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## A Texas Takings Trap: How the Court in *Edwards Aquifer Authority v. Bragg* Fell into a Dangerous Pitfall of Takings Jurisprudence

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# A TEXAS TAKINGS TRAP: HOW THE COURT IN *EDWARDS AQUIFER AUTHORITY* v. *BRAGG* FELL INTO A DANGEROUS PITFALL OF TAKINGS JURISPRUDENCE

JOSEPH BELZA \*

**Abstract:** In *Edwards Aquifer Authority v. Bragg*, the Court of Appeals of Texas, San Antonio held that the Edwards Aquifer Authority’s water well permitting plan amounted to a compensable taking of a pecan farmer’s private property. The court determined that the water regulation was so onerous that it was analogous to physical seizure of property by eminent domain. In its analysis, however, the court fatally misapplied the multi-part *Penn Central* test. The court implicitly framed the four *Penn Central* factors as elements instead of utilizing a more appropriate holistic balancing test. Framing the test in such a way improperly stacks the deck in favor of the private interest. If other courts adopt the *Bragg* version of the *Penn Central* test, “regulatory takings” will expand beyond their reasonable bounds as a cause of action and disastrously undermine states’ ability to implement environmental regulation.

## INTRODUCTION

In the increasingly arid American West, the scene is set for a bitter standoff between individual private landowners and state governments representing the public.<sup>1</sup> They are poised to struggle for extraction and use rights of the region’s most precious—and increasingly scarce—resource: water.<sup>2</sup> California, for instance, finds itself facing a devastating “mega-drought.”<sup>3</sup> With surface water unavailable, industrial and agricultural consumers have turned to groundwater.<sup>4</sup> In an effort to sustain these dwindling

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\* Staff Writer, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW, 2015–2016.

<sup>1</sup> See Heesun Wee, *California Landowners Resist Efforts to Monitor Groundwater*, CNBC (May 13, 2015, 7:00 AM), <http://www.cnbc.com/2015/05/12/the-growing-tension-over-california-water-metering-.html> [<http://perma.cc/Y886-R3QC>].

<sup>2</sup> *Id.*

<sup>3</sup> Julie Schmit & Elizabeth Weise, *Californians Brace for Year of ‘Mega-Drought.’* USA TODAY (Feb. 5, 2014, 12:21 PM), <http://www.usatoday.com/story/money/business/2014/02/04/california-drought-economy/5043691/> [<http://perma.cc/5GKQ-LFBK>].

<sup>4</sup> Wee, *supra* note 1.

aquifers, California has begun to closely monitor consumption from private wells, asserting that this water is a public resource.<sup>5</sup>

These politically charged California legal initiatives mirror the Edwards Aquifer Act (the “Act”), originally enacted in drought-prone Texas two decades earlier.<sup>6</sup> In an effort to mitigate the loss of exhaustible groundwater and to stymie the flow out of rechargeable aquifers, the Texas state legislature established regulatory schemes that promote the conservation of water by controlling its use.<sup>7</sup> In 1993, the Texas legislature created the Edwards Aquifer Authority (“the Authority”) to maintain and preserve groundwater in the aquifer that bears its name.<sup>8</sup> The Authority accomplished this by capping the amount of groundwater an individual could tap and consume.<sup>9</sup> Many landowners considered this an unfair taking of their water, and in some instances attacked these conservation measures in court.<sup>10</sup>

An archetypical example of such a legal battle sparked nearly a decade ago when the Authority implemented a groundwater conservation plan wherein individuals’ usage was capped by pumping permits, which proposed limitations based on past water usage.<sup>11</sup> Glenn and JoLynn Bragg, commercial pecan farmers in Central Texas, sued the Edwards Aquifer Authority in 2006, alleging that the permitting system amounted to a physical seizure of their pecan orchards.<sup>12</sup> They argued that the permitting scheme’s historical usage benchmark—static in nature—did not account for pecan trees, which have a dynamic necessity for water that increases as they mature.<sup>13</sup> Essentially, they argued that because the water conservation regulation partially diminished the usability of their land, they were entitled to compensation by the state.<sup>14</sup> The trial court found for the Braggs, and the Court of Appeals of Texas, San Antonio affirmed, holding that the economic impact on the Bragg’s investment trumped the government’s interest in implementing the regulation.<sup>15</sup>

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<sup>5</sup> *Id.*

<sup>6</sup> *See, e.g.*, CAL. WATER CODE §§ 10720–10736.6 (West 2015); Edwards Aquifer Authority Act of 1993, ch. 626, 1993 TEX. GEN. LAWS 2350.

<sup>7</sup> *See* TEX. GEN. LAWS 2350.

<sup>8</sup> *See id.*

<sup>9</sup> *See id.*; Edwards Aquifer Auth. v. Bragg, 421 S.W.3d 118, 125 (Tex. App. 2013).

<sup>10</sup> *See* Edwards Aquifer Auth. v. Day, 369 S.W.3d 814, 821 (Tex. 2012); Bragg, 421 S.W.3d at 126.

<sup>11</sup> *See* TEX. GEN. LAWS 2350.

<sup>12</sup> Bragg, 421 S.W.3d at 126.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

## I. FACTS AND PROCEDURAL HISTORY

In 1979, Glenn and JoLynn Bragg purchased the Home Place Orchard, a sixty-acre parcel of land in central Texas.<sup>16</sup> They utilized this land both as their homestead and as a commercial pecan orchard.<sup>17</sup> To water the orchard, the Braggs tapped into the underlying water table of the Edwards Aquifer and installed a well and irrigation system.<sup>18</sup> In 1983, the Braggs expanded their pecan operation by purchasing an additional orchard at a nearby forty-two-acre property.<sup>19</sup> Though non-Edwards Aquifer water initially irrigated this second orchard, it eventually outgrew the existing supply.<sup>20</sup> To compensate, the Braggs drilled another Edwards Aquifer well and connected it to an irrigation system.<sup>21</sup> They completed this project in 1995.<sup>22</sup>

Meanwhile, the Texas legislature focused on a new water conservation initiative.<sup>23</sup> The state legislature recognized the economic and social interest tied to the preservation of the Edwards Aquifer, and in 1993, it passed the Act to manage and conserve it.<sup>24</sup> In emphasizing the importance of conservation, the language of the statute specifically highlights the aquifer's contributions to municipal drinking water supply, livestock watering, commercial irrigation, use by firefighters, and aquatic recreation, among others.<sup>25</sup> The Act also created the Authority as the agency charged with administering the statute and empowered the Authority to implement a comprehensive regulatory scheme.<sup>26</sup> The primary directive of the Authority was to limit the ever-increasing water consumption from wells tapping the aquifer.<sup>27</sup> To achieve this, the Authority began to issue water-use permits to well owners, capping the volume of water an individual could pump from the aquifer in a given time period.<sup>28</sup> This consumption cap was based on a well owner's historical usage; in other words, the Authority determined one's limit based on how much water she had used in years past.<sup>29</sup>

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<sup>16</sup> *Id.* at 124.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> See Edwards Aquifer Authority Act of 1993, ch. 626, 1993 TEX. GEN. LAWS 2350; *Bragg*, 421 S.W.3d at 124.

<sup>25</sup> See TEX. GEN. LAWS 2350.

<sup>26</sup> See *id.*; *Bragg*, 421 S.W.3d at 124–25.

<sup>27</sup> See TEX. GEN. LAWS 2350; *Bragg*, 421 S.W.3d at 124–25.

<sup>28</sup> *Bragg*, 421 S.W.3d at 125.

<sup>29</sup> *Id.*

The Braggs complied with this new regulation and applied for well permits for each orchard.<sup>30</sup> They requested, however, that their cap on the first orchard go beyond their historical usage because they anticipated the fact that the pecan trees would need more and more water as they matured.<sup>31</sup> Likewise, they requested an allowance of 193.12 acre-feet of water per year for the second orchard and well.<sup>32</sup> The Authority rejected the Braggs' requests, instead granting a permit for 120.2 acre-feet a year for the first orchard and denying any permit for the second.<sup>33</sup>

The Braggs believed that the Authority's denial of their requests unfairly cut off the use of their land.<sup>34</sup> Accordingly, they filed suit in November 2006, claiming that: (1) the Authority had violated their federal civil rights, and (2) the denial of the requested permits amounted to a compensable taking of their property.<sup>35</sup> The suit was removed to federal court, where the court dismissed the federal civil rights claims and remanded the takings matter back to state court.<sup>36</sup> In state court, the Braggs moved for summary judgment on the takings claim, and the Authority counter-moved for summary judgment.<sup>37</sup> The trial court granted the Braggs' motion and dismissed that of the Authority, concluding that the permitting regulation amounted to a compensable regulatory taking.<sup>38</sup> A bench trial was then held to determine the amount of compensation due, and the court determined that the Authority owed \$597,575.00 for the first well and orchard and \$134,918.40 for the second.<sup>39</sup> Both parties appealed, the Braggs seeking a reevaluation of the compensation due and the Authority seeking a reversal of the finding of a taking.<sup>40</sup> On appeal, the Court of Appeals of Texas affirmed the finding of a regulatory taking, reasoning that the regulation disrupted the Braggs' investment-backed expectations and had an adverse economic impact.<sup>41</sup>

## II. LEGAL BACKGROUND

Takings jurisprudence has its foundation in the Fifth Amendment of the U.S. Constitution and a series of late twentieth-century United States

<sup>30</sup> *Id.* at 126.

<sup>31</sup> *Id.* at 126, 140. The Bragg's past water consumption at the first orchard peaked at 120.2 acre-feet, but they requested an expanded cap of 228.85 acre-feet of water per year. *Id.* at 126.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *See id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 126, 137.

<sup>41</sup> *Id.* at 139, 142, 146.

Supreme Court cases.<sup>42</sup> The Takings Clause of the Fifth Amendment dictates that “private property [shall not] be taken for public use, without just compensation.”<sup>43</sup> An actual physical confiscation of private property—the kind exemplified by *Loretto v. Teleprompter Manhattan CATV Corp.*—most clearly triggers this constitutional protection.<sup>44</sup> The second class of taking—established in *Lucas v. South Carolina Coastal Council*—occurs when a regulation denies *all* economically beneficial or productive use of land.<sup>45</sup>

In *Penn Central Transportation Co. v. City of New York*, the Supreme Court held that a regulation can still amount to a compensable taking even absent a physical confiscation, and even if there remains a beneficial use in the property.<sup>46</sup> The Court in *Penn Central* identified several factors to be considered in such a takings analysis, including: (1) the economic impact of the regulation, (2) investment-backed expectations of the property owner(s), and (3) the nature of the regulation.<sup>47</sup>

The test set forth in *Penn Central* ultimately proved to be somewhat difficult to administer; accordingly, years later, the Court clarified the nature of the test in *Palazzolo v. Rhode Island*.<sup>48</sup> In that case, Justice Sandra Day O’Connor explained that *Penn Central* cannot be a mathematically precise test.<sup>49</sup> Justice O’Connor further warned that it is inappropriate to apply the test too rigidly, and one should instead consider all of the circumstances in context.<sup>50</sup> Ultimately, according to Justice O’Connor, the *Penn Central* test is a careful but imprecise balancing of the private interest versus the public interest at issue in each case.<sup>51</sup>

The Supreme Court of Texas reinforced these ideas in *Hallco Texas, Inc. v. McMullen County*.<sup>52</sup> Echoing Justice O’Connor’s language in *Palazzolo*, the court held that the three explicit *Penn Central* factors are an incomplete analysis on their own.<sup>53</sup> A correct *Penn Central* test considers

<sup>42</sup> See U.S. CONST. amend. V; *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 143 (1978).

<sup>43</sup> U.S. CONST. amend V.

<sup>44</sup> See 458 U.S. at 426. In *Loretto*, a New York statute required certain property owners to allow cable companies to install and maintain components on their property. *Id.* at 421. The Court held for the plaintiff landlord, reasoning that any permanent physical occupation authorized by the government constitutes a compensable taking. *Id.* at 426.

<sup>45</sup> See 505 U.S. at 1019.

<sup>46</sup> 438 U.S. at 143.

<sup>47</sup> *Id.* at 124.

<sup>48</sup> See 533 U.S. 606, 635 (2001) (O’Connor, J., concurring); *Penn Cent. Transp. Co.*, 438 U.S. at 124.

<sup>49</sup> See *Palazzolo*, 533 U.S. at 634–36.

<sup>50</sup> *Id.*

<sup>51</sup> See *id.* at 636.

<sup>52</sup> See 221 S.W.3d 50, 75 (Tex. 2007).

<sup>53</sup> *Palazzolo*, 533 U.S. at 635–36; *Hallco Tex., Inc.*, 221 S.W.3d at 75.

all of the surrounding circumstances, including the three factors.<sup>54</sup> Essentially, the *Hallco* court held that a proper *Penn Central* test is a broad question of fairness, weighing private and public interests in totality.<sup>55</sup>

In *Edwards Aquifer Authority v. Day*, the Texas Supreme Court applied *Penn Central* takings jurisprudence directly to the Edwards Aquifer Authority (“The Authority”) water allocation regulations.<sup>56</sup> Though the Authority in *Day* argued that being forced to compensate for its water conservation initiatives would be disastrous to the public, the court found that such regulations could indeed amount to takings.<sup>57</sup> In essence, the court in *Day* held that it was proper to scrutinize the Authority’s regulations under a *Penn Central* lens.<sup>58</sup>

### III. ANALYSIS

In *Edwards Aquifer Authority v. Bragg*, the Court of Appeals of Texas, San Antonio held that the Edwards Aquifer Authority’s (“the Authority”) pumping permit scheme amounted to a compensable taking of the Braggs’ property.<sup>59</sup> The court determined that the regulation was so onerous that it was analogous to a physical seizure of the orchards by eminent domain.<sup>60</sup> In its analysis, the Court of Appeals segmented the *Penn Central* test into three major parts—the economic impact of the regulations, investment-backed expectations of the landowners, and the nature of the regulation—and applied each question in sequence.<sup>61</sup> The court also added and applied a very brief fourth section to consider additional contextual factors.<sup>62</sup> The court implicitly applied these four *Penn Central* inquiries as elements, instead of utilizing a test that balances the public interest directly against the private interest.<sup>63</sup> Such an application of *Penn Central* conflicts with the holistic nature of the test and inherently favors landowners in cases of alleged regulatory takings.<sup>64</sup>

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<sup>54</sup> *Hallco Tex., Inc.*, 221 S.W.3d at 75.

<sup>55</sup> *See id.*

<sup>56</sup> *See* 369 S.W.3d 814, 843 (Tex. 2012); *Edwards Aquifer Auth. v. Bragg*, 421 S.W.3d 118, 138 (Tex. App. 2013).

<sup>57</sup> *Day*, 369 S.W.3d at 843, 845.

<sup>58</sup> *See id.*

<sup>59</sup> 421 S.W.3d at 146.

<sup>60</sup> *See id.* Under the doctrine of “eminent domain,” a governmental entity has the inherent power to take privately owned property, especially land, and convert it to public use, subject to reasonable compensation for the taking. *Eminent Domain*, BLACK’S LAW DICTIONARY (10th ed. 2014).

<sup>61</sup> *Bragg*, 421 S.W.3d at 139–46.

<sup>62</sup> *Id.* at 145–46.

<sup>63</sup> *See id.* at 139–46.

<sup>64</sup> *See Palazzolo v. Rhode Island*, 533 U.S. 606, 635 (2001) (O’Connor, J., concurring); *Hallco Tex., Inc. v. McMullen Cty.*, 221 S.W.3d 50, 75 (Tex. 2007); *Bragg*, 421 S.W. 3d. at 146.

The Court of Appeals first found that the economic impact of the regulation was substantial enough to weigh in favor of the Braggs.<sup>65</sup> There is no standard numerical benchmark, but the court found it significant that the Braggs' cost of irrigation increased by approximately ten percent and that they had to scale back their orchards by thirty to fifty percent.<sup>66</sup> Second, the court held that the Braggs made investments into this property on which they could reasonably expect returns.<sup>67</sup> Bragg knew when he bought the orchards that the pecan operation would require large amounts of water.<sup>68</sup> Because he had a degree in agricultural economics, the court deferred to his understanding of the pecan endeavor, and held that his expectation of a return on his expenditures was reasonable.<sup>69</sup>

The third prong of the *Penn Central* test, the "nature of the regulation," landed in favor of the Authority because the government has a weighty interest in conserving and regulating water use, especially in arid conditions.<sup>70</sup> Finally, the "other considerations" factor weighed in favor of the Braggs.<sup>71</sup> The court concluded that the Braggs had an especially important stake in the groundwater because on a drought-ridden Texan landscape, water is scarce and unpredictably available.<sup>72</sup> Overall, the court found that the water permit regulation amounted to a taking for which the Braggs were entitled to compensation.<sup>73</sup>

Although the Court of Appeals parroted the language of established takings case law, its application of the *Penn Central* test was clumsy and misguided.<sup>74</sup> The court in *Bragg* quoted the admonition Justice Sandra Day O'Connor made in *Palazzolo* to avoid "mathematically precise variables" in questions of regulatory takings, but it ultimately failed to heed her warning.<sup>75</sup> The court may not have made the mistake of setting hard numerical benchmarks, but it misapplied the *Penn Central* test by converting it into an overly methodical checking of boxes.<sup>76</sup> Addressing the four factors one at a time, the Court determined that factors one, two, and four "weigh[] heavily in favor" of a finding of a compensable taking while question three "weighs

<sup>65</sup> *Bragg*, 421 S.W.3d at 141.

<sup>66</sup> *See id.*

<sup>67</sup> *Id.* at 144.

<sup>68</sup> *Id.* at 143–44.

<sup>69</sup> *See id.*

<sup>70</sup> *Id.* at 144–45.

<sup>71</sup> *Id.* at 145–46.

<sup>72</sup> *Id.* at 146.

<sup>73</sup> *Id.*; *see infra* notes 74–99 and accompanying text.

<sup>74</sup> *See Bragg*, 421 S.W.3d at 139–46.

<sup>75</sup> *See Palazzolo v. Rhode Island*, 533 U.S. 606, 634–36 (2001) (O'Connor, J., concurring); *Bragg*, 421 S.W. 3d at 139–46.

<sup>76</sup> *Bragg*, 421 S.W. 3d at 139–46.



heavily against [such a finding].<sup>77</sup> After analyzing the four prongs individually, the court offered a single sentence conclusion holding that the regulation amounted to a compensable taking.<sup>78</sup> This terse conclusion lacks further explanation and suggests that the court applied a tallying test, rather than a more nuanced balancing test.<sup>79</sup> In essence, it found that the landowner must succeed because three points went to the landowner and only one point went to the agency.<sup>80</sup> This analysis is off-base because the four *Penn Central* factors are not points on a scorecard; rather, they are *factors to consider* when weighing the private individual's interest against that of the public.<sup>81</sup>

Interestingly, the Texas court concedes that the government is “unquestionably” empowered to regulate groundwater because “[r]egulation is essential to its conservation and use.”<sup>82</sup> This acknowledgement of the government's imperative interest and the public's significant stake in this regulation makes the final holding all the more troubling.<sup>83</sup> If the public's interest in a lasting water supply is so significant, why do the consumption rights of a single farmer overcome it?<sup>84</sup> The court in *Bragg* leaves this vital question unanswered.<sup>85</sup> There is no meaningful explanation of *why* the individual's interests outweigh the harm done to the public; the court simply states that they do.<sup>86</sup>

It is unclear if a more thoughtful application of the *Penn Central* test would necessarily change the ultimate outcome of the case.<sup>87</sup> It would, however, force the court to confront more directly the harm to the public and explain why the public good must be secondary to a private right.<sup>88</sup>

<sup>77</sup> *Id.* at 141, 144–46.

<sup>78</sup> *Id.* at 146.

<sup>79</sup> *See id.*

<sup>80</sup> *See id.* at 141, 144–46.

<sup>81</sup> *See Palazzolo v. Rhode Island*, 533 U.S. 606, 634–36 (2001) (O'Connor, J., concurring); *Halloco Tex., Inc. v. McMullen Cty.*, 221 S.W.3d 50, 75 (Tex. 2007); *Bragg*, 421 S.W.3d at 146.

<sup>82</sup> *See Bragg*, 421 S.W.3d at 144–45.

<sup>83</sup> *See id.* at 145–46.

<sup>84</sup> *See id.* at 145.

<sup>85</sup> *See generally id.* (failing to explicitly weigh the public interest directly against the Braggs' interest).

<sup>86</sup> *See id.* at 146. While the water consumption of a single pecan farming operation may not seem immediately alarming, the effect of unchecked commercial water use *in the aggregate* may prove disastrous, especially in a semi-arid region prone to drought. *See* Abby Sewell, *Supervisors Approve Temporary Vineyard Ban in Santa Monica Mountains*, L.A. TIMES (June 16, 2015, 6:26 PM), <http://www.latimes.com/local/lanow/la-me-ln-county-vineyards-ban-20150616-story.html> [<http://perma.cc/X2LT-E4C4>] (“[T]he point is: the aggregate of everybody's actions is contributing [to the drought conditions] . . .”).

<sup>87</sup> *See Bragg*, 421 S.W.3d at 146.

<sup>88</sup> *See Palazzolo v. Rhode Island*, 533 U.S. 606, 635–36 (2001) (O'Connor, J., concurring); *Halloco Tex., Inc. v. McMullen Cty.*, 221 S.W.3d 50, 75 (Tex. 2007); *Bragg*, 421 S.W.3d at 146.

The *Bragg* version of the test—more of a scorecard than a scale—is fundamentally flawed because it artificially segments parts of the analysis.<sup>89</sup> The *Penn Central* analysis should consider all of the public interests on one side and weigh them against the private interest on the other.<sup>90</sup> “Investment-backed expectations” and “economic impact” overlap and should be grouped into the private interest side of the analysis.<sup>91</sup>

By separating the questions of investment-backed expectations and economic impact, the court in *Bragg* has stacked the deck in favor of the landowner.<sup>92</sup> Because investment-backed expectations and economic impact are so closely linked, if a court determines one points to a compensable taking, the other surely will, as well.<sup>93</sup> The *Penn Central* scorecard will already show two points for the private individual.<sup>94</sup> The nature of the regulation, representing a single point, could almost never overcome this two-point lead.<sup>95</sup> The addition of the fourth “other considerations” factor *could* have complicated this calculus, but the nature of that catchall inquiry is so broad and ambiguous that the court in *Bragg* only gave it superficial treatment.<sup>96</sup>

If courts come to adopt the *Bragg* model of the *Penn Central* test, the implications could prove disastrous.<sup>97</sup> A precedent that inherently favors an individual’s property rights would undermine the government’s ability to regulate vital resources.<sup>98</sup> In the point-tallying model, the public interest, no matter how significant, cannot outweigh the interest of an individual who: (1) is economically impacted and (2) has his or her investment-backed expectations disappointed.<sup>99</sup>

## CONCLUSION

The decision in *Edwards Aquifer Authority v. Bragg* illustrates the dangerous opacity of takings jurisprudence. The Court of Appeals of Texas, San Antonio understood the general direction and broad boundaries of the *Penn Central* test. Nevertheless, it applied the test with an indelicate hand, tallying points instead of carefully balancing interests. Separating the factors and framing the test as a scorecard is illogical. The first two factors—the economic impact of the regulation, and the regulation’s interference with investment-

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<sup>89</sup> See *Bragg*, 421 S.W.3d at 146.

<sup>90</sup> See *Palazzolo*, 533 U.S. at 635–36; *Hallco Tex., Inc.*, 221 S.W.3d at 75.

<sup>91</sup> See *Palazzolo*, 533 U.S. at 635–36; *Hallco Tex., Inc.*, 221 S.W.3d at 75.

<sup>92</sup> See *Bragg*, 421 S.W.3d at 139–44, 146.

<sup>93</sup> See *id.* at 139–44.

<sup>94</sup> See *id.*

<sup>95</sup> See *id.*

<sup>96</sup> See *id.* at 139–46.

<sup>97</sup> See *id.*

<sup>98</sup> See *id.*

<sup>99</sup> See *id.*

backed expectations—naturally overlap and will almost always favor the same party. If other courts adopt the *Bragg* interpretation of the *Penn Central* test, the doctrine of invalid regulatory takings will expand beyond its reasonable bounds. The resultant obligation by government agencies to compensate the individuals and industries they regulate could cripple lawmaking efforts, especially environmental regulation.