

“Takings” from the Community

Author : Shelby D. Green

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Yxta Maya Murray, [The Takings Clause of Boyle Heights](#), 43 **N.Y.U. Rev. L. & Soc. Change** 109 (2019).

That the Constitution ensures that private property will not be taken by the government except for a public use and then only with just compensation is one of those principles learned in high school civics class. But, what is this “property” covered by the Fifth Amendment? It is not defined in the Constitution; rather the Supreme Court has stated that the term finds its contours and limits in state law, not under the federal constitution, and then only that which has been recognized and affirmed over the ages by custom, state statutes and judicial pronouncements.

Legal theorists often say that property is about the power of exclusion, by an “owner,” that is, one who holds “title,” as acquired through various established ways—voluntary transfer, inheritance, adverse possession. There are, to be sure, respected alternative theories recognizing property “rights” which are not necessarily founded on “ownership”—such as personhood and expectations and reliance on government benefits. In a recent article, Professor Yxta Maya Murray, describes a novel theory of property held by residents of Boyle Heights, a Los Angeles neighborhood, which she calls the “Boyle Heights property jurisprudence” that appears grounded in their collective experiences in the community.

The residents believe that property rights arise from the labor and cultural capital invested in the community by the residents. From this vantage, a taking of property, no different than if the government itself physically invaded their homes, occurs when there is loss of possession and leaseholds as a consequence of gentrification that is encouraged and facilitated by governmental development initiatives. Professor Murray calls their legal thought a form of “community constitutionalism.” The residents maintain that housing insecurity “takes” “property” because its poor residents should have the right to continued possession, unmolested by the government or investors or by immigrating “hipsters.”

The main issue addressed in the article is whether we can or should indulge this “jurisprudence” as a way of halting what seems to the residents of Boyle Heights to be the wrongful loss of community, or at least to provide compensation to those residents harmed through displacements and higher costs for access to spaces for living and doing business. Professor Murray offers insight into this question through a series of interviews of residents in Boyle Heights, a neighborhood long-burdened by huge shortages of affordable housing and now exposed to high decrees of gentrification, largely resulting from the loosening of rent control laws.

Landlords are now able to evict tenants who had been paying modest rents to convert their property into new spaces with new, higher rents that are out of reach for most of the current community residents. Professor Murray asks whether a “Boyle Heights takings jurisprudence” is so “off the wall,” as not to be entitled to serious consideration as we evaluate legal intervention on behalf of the residents. She does not think so.

In the interviews conducted by Professor Murray, the residents who were uncoached and unschooled in the lingo of property philosophy nonetheless expressed their worries in the many long-voiced notions of

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property. They spoke about how they had viewed the long-held protections against rent escalations as a form of property, not unlike Charles Reich's "New Property." The residents also spoke about how the new gentry were outsiders who brought values and interests out of sync with those long-held in the community, resonating Eduardo Penalver's observations on property as facilitating the formation and maintenance of strong communities whose values differ dramatically from the mainstream.

The residents spoke of the demoralization from the loss of home and business because rents were too high, evoking Gregory Alexander's human flourishing thesis. They also talked about being "surrounded" by gentrifiers, implicating [Loretto v. Teleprompter Manhattan CATV Corp](#), where the Supreme Court found that a minor but permanent occupation in the guise of a cable television apparatus, effected a *per se* taking. In the resident's view, there is a *de facto* psychological occupation of land by the gentrifiers that proves so disturbing of the enjoyment of the community so as to be an invasion. The residents stated that "property" was everything, echoing Laura Underkuffler, that property should be understood as a part of the foundational human conflict between I and thee (or we); Joseph William Singer's work identifying property as being about our way of life; and Matthew Desmond's contention that "without stable shelter, everything else falls apart."

On its face, the Boyle Heights property jurisprudence does not align with recognized Fifth Amendment case law and the residents' assessments of housing as a "pillar" of human rights is not supported by takings jurisprudence. The Supreme Court long ago rejected the idea of housing (and education) as fundamental rights, at least on the federal level.

Takings jurisprudence as we know it now is not so much concerned with the interests that should be preserved, instead it is focused on which public interests would be furthered by a taking, at least as it involves the exercise of eminent domain. And, the line between a valid regulation and compensable taking is a fuzzy one, as the Supreme Court has insisted over time - see, for example, [Penn Central Transp. Co. v. New York City](#) and [Pennsylvania Coal v. Mahon](#), which together instruct that only those regulations that go too far amount to a taking.

Could the same community values recognized as a basis for the government's offensive use of police powers - for example, to clean up blighted areas in [Berman v. Parker](#) - also be used defensively to prevent community disruption?

The stories of worries and losses from gentrification and the government's myopic pursuit of development seem no less relevant in setting the boundaries of property than the rights of tenants in avoiding uninhabitable conditions or violent evictions. Rent control itself was already an incursion into traditional property. The cause was based on the belief that homelessness was a social problem that could not be remedied through bilateral relationships, but also that having a home was fundamental to dignity—one of the interests that property has historically served.

Property and its protections are not static or fixed. Having regard for the "Boyle Heights takings jurisprudence" might well remind us about what property is about. Property exists to serve human values and is limited to that end.

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