Question the Purpose and Legitimacy of Precedent and the Judiciary

According to the courts that discussed the issue, the judicial system of the United States is founded upon precedence.[176] Justice Rehnquist wrote that failure to follow precedent would result in "anarchy . . . within the federal judicial system."[177] The Florida courts agreed.[178] Failure to follow precedent by a lower court "would . . . create chaos and uncertainty in the judicial forum."[179] Put another way, precedent is law and all, especially courts, are bound to follow the law.[180] Implicit in this reasoning is that law is distinguishable from ad hoc decision making, that law is a type of rule to be followed. More specifically, precedent creates some sort of rule.

If precedent and the justification for following precedent is that creating rules to follow creates stability, then precedent must mean more than reaching the same result when the facts and the arguments are exactly

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[174] *See Hav-A-Tampa*, 5 So. 2d at 439–40.

[175] *Id.*

[176] *See, e.g.*, Hutto v. Davis, 454 U.S. 370, 375 (1982); *see also* Jaffree v. Wallace, 705 F.2d 1526, 1532 (11th Cir. 1983).

[177] *Hutto*, 454 U.S. at 375.

[178] Hoffman v. Jones, 280 So. 2d 431, 434 (1973).

[179] *Id.*

[180] *See, e.g.*, Johnson v. Johnson, 284 So. 2d 231, 231 (2d Cir. 1973) ("[O]ur bondage to law is the price of our freedom.").

the same. That sort of precedent is no precedent at all. It is certainly no rule. Such a theory of precedent would permit, indeed virtually requires, each judge and each lawyer to argue that the minutest of factual differences matter. Every set of facts and each distinguishing feature or nuance would become law unto itself.

Perhaps the only way to prevent this approach to precedent is for the court to prove that it reached the correct result with published reasoning. This can be demonstrated by considering the ramifications or effect of a decision with no rationale, in particular, the *Markham* decision. Such a review will show that a decision without rationale cannot be precedential, at least not precedential in a way that avoids the jurisprudential "anarchy" that Justice Rehnquist said would be created without precedent.

Markham decided that no substantial federal, i.e., constitutional, question was raised by the amortization of signs, particularly a five-year amortization of signs.[181] The question raised is whether that decision is legitimate precedent. The question is not whether the decision is binding on lower courts; the question is to what are the lower courts bound?

For example, without rationale or reasoning the question is whether a lower court can follow *Markham* when the time for amortization is different. A summary dismissal does not in any way answer whether a shorter amortization would be valid. No one, particularly a lower court, can claim with any sense of integrity that *Markham* controls with regard to the validity of a four-year, 364-day amortization period. This statement is more clearly true with a four-day amortization period. *Markham*'s summary dismissal cannot honestly be held to control a four-day, four-week, four-month, or four-year amortization.

Markham cannot honestly be said to control the result for any property or property interest other than signs. Without being able to read the rationale of the Court's decision, a lower court cannot "follow precedent" if the property is a lemonade stand or an automobile factory. *Markham* does not really even answer the question of whether amortization would be valid for signs placed in the ground with one- or ten-foot deep foundations, or if a city declared a drive-in theater screen or sculpture to be a sign.

Without showing its reasoning, which the Court never does with a summary decision, the Court's decisionmaking is simply a series of ad hoc decisions, not a system of precedent. Whatever attacks can be and are made on judicial decision making, even if all judicial opinions are simply a series of post-hoc rationalizations, a judicial system that is founded on

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[181] *See* Markham Adver. Co. v. Wash., 393 U.S. 316, 316 (1969).

precedent or that seeks to avoid the appearance of anarchy, must be based on decisions that justify results with explanation. Without an opinion, a judicial decision may be "just," but it cannot create a system of law. It may be just but it remains nothing more than "Because We Said So" jurisprudence. Even worse, it is a public admission of "Because We Said So" jurisprudence.

A court's failure to issue an opinion creates problems for creating a rational system of precedent and precedential law; a poorly drafted opinion may be worse, at least temporarily, as demonstrated by the Florida Supreme Court's Sign Amortization opinions, which say no more than that it can rationally be believed that signs are ugly and interfere with traffic safety. This explanation creates three significant and distinct concerns.

The first concern relates to property. The Florida court listed a variety of property interests involved.[182] The factual background acknowledged the significant sums expended in creating signs and a system of signs.[183] The majority then simply concluded that the mere allegation of a traffic safety concern would justify removal of the signs (i.e., signs distract); therefore, it is not a taking to require that they be removed.[184]

That reasoning permits the government to require removal of anything that distracts. Brightly colored flowers distract drivers; therefore, the growing of flowering plants near highways can be prohibited. Differing shapes and colors of buildings distract drivers, therefore, all buildings can be removed within one hundred feet of a highway. Alternatively, buildings can be required to look the same. The court's rationale provides no justification for distinguishing buildings or flowers from signs.

Relying on aesthetics is even worse. Drivers can be protected from ugly signs. Accordingly, drivers can be protected from ugly houses or factories or strip malls. The court's analysis of property makes no distinction in cost of construction. It makes no distinction in type of structure. It simply holds that property use can be eliminated to protect traffic safety or aesthetics.

It could be suggested that this broad reading is narrowed by the public interests involved. The difficulty with this suggestion is that none of the Florida court's analysis supports it. The court suggested that the government interest is in eliminating unnecessary signs. The problem with this narrowing construction is that the court completely defers to the

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[182] *Hav-A-Tampa*, 5 So. 2d at 433–34; *Swisher & Son*, 5 So. 2d at 442.

[183] *Hav-A-Tampa*, 5 So. 2d at 433; *Swisher & Son*, 5 So. 2d at 442.

[184] *See Hav-A-Tampa*, 5 So. 2d at 438; *Swisher & Son*, 5 So. 2d at 445.

legislative definition of unnecessary. The signs are unnecessary because the legislature said so.

The court did not even pretend to ask the legislature to explain why off-site signs are unnecessary. The court did not explain why it is necessary for a business that is visible to drivers to have a sign next to the road, but it is not necessary for businesses down the street to have early identification of its business. Drivers can see the business. Alternatively, why is it necessary for a government to identify an exit a mile from the exit, but unnecessary for a business at that exit to have a sign a mile from the exit? Put another way, the court gives no explanation why one property, i.e., sign, is unnecessarily distracting, other than to say the legislature said so.

This problem is exacerbated by the reliance on aesthetics. Beauty may be in the eye of the beholder, but the concurring justices' analysis is that beauty may be defined by the government, notwithstanding the view of any other beholder. This analysis, as noted before, permits the legislative branch to order the destruction of any manmade structure visible to a member of the public from any public place.

As flawed as the Florida opinions may be, however, they at least create a starting point for creating a rational system of precedent. A series of subsequent opinions can clarify, modify, narrow, or expand original opinions, and over time a systematic answer may become apparent. A review of the Florida Sign Amortization cases demonstrates how important it is for a court to be clear in its analysis.

CONCLUSION

The Sign Amortization Cases demonstrate beyond doubt that the government can amortize signs without running afoul of the Takings Clause. They also demonstrate the need for well-reasoned opinions to create a legitimate system of precedent. Indeed, they demonstrate even more clearly the need to eliminate summary decisions. More important, the lack of analysis raises a multitude of new questions related to the relationships between time, public interests such as aesthetics, and types of properties and uses.

The approach taken by the typical Sign Amortization case casts significant doubt upon the continued viability of that precedent. These cases assert that no taking has occurred because the government had a legitimate reason to amortize the signs. *Lingle* held that the reason for a regulation was irrelevant to whether a taking had occurred. Overlaying *Lingle* with the Sign Amortization Cases, the analysis becomes: property was not taken because government enacted a regulation. Such an approach

abrogates judicial review and the Constitution. Consequently, the precedence of the prior sign amortization cases, at least where there is no discussion of the property involved, should be overruled. Alternatively, the United States Supreme Court and all the higher courts should provide a new analysis of amortization of property.