RECENT CASES

TAKINGS CLAUSE — REGULATORY TAKINGS — THIRD CIRCUIT REJECTS INVESTORS' TAKINGS CLAUSE CHALLENGE BASED ON MUNICIPAL OFFICIALS' PUBLIC STATEMENTS ABOUT A REGULATORY REGIME. — *Nekrilov v. City of Jersey City*, 45 F.4th 662 (3d Cir. 2022).

One hundred years ago, Justice Holmes commented that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking"[1] and the government must pay just compensation.[2] Justice Holmes's opinion — in which the phrase "too far" was left undefined — spawned the doctrine of regulatory takings and a century of judicial queasiness. In 1978, the Supreme Court clarified the doctrine, holding that one factor in determining the existence of a regulatory taking was whether the plaintiff had "investment-backed expectations" that the status quo would be preserved.[3] Recently, in *Nekrilov v. City of Jersey City*,[4] the Third Circuit held that a set of investors could not have had reasonable investment-backed expectations based on municipal officials' public statements.[5] In distinguishing *Nekrilov* from previous cases that had held differently, the court took a novel approach to investment-backed expectations that risks creating doctrinal confusion in regulatory takings law.

In 2015, the City of Jersey City, New Jersey, passed Ordinance 15-137,[6] a zoning order that legalized Airbnbs and other short-term rental businesses.[7] The City wanted to put the word out. A press release proclaimed that "Jersey City [was] the first city in the Tristate area to formally embrace" Airbnbs.[8] The Mayor of Jersey City, Steven Fulop, wrote an op-ed praising Airbnbs as the future and a chance for "middle-class folks [to] earn a bit of extra income," provided owners did not abuse the system to create "informal hotel[s]."[9] He remarked: "[S]hould [the city] be in the business of disallowing a service like Airbnb . . . ? Absolutely not."[10] Investors took note. Two such investors, Gennadiy

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

[2] U.S. CONST. amend. V ("[P]rivate property [shall not] be taken for public use, without just compensation.").

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

[4] 45 F.4th 662 (3d Cir. 2022).

[5] *Id.* at 674–77.

[6] JERSEY CITY, N.J., CODE OF ORDINANCES §§ 345-6, 345-60.Z (2019) (amended 2021).

[7] *See id.* § 345-60.Z. The Ordinance did impose some limits on short-term rentals. For example, it imposed a licensing process for anyone seeking to let out more than five properties. *See id.* § 345-60.Z.1.b; *see also Nekrilov*, 45 F.4th at 666.

[8] Nekrilov v. City of Jersey City, 528 F. Supp. 3d 252, 262 (D.N.J. 2021).

[9] Steven Fulop, Opinion, *Why Jersey City Will Allow Airbnb*, HUFFPOST (Oct. 19, 2016), https://www.huffpost.com/entry/why-jersey-city-will-allo_b_8331016 [https://perma.cc/67HU-SVHV].

[10] *Id.*

and Eugene Nekrilov, purchased two properties and rented seventeen more, planning to use all nineteen as short-term rentals.[11] These units were hugely profitable, but some would barely have broken even as long-term rentals: one property earned $5183 monthly in short-term rent but, the Nekrilovs alleged, would fetch only $1800 with a long-term tenant[12] — notable given the $1725 monthly mortgage[13] and an additional $40,000 that the Nekrilovs had invested in renovations.[14]

Unfortunately for the Nekrilovs, Mayor Fulop's view of short-term rentals soon changed. In 2019, he signed new legislation, Ordinance 19-077,[15] that meaningfully restricted Airbnbs.[16] Owners were limited to sixty nights of short-term rentals each year, and long-term renters were barred from subletting their properties on the short-term rental market.[17] The Nekrilovs and several other plaintiffs sued Jersey City, alleging that the city's about-face harmed their businesses in violation of the Takings Clause, the Contract Clause, and the Due Process Clause of the Constitution.[18] The plaintiffs sought injunctive relief against enforcement of Ordinance 19-077 as well as monetary damages under 42 U.S.C. § 1983.[19] The City then moved to dismiss the complaint.[20]

The district court dismissed the complaint and denied the plaintiffs' motion for injunctive relief.[21] In the court's view, the Takings Clause did not apply.[22] If plaintiffs could assert a cognizable property interest in running a particular business, the court feared the Takings Clause would invalidate all regulation of business.[23] Moreover, the Takings Clause provided no remedy because the plaintiffs had alternative potential uses for their properties[24] and should have understood that

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[11] *See Nekrilov*, 45 F.4th at 668. Nekrilov did not have a license and was technically in violation of the Ordinance. *See Nekrilov*, 528 F. Supp. 3d at 277 n.12; *supra* note 7.

[12] *Nekrilov*, 45 F.4th at 668.

[13] *Id.*

[14] *Nekrilov*, 528 F. Supp. 3d at 264.

[15] JERSEY CITY, N.J., CODE OF ORDINANCES §§ 3-78, 255-1 to -7, 345-6, 345-60.Z (2021).

[16] *See id.* This abrupt shift in policy was allegedly due to a shift in political allegiances. Mayor Fulop had sought a campaign contribution from Airbnb, a donation that came only belatedly. *See Nekrilov*, 528 F. Supp. 3d at 263. Instead, the local hotel industry began donating to the Mayor's campaign in the lead-up to the introduction of Ordinance 19-077. *See id.*; *see also* Luis Ferré-Sadurní, *Where a $5 Million War Rages Between Airbnb and the Hotel Industry*, N.Y. TIMES (Nov. 6, 2019), https://www.nytimes.com/2019/10/30/nyregion/jersey-city-airbnb-vote.html [https://perma.cc/PHC7-PBE3] (describing Mayor Fulop's purported frustration about a delayed $10,172 donation from Airbnb, as well as $33,200 in campaign contributions that the Mayor subsequently received from a hotel industry group).

[17] *Nekrilov*, 45 F.4th at 667.

[18] *Id.* at 668.

[19] *Id.* at 665–66. Under § 1983, public officials can be liable for subjecting any person "to the deprivation of any rights, privileges, or immunities secured by the Constitution." 42 U.S.C. § 1983.

[20] *Nekrilov*, 45 F.4th at 668.

[21] *Id.*

[22] *See* Nekrilov v. City of Jersey City, 528 F. Supp. 3d 252, 267–68 (D.N.J. 2021).

[23] *See id.*

[24] *See id.* at 269, 274.

regulations can change.[25] Finally, the district court rejected the Contract and Due Process Clause claims, finding a legitimate purpose in adopting the Ordinance that passed constitutional muster.[26] The plaintiffs appealed, challenging the district court's dismissal and renewing each of their arguments.[27]

The Third Circuit affirmed in full.[28] Writing for the panel, Chief Judge Chagares[29] rejected the plaintiffs' claims under both theories of regulatory takings: "per se" takings and "partial" takings.[30] First, he determined that there had been no "per se" taking[31] — where the "regulation denies all economically beneficial productive use of the property"[32] — because the plaintiffs had been denied only their property's "most profitable use," not any possible use.[33] Second, Chief Judge Chagares held that no partial taking had occurred. In a partial taking, compensation is required even though the government does "not render[] the property idle."[34] *Penn Central Transportation Co. v. New York City*[35] laid out the balancing test for finding a partial regulatory taking: courts should weigh (1) the "economic impact of the regulation" on the plaintiff, (2) whether the plaintiff has "distinct investment-backed expectations," and (3) the "character of the governmental action."[36] The Supreme Court has suggested that the "investment-backed expectations" factor has particular prominence.[37]

The majority found that the first and third prongs favored Jersey City. While recognizing that these "plaintiffs have unquestionably been negatively affected by the City's change," the court distinguished an "inability to continue to profit at the same levels from their investments"[38] from the sort of "drastic[]"[39] property-value decline that might cause the "economic impact" prong to favor the plaintiffs.[40] The court also determined that the "character" of the Ordinance was "a general zoning

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[25] *See id.* at 274–75.
[26] *See id.* at 281–83.
[27] *Nekrilov*, 45 F.4th at 668.
[28] *Id.* at 666.
[29] Chief Judge Chagares was joined by Judges Fuentes.
[30] *Nekrilov*, 45 F.4th at 669.
[31] *See id.* at 671–72.
[32] *Id.* at 669 (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992)).
[33] *See id.* at 670–71.
[34] *Id.* at 669 (citing Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978)).
[35] 438 U.S. 104.
[36] *Id.* at 124.
[37] *See, e.g.*, Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 538–39 (2005) ("Primary among those [*Penn Central*] factors are '[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations.'" (quoting *Penn Cent.*, 438 U.S. at 124)); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984) ("[W]e find that the force of [the investment-backed expectations] factor is so overwhelming . . . that it disposes of the taking question . . . .").
[38] *Nekrilov*, 45 F.4th at 674.
[39] *Id.* (alteration in original) (quoting Rogin v. Bensalem Township, 616 F.2d 680, 692 (3d Cir. 1980)).
[40] *See id.*

regulation"[41] that permissibly "adjust[ed] the benefits and burdens of economic life to promote the common good."[42]

The "investment-backed expectations" prong was a closer call, though the court also found for the City.[43] Expectations are "reasonable only if they take into account the power of the state to regulate,"[44] and zoning is the "classic example" of a municipal law that does not require compensation.[45] Here, while the City had actively encouraged investors to open short-term rental properties, the majority reasoned that its statements were qualified, not absolute.[46] A reasonable investor, in the court's view, could not have believed that they could "run those businesses, indefinitely, without additional restrictions."[47] Chief Judge Chagares distinguished *Ruckelshaus v. Monsanto Co.*,[48] a Supreme Court case that had held that government action could engender reasonable investment-backed expectations,[49] by focusing on the government's "explicit assurance[s]"[50] present in that case but not in *Nekrilov*.[51]

Finally, Chief Judge Chagares affirmed the dismissal of the Contract Clause and Due Process Clause claims. Under existing Contract Clause doctrine, the government must have a "significant and legitimate public purpose" for interfering with a contract and must advance that purpose in an "appropriate and reasonable way."[52] The court concluded that the Ordinance did not impair the plaintiffs' contracts and that if it did so, it nonetheless appropriately and reasonably advanced the legitimate purpose of managing the city's housing stock.[53] That legitimate purpose also enabled the Ordinance to survive the rational basis review required by the Due Process Clause.[54]

Judge Bibas concurred, joining the majority in full based on existing precedent but arguing for an originalist reboot of regulatory takings doctrine.[55] In his view, the three *Penn Central* factors are "hard to define and thus hard to meet."[56] Instead, judges should look to the original public meaning of the Takings Clause, which he stated would have

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[41] *Id.* at 678.
[42] *Id.* at 677 (quoting *Penn Cent.*, 438 U.S. at 124).
[43] *See id.* at 675–77 (explaining that the district court saw it as a "closer question," *id.* at 675).
[44] *Id.* at 674 (quoting Pace Res., Inc. v. Shrewsbury Township, 808 F.2d 1023, 1033 (3d Cir. 1987)).
[45] *Id.* at 675 (quoting *Penn Cent.*, 438 U.S. at 125).
[46] *See id.* at 675–76.
[47] *Id.* at 675.
[48] 467 U.S. 986 (1984).
[49] *See id.* at 1010–14.
[50] *Id.* at 1011.
[51] *See Nekrilov*, 45 F.4th at 676.
[52] *Id.* at 678 (quoting Sveen v. Melin, 138 S. Ct. 1815, 1822 (2018) (internal quotation marks omitted)).
[53] *See id.* at 679–80.
[54] *See id.* at 680–81.
[55] *Id.* at 681 (Bibas, J., concurring).
[56] *Id.* at 682 (citing Bridge Aina Le'a, LLC v. Haw. Land Use Comm'n, 141 S. Ct. 731, 731–32 (2021) (Thomas, J., dissenting from the denial of certiorari)).

required compensation when a regulation takes "a state-law property right and press[es] it into public use."[57] Judge Bibas argued that, in *Penn Central* terms, only the "character of the government action" factor was appropriate, as it reflected whether a property right had been taken and reused by the public.[58] By contrast, the "economic impact" and "investment-backed expectations" prongs should be discarded, as they did not align with the Takings Clause's original public meaning.[59] In his view, this alternative approach would provide "not only a surer constitutional footing but also needed clarity."[60] While commenting that "this case is clear,"[61] Judge Bibas worried that "the lack of rules and guidance [in regulatory takings doctrine] invites chaos."[62]

The supposedly "clear" outcome, however, belied a potentially meaningful doctrinal development: the majority's analysis of "investment-backed expectations" narrowed the circumstances under which government assurances could reasonably serve as the basis for those expectations. The Supreme Court had previously held that the government could, through its promises, create interests protected by regulatory takings doctrine.[63] The Third Circuit seemed to cast that case not as a substantive bar on legislative change but instead as a procedural requirement that the government follow its own statutes.[64] This development runs contrary to both the purpose and premise of regulatory takings doctrine, risking significant doctrinal uncertainty.

As it stands today, plaintiffs seeking to demonstrate a partial regulatory taking have a significant — and "government-friendly"[65] — hill to climb.[66] Indeed, Chief Justice Roberts once asked at oral argument: "Do you know of any case where the government has lost a *Penn Central* case?"[67] There are some, but few: an empirical analysis of eighty-two examples found that the government won eighty-seven percent of the time.[68]

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[57] *Id.* at 683.

[58] *See id.* at 685.

[59] *See id.* at 686–87.

[60] *Id.* at 687.

[61] *Id.* at 682.

[62] *Id.* at 683.

[63] *See* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1010–14 (1984).

[64] *See Nekrilov*, 45 F.4th at 676–77.

[65] Justin R. Pidot, *Fees, Expenditures, and the Takings Clause*, 41 ECOLOGY L.Q. 131, 141 (2014); *see also id.* at 133 ("[O]ne lesson is clear: the government usually prevails and . . . often pays no compensation.").

[66] *See also* William W. Wade, Love Terminal*: A Tale of Two Theories*, 50 URB. LAW. 147, 149 (2020) ("[F]ederal appellate courts have confounded *Penn Central*'s believed-to-be 'polestar' test for payment of just compensation with unique hurdles for plaintiffs to qualify for payment for government takings." (footnote omitted)).

[67] Transcript of Oral Argument at 29, Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595 (2013) (No. 11-1447), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2012/11-1447.pdf [https://perma.cc/52TB-L8LM].

[68] *See* F. Patrick Hubbard et al., *Do Owners Have a Fair Chance of Prevailing Under the Ad*

For plaintiffs, the investment-backed expectations prong is part of that difficulty.[69] However, plaintiffs can more easily demonstrate the reasonability of their investment-backed expectations if "the state invited the activity with promises to protect property rights," for "the actions of the state can impact the analysis."[70] In such cases, courts sometimes hold a plaintiff's expectations to be reasonable in light of the state's behavior.

The *Nekrilov* plaintiffs invoked one leading example,[71] *Ruckelshaus v. Monsanto Co.*, where the Supreme Court held that an affirmative promise by the government could form the basis of reasonable investment-backed expectations.[72] In *Ruckelshaus*, Monsanto applied to register a pesticide with the Environmental Protection Agency under a statutory scheme that promised confidential treatment for trade secrets.[73] Later, Congress amended the statute to allow data disclosure, leading Monsanto to allege a regulatory taking.[74] Siding with Monsanto, the Court emphasized the original statute's "prohibit[ion]" on disclosure, an "explicit governmental guarantee [that] formed the basis of a reasonable investment-backed expectation."[75] This promise was necessary to make Monsanto's expectations reasonable, for "absent an express promise, Monsanto had no reasonable, investment-backed expectation that its information would remain inviolate."[76] The Supreme Court effectively tied Congress's hands: having

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Hoc Regulatory Takings Test of Penn Central Transportation Company*?*, 14 DUKE ENV'T L. & POL'Y F. 121, 141 (2003); *see also* Steven J. Eagle, *The Four-Factor* Penn Central *Regulatory Takings Test*, 118 PENN ST. L. REV. 601, 610 (2014) (noting that the *Penn Central* test "has never produced a landowner victory in the Supreme Court unless 'some special factor' was present, such as deprivation of all value or physical occupation").

[69] The caselaw is so government friendly that it has become akin to a "procedural bar." R.S. Radford & J. David Breemer, *Great Expectations: Will* Palazzolo v. Rhode Island *Clarify the Murky Doctrine of Investment-Backed Expectations in Regulatory Takings Law?*, 9 N.Y.U. ENV'T L.J. 449, 480 (2001). Courts have struggled to describe reasonable private expectations not superseded by the government's police power. The Third Circuit has stated, for example, that owners must "take into account the power of the state to regulate in the public interest," Pace Res., Inc. v. Shrewsbury Township, 808 F.2d 1023, 1033 (3d Cir. 1987), and that "disruption of a present use is not enough," *Nekrilov*, 45 F.4th at 675 (citing *Pace Res.*, 808 F.2d at 1032–34). The Federal Circuit has gone further, holding that the overall "regulatory climate" is a relevant factor. *See* Good v. United States, 189 F.3d 1355, 1361–62 (Fed. Cir. 1999) ("In view of the regulatory climate . . . Appellant could not have had a reasonable expectation . . . ."). Plaintiffs' expectations must also be "both subjectively held and objectively reasonable." Eagle, *supra* note 68, at 620.

[70] *Nekrilov*, 45 F.4th at 675.

[71] *See id.* at 676. The plaintiffs also invoked *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). *See Nekrilov*, 45 F.4th at 676. *Kaiser Aetna* was decided several years before *Ruckelshaus* and seemed to suggest a lower standard for government action engendering reasonable investment-backed expectations. *Compare Kaiser Aetna*, 444 U.S. at 167 (noting that the government "acquiesced" to a developer's plans and thus had to pay compensation), *with* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1011 (1984) (emphasizing an "explicit governmental guarantee").

[72] *See Ruckelshaus*, 467 U.S. at 1010–14.

[73] *See id.* at 1010–11.

[74] *See id.* at 994–99.

[75] *Id.* at 1011.

[76] *Id.* at 1008.

promised Monsanto confidentiality, it could not subsequently legislate to change its mind.

In *Nekrilov*, the court seemed to reframe *Ruckelshaus*, interpreting it not as a constraint on legislative policy change but instead only as a bar preventing agencies from acting contrary to law. As the majority described the case: "In *Ruckelshaus*, the plaintiff . . . submitted trade secret data . . . based on 'explicit assurance[s]' that the data would not be publicly disclosed. *After the EPA later disclosed the data*, the Supreme Court held that Monsanto had a reasonable expectation [of confidentiality] . . . and that a taking had occurred."[77] The panel emphasized that an "explicit assurance[]" had been violated, giving rise to a taking — and the only "explicit assurance" in *Ruckelshaus* was the statute's requirements.[78] If *Ruckelshaus* centered on whether Congress could change an "explicit assurance," *Nekrilov*'s reframing concerned whether the EPA could simply violate the statute. This approach — that the only government action giving rise to reasonable expectations is a promise to follow the law — poses two potential dangers.

First, that interpretation conflicts with the stated purpose of regulatory takings doctrine: to provide a limit on otherwise permissible government action. The Supreme Court has described its regulatory takings jurisprudence as an attempt to "reconcile two competing objectives": on one hand, "the individual's right to . . . private property ownership" and on the other, "the government's well-established power to 'adjus[t] rights for the public good.'"[79] In other words, these two objectives are in conflict because the fullest lawful exercise of the government's police power would impinge on private property rights. To avoid that problem, the Court developed regulatory takings doctrine, permitting the government to violate an owner's "reasonable investment-backed expectation[]" only if it pays just compensation.[80] If the Third Circuit is correct that the Takings Clause merely requires that the government follow the law,[81] there would be no limit on the scope of government action — the government could just change the law (as

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[77] *Nekrilov*, 45 F.4th at 676 (second alteration in original) (emphasis added) (quoting *Ruckelshaus*, 467 U.S. at 1011).

[78] *Id.* In *Ruckelshaus*, the phrases "explicit assurance," "explicit guarantee," and similar were used, concerning Monsanto, only to refer to the promise of the statutory scheme. *See Ruckelshaus*, 467 U.S. at 1011–13 (explaining that "disclosure conflicts with the explicit assurance of confidentiality or exclusive use contained in the statute," *id.* at 1013, and noting that while the EPA could disclose nonconfidential data, "the statute also gave Monsanto explicit assurance that EPA was prohibited from disclosing . . . trade secrets," *id.* at 1011).

[79] Murr v. Wisconsin, 137 S. Ct. 1933, 1943 (2017) (alteration in original) (quoting Andrus v. Allard, 444 U.S. 51, 65 (1979)). For more on the implications of government flexibility, see Kyle D. Logue, *Tax Transitions, Opportunistic Retroactivity, and the Benefits of Government Precommitment*, 94 MICH. L. REV. 1129, 1143–48 (1996) (arguing that government flexibility may reduce policy effectiveness by upsetting investment-backed expectations).

[80] *Murr*, 137 S. Ct. at 1945.

[81] *See supra* notes 77–79 and accompanying text.

Jersey City did) to abrogate preexisting expectations. And that would seem to conflict with the Court's insistence that a balance must be struck — rather than an accommodation of just one interest over the other.

Second, that approach seems to render the Takings Clause, or at least the portion interpreted today as regulatory takings doctrine, partly superfluous as a matter of constitutional design. Under this vision, partial regulatory takings doctrine simply replicates what the Due Process Clauses already require: that the government follow appropriate procedure when dispossessing an individual of a property interest.[82] It strains credulity to imagine that this surplusage, arrived at only through a remarkably roundabout chain of judicially constructed rules, represents either the Framers' intent or the best contemporary interpretation. That constitutional concern gains importance in light of the Supreme Court's focus on protecting private property rights and limiting the police power through regulatory takings doctrine. A balance is necessary, the Supreme Court indicated, because "[t]he Founders recognized that the protection of private property is indispensable to the promotion of individual freedom . . . and 'empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them.'"[83] This view suggests that property rights lie at the bedrock of liberty in our constitutional design — making it odd for a court to render superfluous the primary vehicle for their protection.[84]

The *Nekrilov* Court seemed to embrace this doctrinal cloudiness in its recast version of *Ruckelshaus*. Unfortunately, regulatory takings jurisprudence is already beset by confusion. As the Supreme Court admitted recently, this area of the law has seen a "near century" pass without "definitive rules," with only "ad hoc, factual inquiries" instead.[85] Or, as Judge Bibas more colorfully put it in his *Nekrilov* concurrence, the doctrine today "invites chaos."[86] No doubt officials at every level of government — not to mention businesses, investors, and citizens — would appreciate a clearer approach, not further complication. Regulatory takings law may well deserve a shakeup, but courts should tread carefully before following the Third Circuit's instincts in *Nekrilov*.

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[82] *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 332 (1976) ("Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.").

[83] Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2071 (2021) (quoting *Murr*, 137 S. Ct. at 1943).

[84] Of course, parties facing unlawful agency action, including Monsanto in *Ruckelshaus*, can turn to the Administrative Procedure Act (APA), 5 U.S.C. §§ 551, 553–559, 701–706, or similar state statutes. The APA requires federal courts to "hold unlawful and set aside agency action" that is "not in accordance with law." 5 U.S.C. § 706(2)(A). Some parties may even have remedies in contract. *See* 28 U.S.C. §§ 1346, 1491. Yet these statutory or common law measures will inevitably be less robust and less durable than a constitutional command. For example, unlike the Takings Clause, the APA does not permit actions for money damages. *See* 5 U.S.C. § 702.

[85] *Murr*, 137 S. Ct. at 1942 (quoting Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 322 (2002)).

[86] *Nekrilov*, 45 F.4th at 683 (Bibas, J., concurring).