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Blights Out and Property Rights in New Orleans Post-Katrina

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ABSTRACT

In 2018's Saint Bernard Parish Government v. United States, Federal Appeals Judge Timothy Dyk reversed a lower court decision finding that the federal government had violated the Fifth Amendment's Takings Clause rights cherished by home-owning New Orleanians. The lower court maintained that such taking occurred via the Army Corps of Engineers' building, maintaining, and failing to maintain the seventy-six mile long navigational channel known as the Mississippi River-Gulf Outlet (MRGO), which increased the surge storms of Hurricane Katrina. Though MRGO helped turn Katrina into a superstorm that devastated thousands of properties, Judge Dyk determined that the lower court's takings analysis proved fatally flawed because it pivoted on government omission and failed to consider the totality of circumstances.

In line with my ongoing work in Community Constitutionalism, I study the art of a New Orleans-based collective called Blights Out, whose members have staged performances and actions that protest how people of color have been deprived of property post-Katrina. Through careful analysis of their billboards and engagements, I tease out two legal arguments made by the collective: First, that the government may wrongfully deprive the people of property through omission. Second, that the window of time within which such takings may be discerned proves much wider than that imagined by Judge Dyk's description of the "totality of circumstances." Depending on the work of popular constitutionalists and my previous study of

† Professor of Law, Loyola Law School. Thank you to the Andy Warhol Foundation for awarding me a 2018 Art Writer's Grant to support the writing of this Article. Thank you also to Carl Joe Williams, Imani Jacqueline Brown, Mariama Eversley, Linda Santi, Joe Singer, and Chris Serkin.

the linkages between art and jurisprudence, I conclude that Blights Out's legal thought offers a powerful rejoinder to Judge Dyk's analysis, and offers important arguments for the future applications of takings law.

INTRODUCTION

In October-November of 2017, a billboard boasting the slogan *BLIGHTS OUT FOR MAYOR* presided over the intersection of Galvez Street and Orleans Avenue in New Orleans' Tremé neighborhood.¹ The sign, designed by illustrator Hannah Chalew, depicted a black-and-white drawing of a busted and moss-overgrown house. A sinuous vein of red text outlined the scene: *Ecological apartheid (spatial segregation) is already etched into our housing landscape. Will our future city be a gentrified fortress designed to protect the wealthy from the rising-up of seas and people?* A black-and-white caption crowned the spectacle: *#TellYourMayor/We Demand/Truth and Reconciliation/On Gentrification.*²

The faux political campaign and very real public art of the NOLA-based arts collective *Blights Out*³ targeted the violent redistribution of property rights that has changed the class structure and complexion of New Orleans in the thirteen years since Hurricane Katrina landed in 2005.⁴ Initiated in 2014 with a performance called “Home Court Crawl,”⁵ and formalized with a manifesto composed on the eve of the ten year anniversary of Hurricane Katrina,⁶ *Blights Out* embarked upon a host of engagements in addition to its Mayoral campaign. In 2016, it “R[a]n for

1. Hannah Shalew, *Ecological Apartheid*, BLIGHTS OUT, <http://www.blightsout.org/mayor>, slide #7 (last visited Nov. 9, 2019).

2. *Id.*

3. BLIGHTS OUT, <http://www.blightsout.org/> (last visited Nov. 9, 2019).

4. *See infra* text accompanying note 86.

5. *Projects, Home Court Crawl*, BLIGHTS OUT, <http://www.blightsout.org/projects> (last visited Nov. 9, 2019).

6. *An Invitation is a Call to Action, or, A Composite Prose Portrait of What Folks from Blights Out are Feeling, Thinking, & Talking About on the 10th Anniversary of Katrina*, BLIGHTS OUT (Aug. 21, 2015), <http://www.blightsout.org/home/> (“On August 15, 2015, members of Blights Out—natives and newcomers—were asked to share one word to describe how they were feeling as the 10th Anniversary of Hurricane Katrina approached. . .”).

President,” using placards that boasted slogans such as “Black Land Matters,” “Look Me In the Eye,” and “50 Years Later We Still Need Decent Housing Fit For Human Beings.”⁷ And in the years previous, it hosted other events, including 2015’s “Live Action Painting” program, a participatory illustration happening that involved artists painting blighted homes in New Orleans.⁸

Blights Out is the brainchild of Imani Jacqueline Brown,⁹ Mariama Eversley, Byran C. Lee,¹⁰ Jr., Lisa Sigal,¹¹ Sue Press,¹² and Carl Joe Williams;¹³ except for Sigal, who is an Anglo woman based in Brooklyn,¹⁴ these members are or were New Orleans residents and are African-American.¹⁵ These artists, architects, community organizers, and activists together create public art engagements resisting the destruction that Katrina, the state, and gentrification have wreaked upon New Orleans’ communities of color. Through their work, they make arguments about the precise ways in which the “government,” otherwise called the “regime,”¹⁶ has deprived people of property upon the landfall

7. See *Projects, Blights Out for President*, BLIGHTS OUT, <http://www.blightsout.org/projects> (last visited Nov. 9, 2019).

8. *Projects, Live Action Painting*, BLIGHTS OUT, <http://www.blightsout.org/projects> (last visited Nov. 9, 2019).

9. Imani Jacqueline Brown, *Bio*, <http://www.imanijacquelinebrown.net/bio> (last visited Nov. 9, 2019).

10. For an example of Bryan C. Lee’s work, see *Architecture Could Be The Best Weapon Against Extremism* (Aug. 21, 2017), <https://www.youtube.com/watch?v=sNqc85UZtOo>.

11. See Lisa Sigal, *Bio*, <http://lisasigal.net/> (last visited Nov. 9, 2019).

12. For an example of Sue Press’s work, see *Sue Press of the Ole & Nu Style Fellas on Mentoring* (Apr. 22, 2019), https://www.youtube.com/watch?v=Ax5Ywl48v_U.

13. Carl Joe Williams, *Bio & CV*, <http://www.carljoewilliams.com/> (last visited Nov. 9, 2019).

14. Sigal, *supra* note 11.

15. See *supra* notes 9–10 and 12–13.

16. See *Disaster Capitalism*, BLIGHTS OUT, <http://www.blightsout.org/mayor> (last visited Nov. 9, 2019).

of Katrina in '05 and in the years since. Specifically, the artists of Blights Out maintain that “government”¹⁷ forces have “pushed out”¹⁸ or deprived people of color of housing through both bad acts as well as (critically, for this article) omissions.¹⁹ Blights Out artists also assert that the events that created this deprivation extend beyond the days and weeks surrounding Katrina, and encompass the government’s later acts of auctioning “blighted” properties and its supports of neoliberal forces that have permitted the supplanting of community members through gentrification.²⁰

These declarations pertain to legal problems, in particular, those raised by *Saint Bernard Parish Government v. United States (Saint Bernard Parish II)*.²¹ In that 2018 opinion, the Court of Appeals for the District of Columbia Circuit reversed²² a 2015 Court of Federal Claims decision (*Saint Bernard Parish I*)²³ finding that the federal government had temporarily taken property in New Orleans by erecting, expanding, maintaining, and failing to maintain the seventy-six mile long navigational challenge known as the Mississippi River-Gulf Outlet (MRGO), whose structural flaws leveraged the “surge” of Hurricane Katrina²⁴ (the

17. *Id.*

18. *Id.*

19. See, e.g., *infra* note 497 and accompanying text (“In works such as *Home Court Crawl*, *Live Action Painting*, and *50 Years Later, We Still Need Housing Fit for Human Beings*, Blights Out contends that property may be wrested from the people via government omissions.”).

20. See *infra* note 326 and accompanying text (“Blights Out shows that the property deprivation . . .”).

21. *St. Bernard Par. Gov’t v. United States*, (*Saint Bernard Par. II*), 887 F.3d 1354 (Fed. Cir. 2018), *cert. denied sub nom.* *St. Bernard Par. v. United States*, 139 S. Ct. 796 (2019).

22. *Id.* at 1368.

23. *St. Bernard Par. Gov’t v. United States*, (*Saint Bernard Par. I*), 121 Fed. Cl. 687 (2015), *rev’d*, 887 F.3d 1354 (Fed. Cir. 2018).

24. *Id.* at 723 (“The funnel effect caused by the MR–GO further exacerbated the increased storm surge that resulted from Hurricane Katrina.”).

Supreme Court declined certiorari in 2018).²⁵ In *Saint Bernard Parish II*, Judge Timothy Dyk held that lower court Judge Susan Braden erred because takings could not be based on inaction (such as that occurring when the Army Corps failed to maintain the MRGO),²⁶ and because Braden's causation analysis failed to consider "both risk-increasing and risk-decreasing government actions over a period of time to determine whether the totality of the government's actions caused the injury."²⁷ Specifically, Judge Dyk criticized Judge Braden's failure to consider the ameliorative effects of a federally-built barrier wall known as the "Barrier Plan," or "LPV."²⁸ Judge Dyk reasoned that "the result is that plaintiffs [and Judge Braden] failed to take account of other government actions . . . that mitigated the impact of MRGO and may *well have placed the plaintiffs in a better position than if the government had taken no action at all.*"²⁹ The burden of proving that the plaintiffs were not in a "better position" than they would have been if the government had simply done nothing, Dyk emphasized, belonged with, and was not carried by, the plaintiffs.³⁰

Thus, Blights Out artists offer alternative legal theories about the nature of takings than we see in Judge Dyk's 2018 opinion: First, Blights Out's legal thought clashes with Judge Dyk's holding that omission cannot give rise to a claim that the government has wrongfully deprived people of property. Second, Blights Out argues that government takings take place within a larger framing of the "totality of government's

25. *St. Bernard Par. v. United States*, 139 S. Ct. 196 (2019).

26. *Saint Bernard Par. II* at 1360 ("While the theory that the government failed to maintain or modify a government-constructed project may state a tort claim, it does not state a takings claim.").

27. *Id.* at 1365.

28. *Id.* at 1364 ("[A]nd the Claims Court's causation findings took no account of the risk-decreasing impact of the LPV levee construction.").

29. *Id.* at 1363 (emphasis added).

30. *Id.* at 1362 ("It is well established that a takings plaintiff bears the burden of proof to establish that the government action caused the injury.").

actions” than Dyk would admit as relevant, including the later auctionings and supports of neoliberalism that led to the restructuring of New Orleans demographics from 2005 to the present day. If Blights Out is correct, and omissions may create wrongful deprivations of property, and if there is merit to their argument that the “totality of the government’s actions” to be considered in that analysis encompasses a wider window of events than that entertained by Judge Dyk,³¹ the collective’s work offers a powerful rejoinder to *Saint Bernard Parish II*.

In this article, I will consider whether and how Blights Out’s insights matter to the law—and conclude that they can, and they should, on account of the jurisprudential theory that scholars such as Lani Guinier and Gerald Torres have branded Demosprudence,³² Reva Siegel, Robert Post and Jack Balkin have called Popular Constitutionalism,³³ and that I have described as Community Constitutionalism.³⁴ I also conclude that Blights Out’s “legal thought”³⁵ deserves attention based on jurisprudential work that acknowledges how visual and other forms of art offer revelations that legal discourse would do well to recognize.³⁶

31. See *infra* note 383 and accompanying text (“Blights Out artists do not focus only government’s conduct in the immediacy and direct aftermath of the flood, but look at a wide window of events that include later backing of market forces that exclude Black people from their neighborhoods and city.”).

32. See *infra* note 256 and accompanying text (“Guinier and Torres also study how the growth . . .”).

33. See *infra* notes 248–253 and accompanying text (“Renowned popular constitutionalism theorists . . .”).

34. Yxta Maya Murray, *The Takings Clause of Boyle Heights*, 43 N.Y.U. REV. L. & SOC. CHANGE 109, 125 (2019) [hereinafter Murray, *The Takings Clause of Boyle Heights*] (describing Community Constitutionalism).

35. See *id.* (discussing Community Jurisprudence).

36. Yxta Maya Murray, *Rape Trauma, the State, and the Art of Tracey Emin*, 100 CAL. L. REV. 1631, 1636 (2012) [hereinafter Murray, *Rape Trauma*] (“My in-depth study of visual arts in connection with rape law is also, I believe, an innovation within this field. It constitutes an effort to incorporate art’s revelations of women’s buried experience—or, as I conceive of these details, artifacts—into legal understandings.”).

Further, I contend that Blights Out artists, who have weathered the rigors of not only Katrina but also federal and state failures to care for residents in the ensuing years, are in an excellent position to offer interpretations of what constitutes New Orleans-specific takings—that is, that they can offer us relevant points of view that Judge Dyk, who was born in Massachusetts, went to Harvard, and sits in D.C.,³⁷ may simply not have access to.

In Part I of this Article, I will set forth a brief history of New Orleans, Hurricane Katrina, and its aftermath. In Part II, I will recount the decision of Judge Susan Braden of the United States Court of Federal Claims, which found the Army Corps of Engineers effected a temporary taking by building, expanding, maintaining, and failing to maintain the MRGO. In Part III, I will describe the Federal Court of Appeals for the Federal Circuit's reversal of Judge Braden's decision, in the opinion by Judge Timothy B. Dyk. In Part IV, I will set forth the theories of Demosprudence, Popular, and Community Constitutionalism, and the theory of what I have called "artifacts," which validate the art of Blights Out as an interpretive tool for the takings question engaged by Judges Braden and Dyk. In Part V, I will analyze the art of Blights Out, and its construals of omission and the "totality of government actions" as they relate to *Saint Bernard Parish I* and *II*. Finally, in Part VI, I will apply the legal thought of Blights Out to the takings question, subjecting it to Jack Balkin's famous test of whether its constitutional positions are "on" or "off" "the wall."³⁸ Finding that Blights Out's legal thought is on the wall, I will study how it supports Judge Braden's finding that the federal government *did* effect a

37. See *Timothy Dyk*, BALLOTPEDIA, https://ballotpedia.org/Timothy_Dyk (last visited Nov. 9, 2019).

38. Jack M. Balkin, "Wrong the Day it Was Decided": *Lochner* and *Constitutional Historicism*, 85 B.U. L. Rev. 677, 679 (2005) [hereinafter Balkin, "Wrong the Day it Was Decided"] (suggesting that "conventions determining what is a good or bad legal argument about the Constitution, what is a plausible legal claim, and what is 'off-the-wall' change over time in response to changing social, political, and historical conditions.").

temporary taking of property by engaging in acts and omissions that stripped the people of New Orleans of their homes.

I. THE HISTORY OF HURRICANE KATRINA AND ITS IMPACT ON NEW ORLEANS, WITH A FOCUS ON THE LOWER NINTH WARD AND SAINT BERNARD PARISH

As laid out in Judge Susan Braden’s expansive 58-page opinion, *St. Bernard Parish Government and Other Owners of Real Property in St. Bernard Parish or the Lower Ninth Ward of the City of New Orleans v. United States* (2015), New Orleans possesses a panoramic history, extending back to France’s 1718 founding of Nouvelle-Orléans on the St. Bernard Delta,³⁹ and New Orleans’ acquisition by the United States in the 1803 Louisiana Purchase.⁴⁰ Louisiana has a long track record of the exploitation of people of color and inequality. Slavery was instituted in Louisiana by virtue of the Black Code of 1806⁴¹ and fostered by the Fugitive Slave Law of 1850⁴² and the *Dred Scott v. Sandford*⁴³ decision of the United States Supreme Court. In the 1800s, however, a tradition of Black and minority home ownership was

39. *St. Bernard Par. Gov’t v. United States*, (*Saint Bernard Par. I*), 121 Fed. Cl. 687, 693 (2015), *rev’d*, 887 F.3d 1354 (Fed. Cir. 2018).

40. *Id.* at 694.

41. See Black Code, Act of June 7, 1806, as amended April 14, 1807 (“prescribing the rules and conduct to be observed with respect to Negroes and other Slaves of this Territory.”); see Vernon Valentine Palmer, *The Strange Science of Codifying Slavery—Moreau Lislet and the Louisiana Digest of 1808*, 24 TUL. EUR. & CIV. L.F. 83, 113 (2009).

42. James Oliver Horton & Lois E. Horton, *A Federal Assault: African Americans and the Impact of the Fugitive Slave Law of 1850*, 68 CHI.-KENT L. REV. 1179, 1180 (1993) (“The Fugitive Slave Law of 1850 expanded the power of slavery to reach into any state to retrieve those accused of fleeing from bondage.”).

43. *Dred Scott v. Sandford*, 60 U.S. 393 (1857). In *Dred Scott*, a Missouri slave whose master had taken him to a free state sued for freedom, but the Supreme Court held that neither he nor his family were entitled to liberty because they were not citizens. See Michael Stokes Paulsen, *Lincoln and Judicial Authority*, 83 NOTRE DAME L. REV. 1227, 1231 (2008).

instituted in the Lower Ninth Ward, when poor African Americans and immigrants began to build homes there because they were “unable to afford land on higher ground.”⁴⁴ This led to a significant proportion of Black and minority home-ownership,⁴⁵ but titles to these properties were not always recorded, a dilemma that continued through 2005.⁴⁶ Through the 20th century, Black citizens in New Orleans experienced manifold oppressions, including police brutality,⁴⁷ segregation,⁴⁸ and, despite high rates of home ownership, housing insecurity and disastrously poor housing conditions.⁴⁹ Income inequality and its effects persisted up to the time of Katrina: In 2005, it was estimated that 36% of

44. Water Resources Management Practicum 2007, *Wetland Restoration and Community-Based Development Bayou Bienvenue, Lower Ninth Ward, New Orleans* (2008), <https://www.nelson.wisc.edu/docs/neworleans07.pdf>.

45. Rachel Breunlin & Helen A. Regis, *Putting the Ninth Ward on the Map: Race, Place, and Transformation in Desire, New Orleans*, 108 AM. ANTHROPOLOGIST 744 (2006) (discussing high home-ownership in the Lower Ninth Ward prior to Hurricanes Katrina and Rita).

46. Katy Reckdahl, *We can do this: Lower 9th Ward residents focus on need to clear overgrown lots*, NEW ORLEANS ADVOCATE (July 15, 2018), https://www.theadvocate.com/new_orleans/news/article_c62e602c-8889-11e8-a44f-e7e948d36847.html (“At the root of the problem are families who, lacking a clear title to the property where they had lived, perhaps for generations, were ineligible for rebuilding money after Katrina.”); Josephine Ross, *Still in Limbo: The Continuing Failed Response to Katrina*, 51 HOW. L.J. 565, 618 n.63 (2008) (“[M]any New Orleans families, particularly in low-income areas, simply have passed homes down informally through the generations without filing succession papers.”) (quoting Womble Carlyle Sandridge & Rice, *Pro Bono—The New Orleans Project*, <http://www.wcsr.com/default.asp?id=684>).

47. LEONARD MOORE, BLACK RAGE IN NEW ORLEANS: POLICE BRUTALITY AND AFRICAN AMERICAN ACTIVISM: FROM WORLD WAR II TO HURRICANE KATRINA 8 (2010) (“In the 1940s, returning black World War II veterans and other African Americans with heightened expectations in the immediate postwar period came under attack, while in the 1950s and 1960s traditional civil rights activists were often brutalized for demanding integration and voting rights.”).

48. WALTER STERN, RACE AND EDUCATION IN NEW ORLEANS: CREATING THE SEGREGATED CITY, 1764–1960 (2018) (describing violent white reaction to attempted desegregation in 1960).

49. ORISSA AREND, SHOWDOWN IN DESIRE: THE BLACK PANTHERS TAKE A STAND IN NEW ORLEANS 4 (2010) (describing a “disast[rous]” housing project for poor Black families, built in the 1950s).

the Lower Ninth's residents lived in poverty,⁵⁰ and in 2018 the rate was estimated at 33.5%.⁵¹ In 2018, it was estimated that over 90% of the residents were African American.⁵² As for Saint Bernard Parish, it was established in 1847;⁵³ in 2018, its residents were 70.9% white,⁵⁴ and it was estimated that 20% of its population lived below the poverty line.⁵⁵

Property owners residing in Saint Bernard Parish and the Lower Ninth Ward, who brought the takings claim that Braden ruled on,⁵⁶ possess a collective identity as the Saint Bernard Polder (that is, low-lying land reclaimed from the sea),⁵⁷ and have historically received protection from storms in the form of wetlands.⁵⁸ Louisiana and the U.S. Government first began to construct wetlands-threatening waterway navigational canals in 1914 and 1925,⁵⁹ and by 1955 the United States Army Corps of Engineers alerted to the fact that New Orleans and Lake Pontchartrain needed

50. Manuel Roig-Franzia, *Once More, a Neighborhood Sees the Worst*, WASH. POST (Sept. 8, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/07/AR2005090702127.html>.

51. *Lower Ninth Ward Neighborhood in New Orleans, Louisiana*, CITY-DATA.COM, <http://www.city-data.com/neighborhood/Lower-Ninth-Ward-New-Orleans-LA.html> (last visited Nov. 9, 2019).

52. *Race and Ethnicity in Lower 9th Ward*, STATISTICAL ATLAS, <https://statisticalatlas.com/neighborhood/Louisiana/New-Orleans/Lower-9th-Ward/Race-and-Ethnicity> (last visited Nov. 9, 2019).

53. RENAE FRIEDLEY, *BREAUX BRIDGE* 32 (2014).

54. *QuickFacts St. Bernard Parish, Louisiana*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/map/stbernardparishlouisiana/RHI125217> (last visited Nov. 9, 2019).

55. *Saint Bernard Parish*, DATA USA, <https://datausa.io/profile/geo/st-bernard-parish-la/> (last visited Nov. 9, 2019).

56. *Saint Bernard Par. Gov't v. United States (Saint Bernard Par. I)*, 121 Fed. Cl. 687, 690 (2015), *rev'd*, 887 F.3d 1354 (Fed. Cir. 2018) (naming parties).

57. *Polder*, DICTIONARY.COM, <https://www.dictionary.com/browse/polder> (last visited Nov. 9, 2019).

58. *Saint Bernard Par. I*, 121 Fed. Cl. at 694 (“Historically, these wetlands were relatively stable and protected the New Orleans area from catastrophic storms.”).

59. *Id.* at 696.

additional protection from storms.⁶⁰ The Corps thus began to enact a “Barrier Plan,” constructing floodwalls and other devices against the Inner Harbor Navigation Canal (IHNC).⁶¹ As Judge Braden would note, the Barrier Plan was “implemented as the Lake Pontchartrain and Vicinity Hurricane Project, known as the LPV, which was to be comprised of 125 miles of levees and floodwalls.”⁶² However, by 2005, the Barrier Plan had not yet been completed.⁶³ And in 2009, an Army Corps reported observed that “[a]t no time” had any parish enjoyed the full protection called for by the government.⁶⁴

Three years after the U.S. Government had received notice that New Orleans needed storm protection,⁶⁵ the Army Corps of Engineers began to implement the first expansion of the Mississippi River-Gulf Outlet (MRGO),⁶⁶ a seventy-six mile long navigational challenge.⁶⁷ The federal government authorized this construction of a deep-draft channel to the west of the Mississippi even though it threatened cypress swamps, which were crucial for storm protection and would eventually die out due to the change in surrounding water salinity.⁶⁸ In 1958, the United States Fish

60. *Id.* at 696–97.

61. *Id.* at 697. The IHNC borders the Lower Ninth Ward, and the Gulf Intracoastal Waterway, which extends from Brownsville, Texas east to Carrabelle, Florida. *Id.* at 696.

62. *Id.* at 697.

63. *Id.* (“As of May 2005, however, only 90% of the LPV was completed in Orleans Parish, 70% in Jefferson Parish, 90% in Chalmette, and 60% in St. Charles Parish. SPX.0001 at I-28.”).

64. *Id.* (quoting Plaintiff’s exhibits).

65. *Id.* at 696 (“Congress authorized the Army Corps to study the need for additional hurricane protection along the Southern United States coast [in 1955].”); *id.* at 698 (“During 1958–1968, The Army Corps Of Engineers Constructed And Implemented The First Expansion Of The Mississippi River Gulf Outlet.”).

66. *Id.*

67. *Id.* at 691.

68. *See id.* at 699.

& Wildlife Service warned the Army Corps of Engineers that the channel would destroy the trees and threaten local floral and faunal “disaster,” as well as increase salinity and turbidity in the area.⁶⁹ It recommended delaying the project in light of these findings, but the Army Corps of Engineer did not respond to this counsel.⁷⁰ The construction of MRGO continued apace.⁷¹

By 1968, the Army Corps completed a third expansion of MRGO, leading to the burial of over 10,000 acres of swampland and eradication of 2,116 acres of salt marsh and swamp and 36 acres of trees.⁷² At this point, the MRGO possessed 24 miles of levee,⁷³ including a portion protecting Saint Bernard/Chalmette and Orleans Parish East.⁷⁴ Together, these levee portions created the funnel that would prove a delivery system of an astronomical tide wave⁷⁵ during Katrina, because of what are known as Reach 1 and Reach 2 of MRGO: These are, respectively, the east-west section running between the IHNC and the Gulf Intracoastal Waterway/MR-GO and a longer southeast-northwest section.⁷⁶ In particular, the confluence of the Waterway and the MRGO created a risk of an extreme storm surge, which could now be exacerbated by “conditions” in Lakes Pontchartrain and Borgne.⁷⁷

In 1998, the Louisiana Coastal Wetlands Conservation and Restoration Task Force and the Wetlands Conservation and Restoration Authority convened experts in wetlands and coastal conditions, leading to a report auguring 18-foot storm

69. *See id.*

70. *Id.*

71. *Id.*

72. *Id.* at 702–03.

73. *Id.* at 703.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

surges topped by 10-foot waves in the area, which no current or proposed prophylaxes could ward off.⁷⁸ That same year, Saint Bernard Parish Government issued a resolution to “phas[e] out” MRGO,⁷⁹ which it called a “superhighway”⁸⁰ for predicted storms. In 2000, the EPA recommended erecting a hurricane-protective gate to Saint Bernard Parish and a program for redeveloping MRGO destroyed wetlands.⁸¹ It also recognized that private property had already been “washed away” by the effects of the MRGO, and it recommended that affected owners be paid fair market value for their loss.⁸² In its conclusions, however, the EPA asserted that MRGO-exacerbated storm surges proved only a “relatively minor factor” in predicted environmental dangers.⁸³ Then, in November 2004 and June 2005, Army Corps studies warned of MRGO and Lake Borgne deterioration and increased wetland erosion, and predicted potential “wakes” from the MRGO if it ever disconnected from the lake, as well as increased storm surges.⁸⁴

These studies turned out to be “prophetic”⁸⁵ when Hurricane Katrina achieved landfall on the tip of Florida on August 26, 2005.⁸⁶

While the National Weather Service had been disseminating extremely accurate predictions of the Hurricane at least two days previous to landfall, the federal and state government responders still were not able to react to the disaster with any kind of alacrity or efficiency.⁸⁷

78. *Id.* at 704–05.

79. *Id.* at 706.

80. *Id.* at 705.

81. *Id.* at 706.

82. *Id.* at 707.

83. *Id.* at 708.

84. *Id.* at 708–09.

85. *Id.* at 709.

86. *Id.*

87. SELECT BIPARTISAN COMM. TO INVESTIGATE THE PREPARATION FOR AND

Katrina grew to a Category 5 storm on August 28, at around midnight.⁸⁸ This means it blew at least 157 miles per hour.⁸⁹ Waves east of the Mississippi River began to crest over 20 feet.⁹⁰ The fury forced “considerable” waters against the Mississippi Delta and the east-facing levees tracking the Mississippi River, also recruiting waters formed in a pocket created by the delta and the Mississippi coast.⁹¹ The storm then hurled into Lakes Borgne and Pontchartrain as Katrina pushed north.⁹² Enormous wave force blasted hurricane protection systems in Plaquemines, St. Bernard, and Orleans Parishes.⁹³

By 1 p.m., Katrina had been downgraded to a Category 1 storm, meaning that it raged at 74–95 miles an hour.⁹⁴ Still, three breaches occurred at the IHNC, leading to flooding in St. Bernard Parish and the Lower Ninth Ward that reached from seven to eleven feet.⁹⁵ Around 70 percent of the MRGO levee breached, flooding Saint Bernard Parish.⁹⁶ The Lower Ninth Ward was swallowed by waters from Lake Borgne, which battered up the MRGO, and poured in through breaches in the IHNC.⁹⁷ Storm surges eventually

RESPONSE TO KATRINA, 109TH CONG., A FAILURE OF INITIATIVE 11, (Feb. 15, 2006) (“Many who escaped the storm’s wrath owe their lives to these agencies’ accuracy. . . . We repeatedly tried to determine how government could respond so ineffectively to a disaster that was so accurately forecast. How accurately? Storm-track projections released to the public 56 hours before Katrina came ashore were off by only 15 miles. . . . The Hurricane Center’s predicted strength for Katrina at landfall, two days before the storm hit, was off the mark by only 10 miles per hour.”) [hereinafter *A Failure of Initiative*].

88. *Saint Bernard Par. I*, 121 Fed. Cl. at 709.

89. *Id.* at 709 n.14.

90. *Id.*

91. *Id.* at 710.

92. *Id.*

93. *Id.*

94. *Id.* at 709 n.14.

95. *Id.* at 710–11.

96. *Id.* at 711.

97. *Id.*

reached up to 15–19 feet.⁹⁸ In the end, about 80 percent of the city was flooded up to 20 feet a day after landfall,⁹⁹ and between 68% and 98% of homes were “severely damaged or destroyed.”¹⁰⁰

Residents who remained in the city were told to go to the Superdome, the Convention Center, and interstate bridges for safety.¹⁰¹ Many appeared to rely upon the government’s assurance that it would help them, and so forewent self-help, to their detriment.¹⁰² Some members of “[t]he Louisiana National Guard ‘participated in . . . securing operations’ at

98. *Id.*

99. *Id.* at 712.

100. *Id.* (citing *Hurricane Katrina Statistics Fast Facts*, CNN, <http://www.cnn.com/2013/08/23/us/hurricane-katrina-statistics-fast-facts/> (last updated Aug. 8, 2019 6:48 PM)); THE DATA CTR., CURRENT HOUSING UNIT DAMAGE ESTIMATES HURRICANES KATRINA, RITA, AND WILMA 25 (2006), https://gnocdc.s3.amazonaws.com/reports/Katrina_Rita_Wilma_Damage_2_12_06___revised.pdf (“showing that 9,777 of 14,037, i.e., 70%, of owner-occupied housing and 13,695 of 20,229, i.e., 68%, of renter-occupied housing in St. Bernard Parish was classified as ‘Severe/Destroyed.’”).

101. *A Failure of Initiative*, *supra* note 87, at 6 (quoting Patricia Thompson, “We were told to go to the Superdome, the Convention Center, the interstate bridge for safety. We did this more than once. In fact, we tried them all for every day over a week.”).

102. *Id.* at 282 (quoting Dr. Gregory Henderson, “thousands upon thousands of people collected on the boulevard in front of the convention center. There were the infants to the elderly in wheelchairs. There were many elderly lying on sheets and blankets on the median. There were screaming men, women, and children and dazed quiet and confused men, women, and children. Most were African-American, but many were white.”); *see also* Roy Bourgeoise, Jr., *Living Through Hurricane Katrina—An AFA Member’s Account*, 3 AFA WATCHBIRD 50, 54 (2005), <https://journals.tdl.org/watchbird/index.php/watchbird/article/download/3414/33> 98 (“Over the next three days, we waited for help that never came.”); Bill Quigley, *Six Months After Katrina*, COUNTERPUNCH (Feb. 21, 2006), <https://www.counterpunch.org/2006/02/21/six-months-after-katrina/> (“Over 40 people died in the hospital over the next few days as we waited for help.”); Gary Younge & Duncan Campbell, *Still alive amid the chaos: rescuers arrive at last to discover the forgotten survivors*, THE GUARDIAN (Sept. 6, 2005), <https://www.theguardian.com/world/2005/sep/07/hurricanekatrina.usa2> (“Joseph Kelson, 58, was bleeding from a bite from a stray dog and seeking medical attention but, despite the presence of more than 20,000 national guardsmen and hundreds of search and rescue teams, none was forthcoming. ‘I’ve lost all my friends,’ he said. ‘We waited for help but help never came.’”).

the Superdome.”¹⁰³ The House Subcommittee report on Katrina acknowledged that “[a]t these locations, [victims] . . . were subjected to unbearable conditions: limited light, air, and sewage facilities in the Superdome, the blistering heat of the sun, and in many cases limited food and water.”¹⁰⁴

Survivors reported that neither FEMA nor other government responders helped them, and that they endured nightmarish conditions, such as sleeping by corpses when they ventured out of the Superdome.¹⁰⁵ “We never felt so cut off in our lives,” a woman named Patricia Thompson testified.¹⁰⁶ The government did not deliver medical supplies for days.¹⁰⁷ And in some areas, food, water, and ice deliveries were delayed for at least eleven days.¹⁰⁸ There was also inordinate waste: Two years after Katrina, FEMA threw away \$100M in ice that it did not supply in ‘05.¹⁰⁹ Confusion

103. *A Failure of Initiative*, *supra* note 87, at 67.

104. *Id.* at 7.

105. *Id.* at 6 (quoting Patricia Thompson, “We saw buses, helicopters and FEMA trucks, but no one stopped to help us. We never felt so cut off in all our lives. When you feel like this you do one of two things, you either give up or go into survival mode. We chose the latter. This is how we made it. We slept next to dead bodies, we slept on streets at least four times next to human feces and urine. There was garbage everywhere in the city. Panic and fear had taken over.”).

106. *Id.*

107. *Id.* at 275 (“With only nominal amounts of medical supplies pre-positioned by FEMA and HHS, a great deal of medical provisions had to be supplied after Katrina made landfall. In areas like New Orleans, it took days to respond to the catastrophe and deliver medical supplies to the Superdome and Convention Center. The delays were a result of poor planning.”).

108. *Id.* at 83 (“According to Dr. Walter Maestri, the Jefferson Parish Director of Emergency Management, he understood that FEMA may not provide help until 48–72 hours later—but then he expected help. That is, once the state cleared the roads, he anticipated that FEMA trucks would arrive with large quantities of water, food, and ice. Although these were the parish’s planning assumptions, he said FEMA did not get substantial relief to the parish until 11 days after landfall.”).

109. John Cochran, *85M Pounds of Ice Going Down the Drain*, ABC (July 15, 2007), <https://abcnews.go.com/amp/WN/story?id=3379974&page=1>; Chris Edwards, *Hurricane Katrina: Remembering the Federal Failures*, CATO (Aug. 27, 2015, 2:56 PM), <https://www.cato.org/blog/hurricane-katrina-remembering-federal-failures> (“Two years after the storm, the agency ended up throwing out

between state and federal responders led to corpses being left unrecovered for days.¹¹⁰ Federal attention was so lacking that Canadian Mounties were often first responders, which led some residents to feel forsaken by their own government.¹¹¹

Meanwhile, thousands of members of the National Guard flowed into New Orleans, and on September 7 were given Title 32 status retroactive to August 29,¹¹² two days after George Bush had declared a state of emergency.¹¹³ I argue that this means that the Guard were under federal, not state, authority.¹¹⁴ Though the Guard had been ordered

\$100 million of unused ice.”); *see also* REP. BENNIE G. THOMPSON, “ONE YEAR LATER: KATRINA’S WASTE” 14 (2006), <https://www.yumpu.com/en/document/view/49398606/one-year-later-katrinas-waste-a-report-detailing-contracting->

110. *A Failure of Initiative*, *supra* note 87, at 299 (“Body recovery was no less confused. For days, bodies went uncollected as state and federal officials remained indecisive on a body recovery plan.”).

111. *See* Cecilia M. Vega, *The parish that feds overlooked / Canadian group reached St. Bernard before U.S. troops*, S. F. GATE, (Sept. 15, 2005, 4:00 AM), <https://www.sfgate.com/news/article/The-parish-that-feds-overlooked-Canadian-group-2609002.php>; Telephone Interview with Linda Santi (Dec. 27, 2018) (“The first humans that those guys saw were Canadian mounted police patrol. So you didn’t feel like the U.S.A. was in it, was in the game. When you look up and see the Canadian Mounted Police as the first public support you’re starting to feel like you’ve gone through the looking glass.”).

112. JAMES A. WOMBSELL, *ARMY SUPPORT DURING THE HURRICANE KATRINA DISASTER 18–19* (2009), <https://books.google.com/books?id=t8pP6XcGbFoC&printsec=frontcover&dq=%22bush%22+%22katrina%22+%22national+guard%22&hl=en&sa=X&ved=0ahUKEwi8gdakrjgAhUyFzQIHVhNDh8Q6AEINTAC#v=onepage&q=national%20guard&f=false>.

113. *Bush Declares State of Emergency*, FOX NEWS (Aug. 28, 2005), https://www.foxnews.com/printer_friendly_story/0,3566,167240,00.html.

114. While National Guard members are usually considered state employees, “the Army and Air National Guard of the United States, established and maintained under Congress’ army power, function as reserves in the United States Army and Air Force ‘to provide trained units and qualified persons available for active duty in the armed forces, in time of war or national emergency and at such other times as the national security requires.’” *Md. for Use of Levin v. United States*, 381 U.S. 41, 41 (1965), *vacated on other grounds*, *Md. for the Use of Levin v. United States*, 382 U.S. 159 (1965) (treating military members of the Guard as employees of the States, not the Federal Government); *see* *Perpich v. U.S. Dep’t of Def.*, 880 F.2d 11, 15 (8th Cir. 1989), *aff’d*, 496 U.S. 334 (1990). *Perpich* stated, “federal authority over the National Guard in a national

to New Orleans by President Bush, they were beguiled by false reports of rapes, murders, and sniping.¹¹⁵ So intimidated, the Guards “refused” to approach the Superdome until September 2, 100 hours after the hurricane, until “we had enough force in place to do an overwhelming force,” Lieutenant General H. Steven Blum, Chief of the National Guard Bureau, told reporters on September 3.¹¹⁶ Louisiana Governor Kathleen Blanco described the “landing” in New Orleans of “troops of [National Guard soldiers¹¹⁷] fresh from Iraq, well trained, experienced, battle

emergency is preeminent. In such a narrow circumstance, state authority is superseded.” *Id.* Further, “[S]ection 325 of Title 32 provides as follows: (a) Each member of the Army National Guard of the United States . . . who is ordered to active duty is relieved from duty in the National Guard of his State or Territory. . . .” *Clark v. United States*, 322 F.3d 1358, 1367 (Fed. Cir. 2003) (citing 32 U.S.C. § 325).

Moreover, National Guardsmen who dispatch their duties under Title 32 will be immune from state common law tort claims under the Westfall Act, 28 U.S.C. §§ 2671, 2679(d), which strengthens my characterization of the Guardsmen in New Orleans as federal employees. *Gilmore v. Mississippi*, 905 F.3d 781, 786 (5th Cir. 2018) (“The Westfall Act ‘accords federal employees absolute immunity from common-law tort claims arising out of acts they undertake in the course of their official duties.’”) (internal citation omitted). In *Gilmore*, the 5th Circuit held that “[a]lthough National Guard members do not normally fall within the definition of ‘federal employees,’ they are covered by the Westfall Act when ‘engaged in . . . duty under section . . . 502 . . . of title 32.’” *Id.* at 784–95 (citing 28 U.S.C. § 2671). Note that section 502(f) of title 32 refers to “Support of operations or missions undertaken by the member’s unit at the request of the President or Secretary of Defense.” 34 § 502(f)(2)(A). Further, National Guardsmen dispatching active duties during emergencies qualify as federal employees for the purposes of the Federal Tort Claims Act. *See* 28 U.S.C. § 2671 (West 2019) (“‘Employee of the government’ includes (1) officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section . . . 502 . . . of title 32.”). Again, section 502(f) of title 32 refers to “[s]upport of operations or missions undertaken by the member’s unit at the request of the President or Secretary of Defense.” 32 U.S.C. § 502(f)(2)(A); *see also* *In re Minasian*, No. SACV180205AG(JCGX), 2018 WL 1940402, at *2 (C.D. Cal. Apr. 23, 2018) (“Congress has defined ‘employee of the government’ to include National Guard members serving under 32 U.S.C. [§] 502 in other statutory schemes.”).

115. *A Failure of Initiative*, *supra* note 87, at 171.

116. *Id.*

117. *Troops told ‘shoot to kill’ in New Orleans*, ABC AUSTL. (Sept. 1, 2005, 2:25 AM), <https://www.abc.net.au/news/2005-09-02/troops-told-shoot-to-kill-in->

tested . . . [and who were] ready to shoot to kill, and they are more than willing to do so if necessary, and I expect they will.”¹¹⁸ President Bush contributed to the Black community’s objectification and perhaps psychological alienation¹¹⁹ by announcing that there would be “‘zero tolerance’ for armed gangs and profiteers.”¹²⁰

Tragically, these threats came to pass, as the people of New Orleans experienced catastrophic police brutality, despite the supposedly protective presence of the National Guard: On September 4, 2005, four New Orleans police officers shot six unarmed civilians on the Danziger Bridge, killing seventeen-year-old James Brissette and Ronald Madison, a 40-year-old mentally disabled man.¹²¹ Though the officers, when first tried and convicted in 2011, received sentences of between 38 to 65 years, federal prosecutors committed misconduct during the proceedings by posting false stories about the officers in the comments sections of NOLA.com.¹²² When retried, convicted, and sentenced in 2016, the killers received time served and between 7 to twelve years.¹²³

Other horrors also mounted: Public housing projects run

new-orleans/2094678 (“A detachment of 300 National Guard troops have landed in anarchic New Orleans with the authorization to shoot and kill ‘hoodlums’, Louisiana Governor Kathleen Blanco says.”).

118. JOHN ARENA, *DRIVEN FROM NEW ORLEANS: HOW NONPROFITS BETRAY PUBLIC HOUSING AND PROMOTE PRIVATIZATION* 159 (2012).

119. Jordan T. Camp, “*We Know This Place*”: *Neoliberal Racial Regimes and the Katrina Circumstance*, 61 *AM. Q.* 693, 698–99 (2009) (“The White House’s position on this specific response is unambiguous: ‘The security situation is a concern. It is a priority . . . [a]nd there is a zero tolerance approach.’ . . . The Katrina circumstance instances a pattern of militarization of the urban spaces inhabited by the racialized poor that serves to protect bourgeois property interests.”).

120. *Troops told ‘shoot to kill’ in New Orleans*, *supra* note 117.

121. *Danziger Bridge officers sentenced: 7 to 12 years for shooters, cop in cover-up gets 3*, NOLA.COM (Apr. 20, 2016, 11:13 PM) https://www.nola.com/crime/index.ssf/2016/04/danziger_bridge_officers_sente.html

122. *Id.*

123. *Id.*

by the Housing Authority of New Orleans, which was under receivership by the U.S. Department of Housing and Urban Development,¹²⁴ were sealed up after the storm, and residents were not allowed back into their homes, despite allegations that the properties had not been badly damaged by the floods.¹²⁵ In addition, there was a spate of physician-induced “mercy killings” at New Orleans’ Memorial Hospital, which faced temperatures of 100 degrees, failing generators, and patients who degraded into *in extremis* conditions.¹²⁶

National Guard planes¹²⁷ airlifted many residents from the area, including 600 people transported to Salt Lake City, Utah, a majority White city.¹²⁸ Many people did not even know where they were going while *en route*.¹²⁹ Other civilians were transported to locations in Texas.¹³⁰ Residents

124. Cameron French, *Hud Returns Housing Authority of New Orleans to Local Control*, HUD (May 28, 2014), <https://archives.hud.gov/news/2014/pr14-058.cfm> (“HUD took possession of HANO in February of 2002 for substantial default of the agency’s obligation set forth in the Annual Contributions Contract (ACC).”).

125. GABIV RICHARD, *KATRINA: EYES HAVE NOT SEEN, EARS HAVE NOT HEARD* 172 (2008) (“[A]ll of the public housing buildings were sealed up after the storm, but they did not suffer any significant flood damage whatsoever. . . . The St. Bernard, Lafitte, Magnolia, and Florida projects have yet to be reopened. They remain closed and locked up, collecting mold and debris while people are looking for a way to return to their homes.”).

126. See Carrie Cahn, *New Orleans Hospital Staff Discussed Mercy Killings*, NPR (Feb. 16, 2006, 4:40 PM), <https://www.npr.org/templates/story/story.php?storyId=5219917>.

127. Erin Stewart & Pat Reavy, *Airlift: For Katrina evacuees, Utah becomes a refuge from the storm*, DESERET NEWS (Sept. 4, 2005, 12:12 AM), <https://www.deseretnews.com/2005/9/4/19910547/Airlift-For-Katrina-evacuees-Utah-becomes-a-refuge-from-the-storm.html>.

128. *Salt Lake City, Utah Population 2019*, WORLD POPULATION REV. (July 7, 2009), <http://worldpopulationreview.com/us-cities/salt-lake-city-population/>.

129. Jim Avila, *Taken From Bayou to Utah, Katrina Evacuees Try to Adapt*, ABC (Sept. 14, 2005), <https://abcnews.go.com/WNT/HurricaneKatrina/story?id=1126273&page=1> (“I asked the stewardess, I said, ‘Ma’am, where are we going?’ and she said, ‘Salt Lake City.’ And everybody was like, ‘Uh, Utah? What’s in Utah?’”).

130. DAVID P. ANDERSON, *STORM SURGE: THE ROLE OF THE AIR NATIONAL GUARD IN HURRICANE KATRINA RELIEF OPERATIONS* 17 (2011) (“Victims air-lifted from New Orleans International Airport to Kelly Field [in San Antonio] were processed

complained of confusion, lack of communication, and of having no concept of how to get back home.¹³¹ In the end, the trauma was so great that about half¹³² of the city's people left New Orleans, abandoning their homes and properties. At least 100,000 never came back.¹³³ The people left because of their mental anguish,¹³⁴ as well as the unaffordable demolition and blight liens that began to pile up against their properties.¹³⁵ This abandonment exacerbated the damage that New Orleans properties suffered, leading to "blight."¹³⁶

for further transport to one of the nearby hospitals . . .").

131. See Interview with Linda Santi, *supra* note 111 ("They just landed wherever the plane dropped them which, [for me] was Salt Lake City. At times [it was] just trying to find out what was going on and what you had to do and where everybody was, was incredibly hard for people who are used to working a system. And for those who aren't, it's probably even harder—it'll work your last nerve.").

132. Alison Plyer, *Facts for Features: Katrina Impact*, THE DATA CTR. (Aug. 26, 2016), <https://www.datacenterresearch.org/data-resources/katrina/facts-for-impact/> ("The population of New Orleans fell from 484,674 before Katrina (April 2000) to an estimated 230,172 after Katrina (July 2006)—a decrease of 254,502 people and a loss of over half of the city's population. By July of 2012, the population was back up to 369,250—76% of what it was in 2000.").

133. Tom Dart, "New Orleans West": Houston is home for many evacuees 10 years after Katrina, THE GUARDIAN (Aug. 25, 2015, 7:30 AM), <https://www.theguardian.com/us-news/2015/aug/25/new-orleans-west-houston-hurricane-katrina> ("[O]f the 250,000-odd evacuees who arrived in Houston after the storm, up to 100,000 likely stayed permanently.").

134. See Dennis Devine, *Katrina Survivors Touch Down in San Diego*, SAN DIEGO UNION-TRIBUNE (Sept. 5, 2005, 12:00 AM), <https://www.sandiegouniontribune.com/sdut-katrina-survivors-touch-down-in-san-diego-2005sep05-story.html> ("His wife shuddered thinking of the terrifying tide of corpses floating in the flood. 'I couldn't go back to that,' Denise Powell said. 'Some of them could be my family.'").

135. Katy Reckdahl, *10 Years After Katrina, Some Are "Homeless in Their Own Homes"*, NAT'L GEOGRAPHIC (Aug. 13, 2015), <https://nationalgeographic.com/news/2015/08/150813-homeless-after-katrina-new-orleans/> ("[T]he city has demolished a total of 4,106 buildings through a careful blight-abatement process, but tens of thousands of empty properties remain. [Angell Marie] Boutte's property, for instance, has been cited for a long list of code violations involving rodents, high weeds, sanitation, and general neglect since April 2009. . . . Boutte is now facing lien foreclosure and a sheriff's auction of her house. . .").

136. Kathy Finn, *Blighted Houses Still Mar New Orleans a Decade after Katrina*, REUTERS (Aug. 23, 2015, 8:12 AM), <https://www.reuters.com/article/us-usa-katrina-blight/blighted-houses-still-mar-new-orleans-a-decade-after-katrina>

A year after Katrina, HUD also began demolishing public housing projects¹³⁷ and other buildings. Though officials said they would make exceptions for lower income areas like the Lower Ninth Ward,¹³⁸ the first Lower Ninth demolitions were reported in 2006.¹³⁹ In 2015, 24,000 demolition permits had been granted, and there were reports of owners fighting to save their homes.¹⁴⁰ The New Orleans Redevelopment Authority absorbed some of these properties and began to sell them at auction.¹⁴¹

-idUSKCN0QS0FE20150823 (“From the hardscrabble Lower Ninth Ward to middle-class Gentilly, thousands of abandoned homes still litter neighborhoods in New Orleans, a glaring reminder of the mass exodus of residents that followed Hurricane Katrina in 2005.”); Gillian B. White, *A Housing Crisis Amid Tens of Thousands of Abandoned Homes*, THE ATLANTIC (Aug. 20, 2015), <https://www.theatlantic.com/business/archive/2015/08/new-orleans-blight-hurricane-katrina/401843/> (“New Orleans’s abandoned houses, their entrances sealed with graffiti-covered plywood, are common.”).

137. Anne Hawke, *HUD to Demolish Four New Orleans Housing Projects*, NPR (June 8, 2006, 8:00 AM), <https://www.npr.org/templates/story/story.php?storyId=5493936>.

138. Chad Terhune, *Louisiana governments threaten Katrina homes with demolition*, PITTSBURGH POST-GAZETTE (Aug. 28, 2006, 12:00 AM), <https://www.post-gazette.com/news/nation/2006/08/28/Louisiana-governments-threaten-Katrina-homes-with-demolition/stories/200608280108> (“New Orleans already has exempted low-income areas such as the Lower Ninth Ward.”).

139. Audie Cornish, *Demolition Looms for Ninth Ward of New Orleans*, NPR (Feb. 28, 2006, 7:40 PM), <https://www.npr.org/templates/story/story.php?storyId=5238135>; Ron Mott, *New Orleans home demolitions under way*, NBC NEWS (Mar. 7, 2006, 1:37 PM), http://www.nbcnews.com/id/11712019/ns/us_news-katrina_the_long_road_back/t/new-orleans-home-demolitions-under-way/#.XB1n9tVKjIU (reporting city demolitions of houses in Lower Ninth Ward).

140. Lauren LaBorde, *The Lens’ “Missing Home” Looks at Post-Katrina Demolitions*, NOLA.COM (Aug. 31, 2015, 11:54 AM), <https://nola.curbed.com/2015/8/31/9925528/the-lens-missing-home-katrina-demolitions> (“The city issued 24,000 demolition permits since the storm, and the combination of copious FEMA money and fervor to remove blight resulted in a lot of knocked-down buildings.”).

141. Benjamin Alexander-Bloch, *St. Bernard Parish to Auction 151 Properties Bought by Road Home*, NOLA.COM (Oct. 3, 2014, 11:34 PM), https://www.nola.com/politics/index.ssf/2014/10/st_bernard_parish_to_auction_1_1.html (“The state initially acquired about 4,464 lots in St. Bernard under the Road Home program from homeowners who decided not to rebuild after Hurricane Katrina. The Louisiana Land Trust in turn sold about half of those lots to neighboring property owners, in what was dubbed the Lot Next Door program.”); Michelle Krupa, *Brisk Sales of Abandoned Properties at Recent New Orleans*

More than a million people were displaced in the Gulf Coast region in the immediate aftermath of the storm, and up to 600,000 households remained displaced a month later.¹⁴² Initially, shelters took in 273,000 people, and eventually, FEMA trailers housed at “least 114,000 households.”¹⁴³ 134,000 of New Orleanians’ housing units, that is, 70% of occupied domiciles, were damaged by the hurricane and its later flooding.¹⁴⁴

Damages from Katrina and the later-arrived Hurricane Rita, in total, reached \$125 billion, not adjusted for inflation.¹⁴⁵ It has been estimated that there were 1,577 fatalities in Louisiana, “40% . . . caused by drowning[,] 25% . . . caused by injury and trauma, and 11% caused by heart conditions.”¹⁴⁶ Almost half of the dead in Louisiana “were people over the age of 74.”¹⁴⁷

By the time that Blights Out artists began to execute their performances and raise their billboards over a decade after Katrina’s landfall,¹⁴⁸ the landscape of New Orleans had changed. People of color and poorer people lost their homes, either through abandonment or because of their inability to

Redevelopment Authority Auction, THE TIMES-PICAYUNE (Apr. 12, 2011, 9:44 PM), https://www.nola.com/politics/2011/04/brisk_sales_of_abandoned_prope.html (“Since Katrina, NORA has disposed of about 1,250 properties, with purchase agreements pending on about 600 more, Sathe said. In all, about 800 parcels have been bought by neighbors through the Lot Next Door program, which gives neighbors dibs on adjacent lots.”).

142. Alison Plyer, *Facts for Features: Katrina Impact*, THE DATA CTR (Aug. 26, 2016), <https://www.datacenterresearch.org/data-resources/katrina/facts-for-impact/>.

143. *Id.*

144. *Id.*

145. *Hurricane Katrina Statistics Fast Facts*, CNN, <https://www.cnn.com/2013/08/23/us/hurricane-katrina-statistics-fast-facts/index.html> (last updated Aug. 8, 2019, 6:48 PM).

146. *Id.*

147. *Id.*

148. Blights Out began to organize and make art around property dispossession in New Orleans in 2014. See Blights Out: Projects, BLIGHTS OUT, <http://www.blightout.org/projects> (last visited Feb. 19, 2019).

pay for the taxes and liens.¹⁴⁹ As the New Orleans Housing Authority reported in 2016: “Broadly, areas that were majority African American and on lower ground before the storm became even more heavily African American Areas that were majority African American, but on high ground changed quickly and are now majority white or moving in that direction.”¹⁵⁰

As Carl Joe Williams, one of the members of Blights Out, said in an interview in January of 2019:

[There’s a] sense of loss that’s happening here And it’s based on seeing the city change too much. The people who live here feeling a sense of helplessness of what they can do to actually hold on to their space and the way that it has been. So yeah, there’s a sense of things being taken. Here. And not just in the Lower Ninth Ward but the whole city. It feels like the disaster capital at its finest. There’s a lot of people taking advantage of the fact that people are really vulnerable in the city, especially the poor. And they don’t have maybe the resources or the game plan to combat some of the things that have been going on. But yeah, I feel like there’s been a sense of something being taken.¹⁵¹

While Judge Braden, in *Saint Bernard Parish I*, did not mention “disaster capitalism,” gentrification, or address New Orleanians’ feelings of helplessness, she agreed, with Carl Joe Williams, that “something” had been “taken” from the people of New Orleans by the government.¹⁵² She based her determination on the fact that the Army Corps of Engineers, through its building, operation, maintenance, and failure to

149. See *supra* text accompanying note 135.

150. HOUSING AUTHORITY OF NEW ORLEANS, ASSESSMENT OF FAIR HOUSING TOOL 28 (2016) https://www.hano.org/home/agency_plans/AFH%20PUBLIC%20COMMENT%20-%20AUGUST%2019%20FINAL.pdf; Jeff Adelson, *New Orleans segregation, racial disparity likely worsened by post-Katrina policies, report says*, NEW ORLEANS ADVOCATE (Apr. 5, 2018), https://www.theadvocate.com/new-orleans/news/article_92b962f0-3866-11e8-a851-2bbb256e2f49.html (“Unfortunately, many policy decisions made during the recovery repeated or amplified existing patterns of separation and inequality.”).

151. Interview with Carl Joe Williams, in New Orleans, La. (Jan. 5, 2019).

152. *Saint Bernard Par. Gov’t v. United States (Saint Bernard Par. I)*, 121 Fed. Cl. 687, 746 (2015).

maintain the MRGO had caused a temporary taking of Saint Bernard Parish and Lower Ninth Ward properties.¹⁵³ She emphasized that the federal government's construction of the MRGO made the region far more vulnerable to storm surges, and concluded that the MRGO had created a foreseeable and unreasonable risk of flooding that realized in 2005.¹⁵⁴

II. JUDGE BRADEN DETERMINED THAT THE UNITED STATES' ARMY CORPS OF ENGINEERS EFFECTED A TEMPORARY TAKING VIA THE CONSTRUCTION, EXPANSION, MAINTENANCE, AND FAILURE TO MAINTAIN THE MRGO.

On May 1, 2015, Judge Susan Braden held that, under the Tucker Act,¹⁵⁵ the United States was liable for violating the Fifth Amendment rights of owners of real property in Saint Bernard Parish and the Lower Ninth Ward of New Orleans.¹⁵⁶ She determined that the U.S. Army Corps' "construction, expansions, operation, and failure to maintain"¹⁵⁷ the MRGO increased the "surge" of Hurricanes

153. *Id.*

154. *See id.* at 721 ("The fact that the Army Corps was aware that the construction, expansions, operation, and failure to maintain the MR-GO caused adverse environmental impacts, and that those 'adverse impacts on the regional environment and ecology' could result in substantial increased storm surge during hurricanes and severe storms, is well documented in this record.").

155. The Tucker Act gives the Court of Federal Claims jurisdiction "to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1) (2011). To establish such a claim, the plaintiff must identify and plead a Constitutional provision that allots rights to money damages. *See Todd v. United States*, 386 F.3d 1091, 1093-94 (Fed. Cir. 2004).

156. *Saint Bernard Par. I*, 121 Fed. Cl. at 746 ("Plaintiffs established that the Army Corps' construction, expansions, operation, and failure to maintain the MR-GO caused subsequent storm surge that was exacerbated by a 'funnel' effect during Hurricane Katrina and subsequent hurricanes and severe storms, causing flooding on Plaintiffs' properties that effected a temporary taking under the Fifth Amendment. . .").

157. *Id.*

Katrina and Rita.¹⁵⁸ This surge flooded the plaintiffs' properties, due to a "funnel effect" created by MRGO.¹⁵⁹

Braden held that under *Arkansas Game & Fish Commission v. United States*,¹⁶⁰ government floodings of properties were compensable under the Fifth Amendment as temporary takings, provided that the plaintiffs established that they owned protectable property interests under state law, that the character of their property and their "reasonable-investment backed expectations" supported the claim, that there was causation, and that the taking was substantial.¹⁶¹

Judge Braden held that all of these requirements for a temporary taking were fulfilled, since the plaintiffs owned destroyed residences in Saint Bernard Parish or the Lower Ninth Ward,¹⁶² and so possessed investment-backed expectations in their property.¹⁶³ She also lavished attention on the foreseeability of the harm threatened by the construction, expansions, operation, and failure to maintain the MRGO,¹⁶⁴ which exacerbated salinity and related wetlands loss,¹⁶⁵ soil erosion,¹⁶⁶ and storm surge caused by the funnel effect.¹⁶⁷ She additionally wrote about the warnings issued by the St. Bernard Tidal Channel Advisory

158. *Id.*

159. *Id.*

160. *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 32 (2012).

161. *See Saint Bernard Par. I*, 121 Fed. Cl. at 719 (citing *Ark. Game & Fish Comm'n*, 658 U.S at 34–35).

162. *Id.* at 716.

163. *Id.* at 720.

164. *Id.* at 717.

165. *Id.* at 720.

166. *Id.* at 691.

167. *Id.* at 723.

Committee,¹⁶⁸ the EPA,¹⁶⁹ and the Army Corps' own studies.¹⁷⁰ The realization of these hazards, she concluded, established cause.¹⁷¹ It should also be noted that Judge Braden did discuss the role of the LPV in the storm,¹⁷² observing that the LPV and the MRGO did not function well together to protect against flooding. Finally, Braden determined that the plaintiffs suffered "severe," and thus substantial, harm to their properties, which were flooded to such an extent that the owners could not reach the structures for a "significant" period of time after Katrina and Rita.¹⁷³

"[T]he MRGO induced substantially increased storm surge that caused catastrophic flooding on private property—as well as the loss of human life," Judge Braden observed when she concluded that the plaintiffs had made out their temporary takings claim.¹⁷⁴

168. *Id.* at 698 ("On September 3, 1957, the St. Bernard Tidal Channel Advisory Committee convened a meeting with the Army Corps to warn that the MR-GO 'will have adverse effects on the entire marsh area with consequent erosive action and the intrusion of high saline content water into areas normally fresh or only slightly [brackish].").

169. *Id.* at 706–07.

170. *Id.* at 700 ("By 1961, the Army Corps also was aware that larger storm surge could occur on the Gulf Coast, because of the shallow, broad shelf off that coast, and that '[s]torm surges may also be increased by a funneling effect in the converging estuaries.'").

171. *Id.* at 738 ("For these reasons, the court has determined that Plaintiffs established the Army Corps of Engineers' construction, expansions, operation, and failure to maintain the MR-GO caused a 'funnel effect' that exacerbated storm surge during Hurricane Katrina and subsequent hurricanes and severe storms.").

172. She marked the ill-fit between the Barrier Plan's structures and the MRGO, quoting at length from plaintiff's expert Dr. Kemp. *Id.* at 737 ("[A]ll of the LPV structures that breached were adjacent to some part of the MRGO project. . . . [T]hat breaching was initiated by the excess stress applied to LPV structures as a result of proximity to deep channels. . . . The LPV and MRGO projects were never explicitly integrated with each other.").

173. *Id.* at 746 ("There is no question that flooding on Plaintiffs' properties during Hurricane Katrina was severe. In addition, Plaintiffs established that their properties were flooded and that they had no ability to access or use their properties for a significant time period following Hurricanes Katrina and Rita.").

174. *Id.* at 747.

III. THE REVERSAL OF THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT

On April 20, 2018, the Court of Appeals for the Federal Circuit reversed Judge Braden.¹⁷⁵ In a brisk, 23-page opinion, Judge Timothy Dyk held that Braden had erred for two reasons: 1) Dyk reasoned that Braden had based her takings analysis on government *inaction*, but that takings could only be predicated on affirmative governmental conduct;¹⁷⁶ 2) Dyk also held that Braden’s causation analysis proved fatally flawed because it only considered the ways in which MRGO contributed to the flooding in the Lower Ninth Ward and Saint Bernard Parish, without analyzing whether the ameliorative effects of the Barrier Plan (that is, the LPV) had, in fact, placed the victims in a better position overall.¹⁷⁷

A. *Judge Dyk Determined That Governmental Takings Cannot Issue from “Inaction,” Which He Also Concluded Occurred in This Case*

The Court of Appeals’ first reason for reversing contained two parts: First, the Court held that Braden had relied upon government inaction (here, failing to maintain the MRGO) in her finding of a takings claim, and then it determined that the prevailing law on takings prevented a plaintiff victory on that theory.

1. Did the government only commit an omission and not an affirmative act?

Judge Dyk decided that *Saint Bernard Parish I* was reversible because Braden emphasized government

175. *St. Bernard Par. Gov’t v. United States (Saint Bernard Par. II)*, 887 F.3d 1354 (Fed. Cir. 2018).

176. *Id.* at 1357 (“We conclude that the government cannot be liable on a takings theory for inaction. . .”).

177. *See id.* (“[B]oth the plaintiffs and the Claims Court failed to apply the correct legal standard, which required that the causation analysis account for government flood control projects that reduced the risk of flooding. There was accordingly a failure of proof on a key legal issue. We reverse.”).

omission. This conclusion appears precarious, however: As noted above, Braden discussed the Army Corps' "construction, expansions, operation, and failure to maintain the MR-GO."¹⁷⁸ She repeatedly emphasized positive actions: She established how the MRGO's construction had been authorized in 1956 and built to its "full dimensions" in 1968.¹⁷⁹ She also noted that the government actively built some protection into the channel in the 1980s, though after a "delay" that "destroyed the banks" that would have helped to preserve critical levees; the results "added more fetch."¹⁸⁰

178. *Saint Bernard Par. I*, 121 Fed. Cl. at 738.

179. *Id.* at 691.

180.

Though the Corps eventually added foreshore protection in the 1980s, that delay allowed the channel to widen considerably, destroying the banks that would have helped to protect the nearby Reach 2 levee (in the Chalmette Area Unit) from front-side wave attack as well as loss of height. The increased channel width added more fetch as well, allowing for a more forceful frontal wave attack on the levee.

Id. at 692. In other ways, as well, Judge Dyk failed to acknowledge that Judge Braden's analysis pivoted on affirmative government conduct. For instance, when taking notice of evidence the causal connection between the MRGO and increased salinity in the surrounding area, Judge Braden wrote: "... Army Corps documents show that salinity increased substantially in the wetlands in and surrounding the New Orleans Polder after the Army Corps' *construction, expansion, operation, and failure to maintain the MR-GO*. They also show a significant decrease in salinity after the MR-GO was closed." *Id.* at 725 (emphasis added).

This is only one example of Judge Braden's focus on affirmative Army Corps conduct. Braden continued to use similar language throughout the opinion identifying the causal link between the Army Corps' conduct and the flooding, specifically targeting the Corps' "construction," "operation," "maintenance," and "expansion" of the MRGO:

On December 9, 2010, after Hurricane Katrina, the Army Corps issued a draft Environmental Impact Statement concluding that: The *construction, operation, and maintenance* of the MRGO caused the loss of approximately 24,610 acres and indirectly to an additional loss of 33,920 acres. Approximately 63,178 acres of land is estimated to have been lost in the study area from 1985 through 2010. Approximately 131,091 acres are projected to be lost between 2010 and 2065 within the study area.

Id. at 730 (emphasis added) (stating that the combination of erosion resulting

Nevertheless, Judge Dyk wrote that Braden's analysis was tantamount to basing liability "in large part on the failure of the government to take action, particularly on its failure to maintain MRGO or to modify it."¹⁸¹ Judge Dyk also observed that each of Braden's causation analyses mentioned a "causal link to the 'failure to maintain' MRGO."¹⁸² "Thus, the government's failure to properly maintain or to modify the banks played a significant role in plaintiffs' takings theory and the Claims Court's analysis," Judge Dyk wrote.¹⁸³

2. Judge Dyk determined that government "inaction" could not give rise to a takings claim.

Dyk engaged in disputable readings of several cases when determining that "inaction" could not give rise to a cognizable takings claim. "A property loss compensable as a taking only results when the asserted invasion is the direct, natural, or probable result of authorized government action," he asserted,¹⁸⁴ citing the 1924 Supreme Court opinion of *Sanguinetti v. United States*.¹⁸⁵

from the Army Corps' *authorized expansions* and continued ship wave erosion played an "important role in the propagation of the astronomical tide wave and in the flux of more saline water from Lake Borgne/Brenton Sound into Lake Pontchartrain via the [INHC]"); *id.* at 733 ("A 2010 Army Corps draft environmental impact statement also reported that: *Construction and maintenance* of the MRGO caused widespread wetland loss and damages to estuarine habitats from the outer marshes in Breton Sound to the swamps and tidal fresh marsh in the western reaches of the Lake Borgne basin.") (emphasis added); *id.* at 738 ("Plaintiffs established the Army Corps of Engineers' *construction, expansions, operation,* and failure to maintain the MR-GO caused a 'funnel effect' that exacerbated storm surge during Hurricane Katrina and subsequent hurricanes and severe storms.") (emphasis added). Thus, Braden did not rest her causation finding primarily or even substantially on Army Corps omissions, but rather identified the government's many types of affirmative conduct as causes of the tragedy of 2005.

181. *Saint Bernard Par. II*, 887 F.3d at 1360 (citing *Saint Bernard Par. I*, 121 Fed. Cl. at 730).

182. *Id.* at 1360 (citing *Saint Bernard Par. I*, 121 Fed. Cl. at 726, 729, 731, 733, 738).

183. *Id.*

184. *Id.*

185. *See id.* (citing *Sanguinetti v. United States*, 264 U.S. 146, 149–50 (1924)).

Does *Sanguinetti* require an affirmative act for a takings claim? That case, like *Saint Bernard Parish*, involved flooding.¹⁸⁶ There, plaintiff's land was close to two waterways, the Mormon slough and the Calaveras river.¹⁸⁷ These waterways, during heavy season, had been known to flood the plaintiff's property, which lay between them.¹⁸⁸ During periods of "high water," navigable channels would become unpassable, and thus Congress authorized the construction of a canal so that Mormon slough's overflow would dump into the Calaveras river.¹⁸⁹ Government engineers built the canal upon land acquired by the federal government.¹⁹⁰ They placed a diversion dam in the slough to dispose of the material.¹⁹¹ They completed the canal in 1910, and in 1911 there was a severe flood; recurrent, lesser floods also occurred in all later years except for 1912 and 1913.¹⁹² The waters invaded and injured the plaintiff's property, and the plaintiff made a takings claim.¹⁹³

The *Sanguinetti* Court demurred. It held that, for there to be a taking, "it is, at least, necessary that the overflow be the direct result of the structure,"¹⁹⁴ but—importantly—did not pivot its holding on government inaction vs. positive action (as *Saint Bernard Parish II* indicates that it did).¹⁹⁵ Rather, the *Sanguinetti* court held that such direct proofs could not be made because "[p]rior to the construction of the canal the land had been subject to the same periodical

186. *Sanguinetti* at 147.

187. *Id.* at 146.

188. *Id.*

189. *Id.* at 146–47.

190. *Id.* at 147.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.* at 149.

195. See *St. Bernard Par. Gov't v. United States (Saint Bernard Par. II)*, 887 F.3d 1354, 1360 (Fed. Cir. 2018)(citing *Sanguinetti*, 264 U.S. at 149–50).

overflow. If the amount or severity thereof was increased by reason of the canal, the extent of the increase is purely conjectural.”¹⁹⁶ Thus, the plaintiff’s problem in *Sanguinetti* does not skew along the lines of positive act vs. commission, but rather stumbled on the fact that the canal’s role in increasing the severity of flooding proved only speculative.

Judge Dyk also cited the Federal Circuit’s own 2003 decision *Ridge Line, Inc. v. United States* for the proposition that only affirmative governmental behavior, and not omission, could give rise to takings.¹⁹⁷ There, the Circuit reversed a Court of Federal Claims determination that the West Virginia-based federal Post Office’s construction of a facility and parking lots, which plaintiffs claimed diverted waters onto and damaged their property, could not constitute a taking.¹⁹⁸ The *Ridge Line* court reversed because the lower court had not considered “whether the increased storm drainage constituted a taking of a flowage easement by inverse condemnation.”¹⁹⁹ Thus, *Ridge Line* is not a case where a plaintiff loses because she depended upon an omissions theory—instead, it holds that the lower court erred in failing to consider whether increased storm draining *did* constitute a taking. Judge Dyk leaned on²⁰⁰ *Ridge Court* because it counseled that, on remand, plaintiff’s success depended upon a conclusion that the taking “only result[ed] . . . [from] the ‘direct, natural, or probable result of an authorized activity and not the incidental or

196. *Sanguinetti*, 264 U.S. at 149.

197. See *Saint Bernard Par. II*, 887 F.3d at 1360 (citing *Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1355 (Fed. Cir. 2003)).

198. *Ridge Line*, 346 F.3d at 1350 (“[W]e vacate the trial court’s judgment and remand for further analysis and decision consistent with this opinion.”).

199. *Id.*

200. While the theory that the government failed to maintain or modify a government constructed project may state a tort claim, it does not state a takings claim. A property loss is compensable as a taking only results when the asserted invasion is the direct, natural, or probable result of authorized government action. See *Saint Bernard Parish II*, 887 F.3d at 1360 (citing *Sanguinetti*, 264 U.S. at 149–50; *Ridge Line*, 346 F.3d at 1355).

consequential injury inflicted by the action,” quoting a Court of Federal Claims case called *Columbia Basin Orchard v. United States*.²⁰¹

Columbia Basin involved the Bureau of Reclamation’s creation of a storage reservoir by sinking a shaft into a waterway west of one Orchard Lake, which stood about four miles away from a spring that the plaintiff used to irrigate his orchard.²⁰² The water pumped from the shaft doused into Orchard Lake,²⁰³ and in 1940 Orchard Lake overflowed into the plaintiff’s spring, after two years of unusually heavy rainfall and snow melt.²⁰⁴ The lake water introduced salts and alkali into the spring, which the Bureau attempted to fix by erecting a dike around the spring,²⁰⁵ but this didn’t work, and the waters continued to be contaminated until May 1940.²⁰⁶ As the *Ridge Line* court observed when relying on *Columbia Basin*, the *Columbia Basin* court cited the rule that “[t]o constitute a taking, the overflow of or seepage into the spring must have been the direct, natural or probable result of an authorized activity and not the incidental or consequential injury inflicted by the action.”²⁰⁷ However, just as in *Sanguinetti*, *Columbia Basin* did *not* hold that the takings claim failed because the government had omitted to act—instead, it held that the plaintiffs had failed to prove that the dike constituted a substantial-enough cause of the overflow and contamination: In lieu of the dike, the heavy rains were the culprit.²⁰⁸ Nevertheless, in Judge Dyk’s

201. *Ridge Line* 346 F.3d at 1355 (quoting *Columbia Basin Orchard v. United States*, 132 F. Supp. 707, 709 (Ct. Cl. 1955)).

202. *Columbia Basin Orchard*, 132 F. Supp. at 708.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.* at 709.

207. *Id.*

208. *See id.* (“Plainly, the discharge of this water from the Ankeny Shaft would not have caused Orchard Lake to overflow the spring, except for the unprecedented rainfall. It is, therefore, impossible to say that the flooding of the

opinion, *Sanguinetti*, *Ridge Line*, and *Columbia Basin* were all transformed into authorities forbidding takings claims where there is inaction.²⁰⁹

Besides *Sanguinetti*, Judge Dyk also depended on two other Supreme Court cases, *Arkansas Game & Fishing Commission v. United States*²¹⁰ and *United States v. Spontenbarger*.²¹¹ Judge Dyk characterized *Arkansas Game* as pivoting on the “affirmative actions by the government in releasing water from a government constructed and operated dam that caused downstream flooding on the plaintiff’s property.”²¹² The facts of *Arkansas Game*, however, are not that stark: the case arose because in 1948, when the Army Corps of Engineers constructed a dam in a management area owned by the Arkansas Department of Game and Fish,²¹³ it also adopted a plan known as the Water Control Manual, which set the rates at which the Dam would release water.²¹⁴ In 1993, farmers began to complain to the Corps, which responded by releasing water from the Dam “at a slower rate than usual, providing downstream farmers with a longer harvest time.”²¹⁵ It also extended the period in which higher levels of water would be released.²¹⁶ This led to downstream flooding in the management area during its tree growing season, harming the trees and the land.²¹⁷ The Court determined that a temporary taking had been established.²¹⁸

spring or seepage into it, was the natural or probable consequence of the discharge of the waters from the shaft into the lake.”).

209. See *supra* text accompanying notes 195–209.

210. *Saint Bernard Par. Gov’t v. United States (Saint Bernard Par. II)*, 887 F.3d 1354, 1361 (Fed. Cir. 2018).

211. *Id.*

212. *Id.*

213. *Ark. Game & Fish Comm’n v. United States*, 568 U.S. 23, 27 (2012).

214. *Id.*

215. *Id.* at 27–28.

216. *Id.* at 28.

217. *Id.*

218. See *id.* at 34 (“Because government-induced flooding can constitute a

Why? Because of “affirmative acts,” or, instead, omissions in the forms of failures to take care? No: There is no hard omissions/commissions line drawn by *Arkansas Game and Fish*. As the Court there said:

If the Corps had released the water more rapidly in the fall of 1993, in accordance with the Manual and with past practice, there would have been short-term waves of flooding which would have receded quickly. The lower rate of release in the fall, however, extended the period of flooding well into the following spring and summer. While the deviation benefited farmers, it interfered with the Management Area’s tree-growing season.²¹⁹

As the quoted portion shows, the Corps’ acts could be construed as either an “affirmative act”—flooding—or failing to take care to prevent flooding, by failing to “release[] the water more rapidly in the fall of 1993.”²²⁰

And, finally, Judge Dyk’s reliance upon the 1939 decision of *United States v. Sponenbarger*²²¹ ignores its inapplicability to the facts of *Saint Bernard Parish*. In *Sponenbarger*, the Supreme Court declined a petitioner’s taking claim where her land, which rested in the alluvial valley of the Mississippi River, was only *threatened* with flooding because of diversions created by constructions authorized by the Mississippi Flood Control Act of 1928.²²² The Court there determined that “the program of improvement under the 1928 Act had not increased the immemorial danger of unpredictable major floods to which respondent’s land had always been subject,”²²³ and that if petitioner did suffer

taking of property, and because a taking need not be permanent to be compensable, our precedent indicates that government-induced flooding of limited duration may be compensable. No decision of this Court authorizes a blanket temporary-flooding exception to our Takings Clause jurisprudence, and we decline to create such an exception in this case.”).

219. *Id.* at 28.

220. *Id.*

221. *Saint Bernard Par. Gov’t v. United States (Saint Bernard Par. II)*, 887 F.3d 1354, 1361 (Fed. Cir. 2018).

222. *See United States v. Sponenbarger*, 308 U.S. 256, 260 (1939).

223. *Id.* at 265.

flooding that was not prevented by the government's flood control plan, the "Government [is not] a taker of all lands not fully and wholly protected. When undertaking to safeguard a large area from existing flood hazards, the Government does not owe compensation under the Fifth Amendment to every landowner which it fails to or cannot protect."²²⁴ Further, the Court observed that the petitioner only claimed to be at risk of greater flooding caused by the flood control measures, but that this had not yet come to pass. This, the Court said, could not constitute a taking: "[T]o hold the Government responsible for such floods would be to say that the Fifth Amendment requires the Government to pay a landowner for damages which may result from conjectural major floods"²²⁵

Sponenbarger does not apply to the facts of 2005, because the floods were not conjectural,²²⁶ and the Army Corps' construction, maintenance, expansion, and failure to maintain the MRGO caused a cluster of events that led to the disaster of Katrina in the form of erosion, salinity, and funnel effects.²²⁷ *Sponenbarger* involves a possible failure to save and a hypothetical increased risk of flooding. Neither scenario aligns with the devastation caused by MRGO in New Orleans in 2005.

Judge Dyk's reliance upon *Sanguinetti*, *Ridge Line*, *Arkansas Game*, and *Sponenbarger* for the proposition that governmental inaction cannot give rise to takings claims, then, ignores the facts of those cases and exploits the ambiguity of the oft-repeated test that takings require "authorized activity." Is "activity" only positive conduct, or standing by while government-propelled disaster strikes as well?

224. *Id.*

225. *Id.*

226. *See supra* text accompanying note 87 (extremely accurate predictions).

227. *See supra* text accompanying notes 84–87.

As we will see in Part V, Blights Out maintains that the government may wrongfully deprive people of their property through omissions. I will engage their legal thought when analyzing the rectitude of Judge Dyk's holding, while also addressing the ambiguities of *Sanguinetti*, *Ridge Line*, *Arkansas Game & Fish*, as well as jurisprudential authorities that weigh in favor of takings-by-omission.

For the time being, however, let us turn to the next basis for Judge Dyk's conclusion that Judge Braden had erred in *Saint Bernard I*: Dyk asserted that Braden had failed to consider the "totality of the government's actions,"²²⁸ and that the plaintiffs had failed to prove that the government had not put them in a better situation than they would have found themselves in in the absence of any government conduct at all.

B. *Judge Dyk Determined that Judge Braden's Causation Analysis Failed Because She Did Not Consider "the Totality of the Government's Actions," That Is, Whether the Ameliorative Effects of the Barrier Plan Put the Petitioners in a Better Position Than They Would Have Been Absent Any Governmental Conduct at All.*

Judge Dyk's reversal also rested on a conviction that Braden had failed to consider the "totality of the government's actions"²²⁹ when analyzing the takings claim, and that her error caused her to ignore the helpful efforts the government had engaged in to reduce flooding through the Barrier Plan.²³⁰ This oversight, Judge Dyk concluded, rendered her causation analysis void.

"[T]he plaintiffs have failed to establish that the construction or operation of MRGO caused their injury," Dyk

228. *Saint Bernard Par. Gov't v. United States (Saint Bernard Par. II)*, 887 F.3d 1354, 1365 (Fed. Cir. 2018).

229. *Id.*

230. *Id.* at 1364.

proclaimed.²³¹ A valid causation analysis, Dyk concluded, needed to consider “what would have occurred” if the government had not acted,²³² which Dyk determined the plaintiffs were unable to establish since they did not want the Barrier Plan’s effects weighed when considering whether MRGO caused the flooding.²³³ In a striking assessment, Dyk held that “[t]he result is that plaintiffs failed to take account of other government actions . . . that mitigated the impact of MRGO and may *well have placed the plaintiffs in a better position than if the government had taken no action at all.*”²³⁴ The burden for proving that the plaintiffs were not in a “better position” than they would have been if the government had simply done nothing, Dyk emphasized, belonged with the plaintiffs themselves.²³⁵

Dyk continued to criticize Braden and the plaintiffs for only considering the MRGO’s effects “in isolation.”²³⁶ And, citing cases such as *Arkansas Game*, he specified that the causation analysis must consider “all government actions,”²³⁷ and “other government actions.”²³⁸ He emphasized that in *Arkansas Game* the Court’s causation analysis considered not only the deviation of the waters, but also the construction of the dam.²³⁹ Dyk also cited

231. *Id.* at 1362.

232. *Id.* (quoting *United States v. Archer*, 241 U.S. 119, 132 (1916)).

233. *See id.* at 1363 (“Plaintiffs on appeal are clear that in their view the LPV levees cannot be considered in the causation analysis.”).

234. *Id.* (emphasis added).

235. *Id.* at 1362 (“It is well established that a takings plaintiff bears the burden of proof to establish that the government action caused the injury.”).

236. *See id.* at 1358 (“Plaintiffs made no effort to show that the combination of MRGO and the LPV levees caused more flooding than would have occurred without any government action, arguing that the court should limit its consideration to MRGO in isolation.”).

237. *Id.* at 1364 (citing *Ark. Game & Fish Comm’n v. United States*, 736 F.3d 1364, 1372 n.2 (Fed. Cir. 2013)).

238. *Id.* at 1363.

239. *Id.*; *see also Ark. Game & Fish Comm’n*, 736 F.3d at 1372 n.2 (“[T]he proper comparison would be between the flooding that occurred prior to the

Sponenbarger, which requires that takings claimants offer proofs that takings occurred within a government “*program measured in its entirety*”²⁴⁰—there, where the government “undert[ook] to safeguard a large area *from existing flood hazards*”²⁴¹ through “a comprehensive ten-year program for the entire valley”²⁴²

Plaintiffs, however, argued that the LPV/Barrier project was unrelated to the MRGO, because “the relevant beneficial government action must be part of the same project and that ‘[t]he Government cannot defeat Plaintiffs’ claim by pointing to benefits provided by the separate LPV project.’”²⁴³ Dyk was not impressed by Braden’s recognition of how the LPV and the MRGO were never integrated with each other and did not function together effectively to protect against flood.²⁴⁴ Instead, he held that the Barrier Plan and the LPV both constituted relevant, similar governmental conduct for the purposes of the causation analysis, because both were dedicated to stem “the risk of flooding” and “avoiding flooding damage.”²⁴⁵ Thus, he held, Braden had failed to take into

construction of Clearwater Dam and the flooding that occurred during the deviation period.”).

240. See *Saint Bernard Par. II*, 887 F.3d at 1364 (citing *United States v. Sponenbarger*, 308 U.S. 266, 266–67, (2018)(emphasis added).

241. See *Sponenbarger*, 308 U.S. at 265 (emphasis added).

242. *Id.* at 262. Dyk also cited *John B. Hardwicke Co. v. United States*, 467 F.2d 488 (Ct. Cl. 1972), where the Court of Claims considered the building of two dams when considering whether there was a taking. See *Saint Bernard Par. II*, 887 F.3d at 1364.

243. *Saint Bernard Par. II*, 887 F.3d at 1365.

244. See *Saint Bernard Par. Gov’t v. United States (Saint Bernard Par. I)*, 121 Fed. Cl. 687, 737 (2015) (“The LPV and MRGO projects were never explicitly integrated with each other though they occupied the same landscape. . . . [and that there was] no evidence that the MRGO project was ever modified to reduce the predictable excess surge stresses and wave attack caused by the encroachment of the channels on LPV structures, or, alternatively, that the LPV structures were bolstered in any way to withstand the obviously increasing threat.”).

245. See *Saint Bernard Par. II*, 887 F.3d at 1365 (“Here, there is no question that the LPV project was directed to decreasing the very flood risk that the plaintiffs allege was increased by the MRGO project. The LPV project was

consideration all governmental conduct related to flooding, that is, whether the “totality of the government’s actions caused the injury,”²⁴⁶ and thus there remained an open question of whether the government had left the plaintiffs in a better position.

In Part V, I show how *Blight’s Out’s* art gives us new information on how to construe the “totality of the government’s actions” as it relates to Katrina’s “flooding” “risk” and “damage,” which challenges Dyk’s conclusion that Braden’s causation analysis proved a nullity. I detail how *Blight’s Out* artists’ work makes the case that the government has *not* left the people of New Orleans better off than if it had not acted at all, and that this perspective interacts powerfully with existing law on takings causation.

In the next Part, however, I will first attend to the question of how and whether *Blight’s Out’s* art pertains in any relevant way to the constitutional takings law. Based on existing jurisprudence, I conclude that it does.

directly concerned with flood control; it was authorized under the Flood Control Act of 1965. *See* Pub. L. No. 89-298, 79 Stat. 1073, 1077 (1965). The LPV project included levees along the banks of MRGO, and the construction of the levees used some of the material dredged from MRGO. The levees built under the LPV project decreased the risk of flooding in the area, including on plaintiffs’ properties. Avoiding flooding damage was the very objective of the system of levees.”).

246. *Id.*

IV. DEMOSPRUDENCE, POPULAR CONSTITUTIONALISM, AND
COMMUNITY CONSTITUTIONALISM

What authority grants us the right to consider the art of Blights Out when critiquing Judge Dyk's opinion in *Saint Bernard Parish II*? Several precedents, happily, come to our aid: this Article exists in a lengthy tradition of jurisprudence that recognizes the role of non-lawyers in the creation of constitutional and other legal meaning.²⁴⁷

Beginning in the 1980s, social movement scholars, legal anthropologists, and close observers of property "outlaws" and marginalized people began to incorporate alternative understandings of law into legal discourse. Renown popular constitutionalism theorists Jack Balkin,²⁴⁸ Reva Siegel,²⁴⁹ and Robert Post²⁵⁰ demonstrated in the early 2000s how social movements—for example, the suffragist movement of the 19th century, the 20th century's National Organization of Women's ERA activists, and 20th century pro-life agitators—changed interpretations of the Establishment and Equal Protection clauses.²⁵¹ Proponents succeeded particularly

247. See *infra* text accompanying notes 249–72.

248. Professor Balkin is famous for his theories of popular constitutionalism. See, e.g., Lee J. Strang, *Originalism As Popular Constitutionalism?: Theoretical Possibilities and Practical Differences*, 87 NOTRE DAME L. REV. 253, 261 (2011) ("According to Balkin, fidelity to the Constitution requires interpreters to adhere to its text's original meaning and the principles underlying that meaning. However, the Constitution's original meaning and principles will regularly not determine the outcome of constitutional issues, making them subject to constitutional construction. It is in this zone of construction that popular constitutionalism takes over and constructs meaning.").

249. Siegel, in her work with Robert Post, helps define democratic constitutionalism, which affirms the role of "representative government and mobilized citizens in enforcing the Constitution at the same time as it affirms the role of courts in using professional legal reason to interpret the Constitution." See Reva Siegel & Robert Post, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 379 (2007).

250. *Id.*

251. See *id.*; see also Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 SUFFOLK U. L. REV. 27, 57–58 (2005) [hereinafter Balkin, *How Social Movements Change*]; see also Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and*

where they possessed friends in “high places”²⁵² and their claims did not seem “off the wall,” in Balkin’s famous phrasing.²⁵³

Relatedly, Lani Guinier and Gerald Torres study *Demosprudence*, the term that accounts for how social mobilizations can “contribute to the meaning of law.”²⁵⁴ In Guinier’s article *Courting the People: Demosprudence and the Law/Politics Divide*, Guinier cites the importance of “role-literate participants,” such as Dr. Martin Luther King, Jr., who remade voting rights and accommodations law by leading social protests.²⁵⁵ Guinier and Torres also study how the growth of civil and constitutional rights depend upon “ordinary men and women on the ground,” such as the participants in the Freedom Summer.²⁵⁶ In addition, scholar

Constitutional Change: The Case of the de Facto ERA, 94 CALIF. L. REV. 1323, 1331 (2006) (“ERA debate guided the Court. . .”).

252. Balkin, *How Social Movements Change*, *supra* note 251, at 57–58. (“To put it bluntly, when constitutional claims of social movements are presented before courts, it matters a great deal whether the movement’s representatives have friends in high places, and in particular, on the federal bench. The more friends they have, the more likely they are to win. The fewer friends they have, the more likely they are to lose.”).

253. Balkin, “*Wrong the Day it Was Decided*,” *supra* note 38, at 679 (“[C]onventions determining what is a good or bad legal argument about the Constitution, what is a plausible legal claim, and what is ‘off-the-wall’ change over time in response to changing social, political, and historical conditions.”).

254. Lani Guinier, *Courting the People: Demosprudence and the Law/Politics Divide*, 89 B.U. L. REV. 539, 545 (2009).

255. *Id.* at 550. In her groundbreaking work on dissenting opinions and demosprudence, Professor Guinier “offers concrete examples in which oral dissents apparently mobilized citizens and lent authority to their efforts at social change and law reform.” Linda C. McClain, *Supreme Court Justices, Empathy, and Social Change: A Comment on Lani Guinier’s Demosprudence Through Dissent*, 89 B.U. L. REV. 589, 590 (2009).

256. Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2799 (2014). Professor Torres is recognized as co-creating the language required to recognize popular constitutionalism. See Stacey L. Sobel, *Culture Shifting at Warp Speed: How the Law, Public Engagement, and Will & Grace Led to Social Change for LGBT People*, 89 ST. JOHN’S L. REV. 143, 152 (2015) (“Torres and Guinier developed the concept of demosprudence, or the jurisprudence of social movements. . .”).

Mark Tushnet imagines a “populist constitutional[ism]”²⁵⁷ and Larry Kramer approves of popular resistance to an “overly assertive” Court.²⁵⁸

In my own work, I have engaged the voices of community in an effort to understand the legal thought of disenfranchised people.²⁵⁹ I describe this as community constitutionalism that is of a piece with popular and demosprudential constitutionalism, though it embeds in specific communities and often focuses on unheard people, not charismatic leaders or social movement agitators.²⁶⁰ In this engagement, I have interviewed people in Boyle Heights,²⁶¹ Manhattanville,²⁶² and Detroit²⁶³ about property insecurity and their interpretations of the Fifth

257. MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 174 (1999). Professor Tushnet is celebrated as a populist and an interdisciplinary scholar. See Mark A. Graber, *Thick and Thin: Interdisciplinary Conversations on Populism, Law, Political Science, and Constitutional Change*, 90 GEO. L.J. 233, 235 (2001) (“Professor Tushnet is celebrated in the portion of the academic universe inhabited by PhDs interested in constitutional development as the most distinguished law professor actively promoting conversations between law professors and members of other academic disciplines.”).

258. LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 249 (2004). Professor Kramer is one of the most influential theorists of popular constitutionalism. See Michael Serota, *Popular Constitutional Interpretation*, 44 CONN. L. REV. 1637, 1644 (2012) (“Arguably, no theorist has been more influential in guiding the debate than Larry Kramer.”).

259. See, e.g., Murray, *The Takings Clause of Boyle Heights*, *supra* note 34, at 125 (“I call their legal thought a form of Community Constitutionalism, and in the following sections, seek to introduce it to mainstream constitutional thought.”).

260. See *id.* at 142 (“To the extent that people in Boyle Heights did not broadcast their visions of takings and constitutional rights in advertised actions, but rather lived out these principles in their minds and in their everyday lives, their contributions differ from the protest models described by some of the most famous constitutionalists and demosprudes. . .”).

261. *Id.*

262. Yxta Maya Murray, *Peering*, 22 GEO. J. ON POVERTY L. & POL’Y 249, 298 (2015).

263. Yxta Maya Murray, *Detroit Looks Toward a Massive, Unconstitutional Blight Condemnation: The Optics of Eminent Domain in Motor City*, 23 GEO. J. ON POVERTY L. & POL’Y 395, 400 (2016).

Amendment's Takings Clause. I have also interviewed victims of Hurricane Maria in Puerto Rico about their understandings of Equal Protection in the wake of FEMA's failures to provide adequate disaster relief to survivors there.²⁶⁴ Part of the impetus for this work is my recognition that people who suffer directly the loss of housing or other fundamental goods have a privileged understanding of the real-world workings of constitutional rights as they exist on the ground. Their community legal thought, then, should provide a powerful and persuasive influence on jurisprudence if we believe that this intimate experience with inequality deserves "recognition and acceptance."²⁶⁵

Importantly for this article, I have also engaged artists in demosprudential ventures: As one example, I have studied the art of Turkish-British rape survivor Tracey Emin.²⁶⁶ In *Rape Trauma Syndrome and the Art of Tracey Emin*, I analyzed Emin's art about her rape, and its observations of how the state failed to support her in its aftermath, to leverage my case of rape law reform.²⁶⁷ Further, I have studied the protest art of Latinos in Arizona, who reacted to Arizona's Latino-scapegoating Support Our Law Enforcement and Safe Neighborhoods Act (SB 1070); I engaged the images used in that art in an argument against 1070's constitutionality.²⁶⁸ It is important to note that I am not the first to study art in the demosprudential project: Guinier and Torres, too, describe interactions among Latino farmworkers involved in Luis Valdes's *Teatro Campesino* in

264. See Yxta Maya Murray, "*FEMA Has Been a Nightmare:*," *Epistemic Injustice in Puerto Rico*, 55 WILLAMETTE L. REV. 321, 347–59 (2019).

265. Frank Michelman, *Parsing "A Right to Have Rights,"* 3 CONSTELLATIONS 200, 203 (1996) ("[T]he having of rights depends on receipt of a special sort of social recognition and acceptance—that is, of one's juridical status within some particular concrete political community.").

266. Murray, *Rape Trauma*, *supra* note 36, at 1631.

267. *Id.* at 1694 (describing women's "divorce from the state.").

268. Yxta Maya Murray, *Inflammatory Statehood*, 30 HARV. J. RACIAL & ETHNIC JUST. 227, 227–28, 280 (2014) (describing art and engaging the art in the equal protection argument).

their analysis of the birth and development of rights-thought in 1960s California.²⁶⁹ As this work shows, the art of marginalized people provides a key resource for constitutional interpretation, as it conveys the “buried experience” of marginalized people, which courts may not understand.²⁷⁰ Further, art communicates those experiences in ways resonant with emotion, which may contribute to their “intelligent and responsible engagement by law.”²⁷¹

In this Article, I study the work of Blights Out in relationship to the question presented in the *Saint Bernard Parish* lawsuit. This project coheres with existing traditions of rights jurisprudence: It “contribute[s] to the meaning of law”²⁷² by offering the emotionally cathartic²⁷³ yet heretofore buried²⁷⁴ experiences of people of color who know best what it means to be deprived of housing in New Orleans post-Katrina. Blights Out artists are role-literate agitators²⁷⁵ who disclose alternative interpretations of legal concepts relevant to *Saint Bernard Parish I* and *II*. As the reader has already seen, I also interweave my analysis of Blights Out’s art with interviews with the artists,²⁷⁶ as well as one New Orleans resident who is not an artist, nor an activist, but experienced

269. Guinier & Torres, *supra* note 256, at 2793, the authors describe “audience participation” in political theater that gave workers a “sense of agency.” This seems a personal processing of rights understanding.

270. Murray, *Rape Trauma*, *supra* note 36, at 1636.

271. Kathryn Abrams & Hila Keren, *Who’s Afraid of Law and the Emotions?*, 94 MINN. L. REV. 1997, 2000 (2010).

272. Lani Guinier, *Courting the People: Demosprudence and the Law/Politics Divide*, 89 B.U. L. REV. 539, 545 (2009) [hereinafter *Courting the People*].

273. Abrams & Keren, *supra* note 271, at 2000.

274. Murray, *Rape Trauma*, *supra* note 36, at 1636.

275. See *Courting the People*, *supra* note 272, at 550. See also Linda C. McClain, *Supreme Court Justices, Empathy, and Social Change: A Comment on Lani Guinier’s Demosprudence Through Dissent*, 89 B.U. L. REV. 589, 590 (2009) (“Professor Guinier offers concrete examples in which oral dissents apparently mobilized citizens and lent authority to their efforts at social change and law reform.”).

276. See, e.g., Interview with Carl Joe Williams, *supra* note 151.

the storm and its aftermath first-hand.²⁷⁷

In the next Part, I will examine Blights Out artists' readings of the omission/commission distinction and the "totality" test cited by Judge Dyk, and see whether their alternative interpretations of those concepts pass the "on the wall" test of Jack Balkin.²⁷⁸ I will then see how Blights Out's artistic and community jurisprudence applies to the quandary of whether the federal government took property in 2005, in the events surrounding Hurricane Katrina.

V. THE ART AND LEGAL THOUGHT OF BLIGHTS OUT

The art-activists Imani Jacqueline Brown, Mariama Eversley, Byran C. Lee, Jr., Lisa Sigal, Sue Press, and Carl Joe Williams²⁷⁹ deploy a wildly creative and multi-pronged approach to resisting housing deprivation created by state forces. Their work takes a wide view of property loss. Blights Out argues that Katrina forms just one trauma point in a lengthy and wrongful redistribution of property, which the government promoted by both actively and passively supporting neoliberal forces that gentrified New Orleans thirteen years after the storm.²⁸⁰

277. See *infra* text accompanying note 492.

278. Balkin, "Wrong the Day it Was Decided," *supra* note 38.

279. See *supra* notes 9–13.

280. See *infra* text accompanying note 365. Blights Out is certainly not alone in linking Katrina to dispossession created by gentrification. In 2006, Berkeley City Planning graduate students Brendan Nee and Jed Horne initiated "NOLAplans" to provide the community links to final planning documents and to also collect feedback from the community about rebuilding plans post-Katrina. See Citywide Strategic Recovery and Rebuilding Plan, THE UNIFIED NEW ORLEANS PLAN, <https://nolaplans.com/about/> (last visited Nov. 9, 2019). In their report *City of New Orleans: 6th Ward/Treme/Lafitte Neighborhood*, they write: "The vision starts with residents participating actively in the planning process, and then contributing to its success through their involvement in the physical improvements. A vision of rebuilding the neighborhood 'better than it was' brings concern that many in the neighborhood will be displaced through gentrification.", Citywide Strategic Recovery and Rebuilding Plan, THE UNIFIED NEW ORLEANS PLAN, https://nolaplans.com/plans/Lambert%20Final/District_4_Final_TremeLafitte6thWard.pdf (last visited Nov. 9, 2019).

Here, I will focus on four of Blights Out's interventions, which include its 2014 *Home Court Crawl* action,²⁸¹ its 2015 *Live Action Painting* happening,²⁸² and its 2016 and 2017 "runs" for Mayor²⁸³ and President.²⁸⁴ These works, individually and together, make a causation argument and also characterize the appropriate "totality of government actions" to be considered. Respectively, Blights Out artists assert that the government has deprived people of color in New Orleans of property through acts of omission, and also maintains that the frame of reference for this taking includes not only the direct events of Katrina but also later government failures to protect the community against unfettered disaster capitalism.

A. Home Court Crawl (2014)

In December of 2014, Brown, Eversley, Lee, Sigal, Press, and Williams initiated Blights Out on the eve of the 10-year anniversary of Hurricane Katrina with its *Home Court Crawl*.²⁸⁵ This engagement involved printing text in Tyvek paint onto the façades of blighted properties in New Orleans.²⁸⁶ These phrases consisted of stage directions and lines of dialogue from *Burn*, one of the plays in *365 Days/365 Plays*, an intriguing and sprawling work by Suzanne Lori-Parks²⁸⁷ whose main purpose in its writing was to

281. See *infra* Section A of this Part.

282. See *infra* Section B of this Part.

283. See *infra* Section C of this Part.

284. See *infra* Section D of this Part.

285. *Projects, Home Court Crawl*, BLIGHTS OUT, <http://www.blightsout.org/projects> (last visited Nov. 9, 2019) ("In December 2014, Blights Out activated Home Court Crawl (HCC) with a porch crawl/ roving performance . . . In retrospect, we see HCC as the beginning of Blights Out, despite the prior 6 months of organizing.").

286. See *id.* (describing materials used).

287. See *id.* (describing influence of Parks). Suzanne Lori-Parks is not a member of the collective.

“reveal community where it already exists.”²⁸⁸ *Burn* is a micro play, which follows the conversation of a Woman and a Man, who are watching an unnamed structure catch fire:

Man: Its burning.

Woman: Mmm.

Man: Why didn't you tell me?

Woman: You didn't smell it?

Man:—My cold.

Woman: I forgot.

Man: You think it'll burn to the ground?

Woman: God willing.

Man: Theyre trying pretty hard to put it out.

Woman: And then we'll have the ruin of it to look at. That'll really suck.²⁸⁹

The play ends with the lines: “The fire, in answer to their prayers, does pick up somewhat. But it gets put out before the structure can completely burn, and the rest of their lives are lived out in the shadow of the ruins.”²⁹⁰

In *Home Court Crawl*, community members read these lines out loud in front of the blighted buildings, and also gave talks about blight and housing insecurity, recited poetry, and enjoyed communal feasting.²⁹¹ In addition, a brass band wove through the properties, leading the community members in a singing and dancing variation of New Orleans' famous “second line” parades,²⁹² which are descended from the city's jazz funerals and church worship.²⁹³ Web images of

288. John Moore, *365 Days . . . 365 Plays*, THE DENVER POST (Nov. 10, 2006), <https://www.denverpost.com/2006/11/10/365-days-365-plays/>.

289. SUZANNE LORI-PARKS, *365 PLAYS/365 DAYS* 141–42 (2006).

290. *Id.* at 142.

291. Carl Joe Williams thus described the event to me. Interview with Carl Joe Williams, *supra* note 151.

292. *Id.* See also BLIGHTS OUT, *supra* note 5.

293. See RICHARD BRENT TURNER, *JAZZ RELIGION, THE SECOND LINE, AND BLACK NEW ORLEANS* 103 (2009) (quoting Jessie Charles) (“Second-line—that’s the life of parade and a funeral . . . Dancing in Sanctified churches is like the second-line.’ Thus the communal music, the African ancestral memory, and the trance-inducing worship style of the Sanctified Churches influenced second-liners in jazz funerals in Louis Armstrong’s youth in the early twentieth century.”).

Home Court Crawl reveal residents drumming, shouting, boogeying, and declaiming amongst the destroyed property.²⁹⁴ On its website, Blights Out describes the project as “perform[ing] architecture” by “engaging in a call-and-response with blighted homes, reading the architecture as text, riffing on the absurd state of the hollow structures, and energizing them with folly, rage, spirit, and joy.”²⁹⁵

In this work, Blights Out describes a loss of property in ways that are relevant to *Saint Bernard Parish*. They argue that such dispossession was caused by *government omission*, which must be understood as unfurling not only from the events of Katrina²⁹⁶ but also from later state failures to prevent gentrification that led to displacement.²⁹⁷ The collective performed a funeral²⁹⁸ for housing and a community deleted by government neglect. The lines from *Burn* clarify that the government’s failures to stop the “burning” of Katrina and to protect the community by rehousing them in safe, local domiciles after the storm caused people’s lives to be doomed by the shadow of

294. See BLIGHTS OUT, *supra* note 5.

295. *Id.*

296. Blights Out’s case that the state must be recognized as responsible for Katrina’s direct effects on housing security can be found in some of its founding documents, though this argument is obliquely stated. Blights Out was initiated through process of story circles that Blights Out organized in the community, see BLIGHTS OUT, *supra* note 61 (“On August 15, 2015, members of Blights Out—natives and newcomers—were asked to share one word to describe how they were feeling as the 10th Anniversary of Hurricane Katrina approached . . .”). In this process, they connected Katrina to a host of other government-sponsored forms of discrimination. See *id.* (“Katrina, and the changes that unfolded thereafter, were just fireworks at the climax of a long con: Slavery. Colonialism. Segregation. Desegregation. Disinvestment and Urban Renewal. The Claiborne Overpass. The displacement of people from their homelands; the elimination of public transportation; the closing and privatization of neighborhood schools; the indefinite isolation of individuals within prison cells; in some neighborhoods—working class neighborhoods of color, that is—one out of three businesses and one out of four homes linger vacant, ghostly.”).

297. See *supra* text accompanying note 20.

298. See TURNER, *supra* note 293.

“ruin[].”²⁹⁹

Furthermore, Blights Out’s artists regard many factors as relevant in this causation analysis. Their engagement emphasized not only the people’s lingering pain but also their persistent resistance or resilience, since they were feeding each other, communing with one another, dancing with one another, and playing each other songs in a revisionist funeral. This is important from the perspective of a takings analysis, because *Home Court Crawl* occurred nine years after Katrina, and five years after Judge Braden determined that the temporary taking, caused by MRGO, had ceased.³⁰⁰ *Home Court Crawl* reveals that the taking did not just occur during Hurricane Katrina, but also continued to the present day (that is, 2014), when the people “have the ruin of it to look at.”³⁰¹ This “ruin” consists of the ever-degrading properties that deprive communities of color and other vulnerable populations of their senses of home,³⁰² and simultaneously set the stage for the ever-escalating

299. See PARKS, *supra* note 289.

300. Braden determined that the taking ceased in 2009, after the Army Corps closed down the MRGO. “In this case, the common question determined by the court was whether the Army Corps’ construction, expansions, operation, and failure to maintain the MR–GO caused increased storm surge flooding in St. Bernard Parish and the Lower Ninth Ward during Hurricane Katrina as well as “inevitably recurring” flooding during subsequent hurricanes and severe storms, effecting a temporary taking of Plaintiffs’ properties until the MR–GO was permanently closed in July 2009.” St. Bernard Par. Gov’t v. United States, 126 Fed. Cl. 707, 735 (2016).

301. See PARKS, *supra* note 289.

302. In this way, Blights Out’s takings claim rests not only on accusations of gentrification, but also on the government’s failure to rebuild dilapidated homes, which create psychological corrosion. The emotional basis of Blights Out’s takings argument resembles those I have seen in other communities, such as Boyle Heights, California, where residents complained that gentrification gave them a sense of anxiety and a feeling of being ‘surrounded.’ See Murray, *The Taking Clause of Boyle Heights*, *supra* note 162 (“A.’s description of being “surrounded” speaks of a fear of incipient invasion—that is, occupation. It may also qualify as a de facto psychological occupation of land, where the specter of gentrifiers proves so anxiety-producing that its influence floods into Boyle Heights and permanently invades it.”).

acquisition and gentrification that Blights Out fights.³⁰³ Thus, the “totality” of government conduct that Blights Out considered relevant when analyzing wrongful property dispossession encompasses a plethora of government omissions tracking from 2005 to 2014, which have devastated New Orleans’ vulnerable populations.

B. Live Action Painting (2015)

In May of 2015, in connection with Blights Out, local artists Katrina Andry, Ron Bechet, Amy Bryant, Jer’Lisa Devezin, Keith Duncan, Horton Humble, and Varion Laurent set up easels in front of blighted houses in New Orleans’ Mid-City and Tremé neighborhoods³⁰⁴ and began to paint them.³⁰⁵ All of the artists were of color,³⁰⁶ and the event went unaccompanied by any press releases or media notification.³⁰⁷ The live action painting followed the City of New Orleans’ decision to place houses up for auction or

303. See, e.g., BLIGHTS OUT, *supra* note 1. (describing “ecological apartheid”); see also Interview with Carl Joe Williams, *supra* note 151 (regarding Blights Out’s resistance of auctioning and gentrification); *infra* text accompanying note 308; Benjamin Alexander-Bloch, *St. Bernard Parish to Auction 151 Properties Bought By Road Home*, NOLA.COM (Oct. 3, 2014, 11:34 PM), https://www.nola.com/politics/index.ssf/2014/10/st_bernard_parish_to_auction_1_1.html (“The state initially acquired about 4,464 lots in St. Bernard under the Road Home program from homeowners who decided not to rebuild after Hurricane Katrina. The Louisiana Land Trust in turn sold about half of those lots to neighboring property owners, in what was dubbed the Lot Next Door program.”); see also Michelle Krupa, *Brisk Sales Of Abandoned Properties At Recent New Orleans Redevelopment Authority Auction*, NOLA.COM (Apr. 12, 2011, 9:44 PM), https://www.nola.com/politics/2011/04/brisk_sales_of_abandoned_prope.html (“Since Katrina, NORA has disposed of about 1,250 properties, with purchase agreements pending on about 600 more, Sathe said. In all, about 800 parcels have been bought by neighbors through the Lot Next Door program, which gives neighbors dibs on adjacent lots.”).

304. See Rosemary Reyes, *Connecting Intentionally: The Beginning of Blights Out*, PELICAN BOMB (Jan. 13, 2016), <http://pelicanbomb.com/art-review/2016/connecting-intentionally-the-beginning-of-blights-out> (giving locations).

305. BLIGHTS OUT, *supra* note 8 (last visited Nov. 9, 2019).

306. *Id.*

307. *Id.*

otherwise sell them.³⁰⁸ “[H]ousing rights advocates and neighbors alike feared that the auction would lead to a land grab and bloodletting of rapidly gentrifying neighborhoods like New Orleans’ historic 6th Ward,” Blights Out noted on its web page.³⁰⁹ The collective regarded the plein air painting (that is, painting outside³¹⁰) as a “protest.”³¹¹ Equipped with their canvases, papers, charcoals, watercolors, and pencils, Blights Out artists quietly sketched and painted the houses that had been left crumbling since Katrina, and tried to make contact with the Sixth Ward’s changing population. The artist-activists felt as if their goals fell somewhat short on this last count, though they did engage with a local woman named Miss Sue. As Carl Joe Williams explained:

Miss Sue, she was giving us water, we were right by [her house.] We went out there and we chose a blighted property, and we started making art and making drawings. It was just more of a quiet protest, and also an opportunity to engage with the neighbors. That didn’t happen so much, [but] it was cool.³¹²

The photographs that Blights Out took of the event show the artists rendering the houses mostly in black and white—one artist, for example, drew a battered home in an impressionistic style,³¹³ and another artist created a precise, sharp realist depiction that recalls illustration and

308. Alexander-Bloch, *supra* note 304; *see also* Michelle Krupa, *supra* note 304 and accompanying text. (“Since Katrina, NORA has disposed of about 1,250 properties, with purchase agreements pending on about 600 more, Sathe said. In all, about 800 parcels have been bought by neighbors through the Lot Next Door program, which gives neighbors dibs on adjacent lots.”).

309. BLIGHTS OUT, *supra* note 8.

310. Daniel Grant, *Debate: Must ‘Plein Air’ Be Defined?*, HUFFPOST, https://www.huffingtonpost.com/daniel-grant/debate-must-plein-air-be-_b_789629.html (last updated May 25, 2011) (“Take, for example, the term painting ‘plein air’ a French expression meaning ‘open air’ (and used colloquially by the French for camping and outdoor sports) that refers to creating a work of art outside.”).

311. *Design as Protest*, BLIGHTS OUT, <http://www.blightout.org/projects/> (last visited Nov. 9, 2019).

312. Interview with Carl Joe Williams, *supra* note 151.

313. BLIGHTS OUT, *supra* note 8 (displaying this in the first three images of the photographs documenting the action).

architecture plans.³¹⁴ The photo review of the action also shows the artists smiling while sitting on a broken porch that seems to have been wrenched away from a house's façade,³¹⁵ and sitting together on a stoop of a dilapidated house that is covered with moss.³¹⁶

In this action, the Blights Out artists brought together two traditions, being plein air painting as well as the heritage of house portraits. Plein air painting rose as a favored form in late 18th century France, and artists prized it for its ability to convey facts or "truth,"³¹⁷ in a variety of contested forms. It has been associated with, for example, the Enlightenment obsession with natural science and the precise study and rendering of nature,³¹⁸ passions that led to sometimes distressing collections of "specimens" and even racist forms of taxonomy.³¹⁹ Painters such as Corot and Manet also affiliated plein air painting with "authenticity that [could be expressed] . . . with a direct and spontaneous painting technique, as opposed to the 'lèche' (licked, highly polished) finish associated with official academic painting."³²⁰

314. *Id.* (pictures 4 & 5).

315. *Id.* (picture 6).

316. *Id.* (picture 7).

317. These are my own scare quotes, since disclosures of "truth" by documentary methods in the 18th century were horrifying racist exercises. See, e.g., Yxta Maya Murray, *From Here I Saw What Happened and I Cried: Carrie Mae Weems' Challenge to the Harvard Archive*, 8 UNBOUND: HARV. J. LEGAL LEFT 1, 18 (2013) [hereinafter Murray, *From Here I Saw What Happened*] (describing Georges Cuvier's 1815 dissection of Sarah Baartman).

318. ANTHEA CALLEN, *THE WORK OF ART: PLEIN AIR PAINTING AND ARTISTIC IDENTITY IN NINETEENTH CENTURY FRANCE* 11 (2015) ("[I]t has been linked to the growing metropolitan Enlightenment concern for natural science, *natura naturans*, and the accurate observation of nature. The eighteenth century passion for collecting and cataloguing natural phenomenon from flora to fauna to geological specimens, for a naturalist Linnean taxonomy, has parallel, too, in the plein-air artists' records of nature.").

319. See Murray, *From Here I Saw What Happened*, *supra* note 317, at 14 n.80.

320. CALLEN, *supra* note 318, at 13.

The history of home portraits can also be traced to at least the 18th century, when English nobles commissioned artists to paint their great houses in order to convey their own personal status and grandeur. As art historian Linda Chisolm writes, the house became the “symbol and measure of position. The larger and more impressive the house, the greater the esteem in which the owner was held. Artists were commissioned to paint the great houses in the most flattering light, as they did in portraits of people.”³²¹ So, for example, Richard Wilson painted an idealized Wilton House for Henry, Earl of Pembroke in 1750,³²² and John Constable rendered an exquisite Malvern Hall for Henry Greswolde Lewis in 1820.

Blights Out’s May 2015 action engaged this history and flipped it on its head: once the subject of racist taxonomy and investigative science, Black people now looked at the world around them to see what was authentic—loss, destruction—and marked it down on paper and canvas. And while house portraits once functioned as high-status signaling, *these* house portraits sought to make a record of the continuing effects of Katrina. The artists also documented how dispossession had begun to take the form of gentrification, which caused the neighborhood to be populated by people who did not want to engage with the artists (as Carl Joe Williams said, “that didn’t happen so much” except for Miss Sue).³²³ The portraits also reveal the violence of the redistribution of property, since the scars and battery of the flood, as well as the erosion caused by time, are visible on the façades of the homes.

What does this all mean for *Saint Bernard Parish*? Again, the appellate court reversed Braden based on the

321. LINDA CHISOLM, *THE HISTORY OF LANDSCAPE DESIGN IN 100 GARDENS* 142 (2018).

322. JEREMY BLACK, *CULTURE IN EIGHTEENTH-CENTURY ENGLAND: A SUBJECT FOR TASTE* 55 (2007).

323. Interview with Carl Joe Williams, *supra* note 151.

issues of *omission* and *causation*.³²⁴ Regarding omission, like *Home Court Crawl*, *Live Action Painting* shows that the government's failure to take action on blight and gentrification commits terrible harms on communities of color: The action documents the stricken bodies of the houses, and the artists' failed interactions with invisible new neighbors, to show the community "ruin" complained of in *Home Court Crawl*—that is, dispossession, or "taking" in Fifth Amendment parlance. Blight, auctioning, home loss, and frosty newcomers have crept into New Orleans because of the government's failure to care for its vulnerable populations extending from 2005 to 2015, the date of *Live Action Painting*.

Regarding "the totality of the government action[s]" argument, again, like *Home Court Crawl*, *Live Action Painting* reveals that the relevant scope of the government's behavior does not just boil down to the building and failure to maintain MRGO,³²⁵ or its construction of the LPV.³²⁶ Instead, *Blights Out* shows that the property deprivation has remained a continual morphing process, which first took the form of the flood, and then shifted into a blight-creating diaspora, auctioning, and demographic tilt away from lower income people of color. For *Blights Out*, the "totality of the government's actions" encompasses events that reach back to Katrina and its direct aftermath, and continue rolling into 2015.

324. *St. Bernard Par. Gov't v. United States (Saint Bernard Par. II)*, 887 F.3d 1354, 1360, 1365 (Fed. Cir. 2018).

325. *See id.* at 1365.

326. *Id.*

C. *The Political Campaigns*

In November 2016, Blights Out “Ran For President,” and in 2018 it “Ran For Mayor.” These actions involved a multi-platformed approach. First, back in 2015, the collective began to gather stories from the community using “story circles,” which they held in a Black-owned local bookstore on the eve of the ten-year anniversary of Hurricane Katrina.³²⁷ As Mariama Eversley explained to me in a conversation we conducted on November 10, 2017 in the 6th Ward: “[We seek to] stoke the imaginary, the imaginary of citizens—what would it look like if ordinary people’s lived experiences were made into policies and the slogans themselves were [gathered from] story circles? . . . Story circles [are] an ancient way of communicating in New Orleans.”³²⁸

Through these story circles, Blights Out gathered leitmotifs and legends with which they later populated their campaigns’ lawn signs and billboards.³²⁹ As with the previous actions, these campaigns argue that the government has committed property dispossession through acts of omission, and that the relevant “totality of the government’s actions” to be considered in this analysis should be understood as stemming from at least 2005 to the

327. Interview with Mariama Eversley, Blights Out, in New Orleans, La. (Nov. 10, 2017); *see also* BLIGHTS OUT, *supra* note 6. (“On August 15, 2015, members of Blights Out—natives and newcomers—were asked to share one word to describe how they were feeling as the 10th Anniversary of Hurricane Katrina approached. Dueling, conflicting, entwined emotions about the future were exposed: fear and anxiety tempered with optimism and hope. These single words sparked a profound conversation about what it means to belong to and become part of a place and a community.”).

328. Interview with Mariama Eversley, *supra* note 327; *see also* JOHN FLAHERTY, FLOODLINES: COMMUNITY AND RESISTANCE FROM KATRINA TO THE JENA SIX 21 (2010) (“One of the key features of New Orleans organizing is the story circle—a process whereby people communicate and come together by telling personal stories on a theme. Story circles were developed by the Free Southern Theatre (FST), which formed out of SNCC and Freedom Summer in the mid-’60s as the theatrical branch of the civil rights movement.”).

329. Mariama Eversley explained this to me in our interview. *See* Interview with Mariama Eversley, *supra* note 327.

current, gentrified, moment.

1. Blights Out for President

In November of 2016, Blights Out artists distributed lawn signs and two billboards featuring the slogans its members had collected during the story cycle process.³³⁰ “As they reported on their webpage, they did so in order to metaphorically saturate the city beginning on the eve of the November 8, 2016 election and into the future because civic engagement does not end at the ballot.”³³¹

The slogans read as follows:

“The People” for President

Development Without Displacement

Commodified Housing is Class Warfare

50 Years Later, We Still Need “Decent Housing Fit for Human Beings”

Look Me In the Eye

Trauma Is Planned into Architecture/Resistance Is Developed In People³³²

Together, these slogans communicated three messages relevant to the *Saint Bernard’s Parish* analysis. First, “The People’ For President” sign verified that Blights Out intends to become a part of the federal political conversation about Katrina, housing, and rights, and to put the people’s voices at the forefront of the agenda. This relates to Blights Out’s place within demospudence, as it stakes a claim as an artistic and social movement that “does not end at the ballot.”³³³ Blights Out seeks to create cultural, social, and political change in the same way as did the social movement agents studied by the likes of Reva Siegel, Robert Post, Jack

330. BLIGHTS OUT, *supra* note 7.

331. *Id.*

332. *Id.*

333. *Id.*

M. Balkin, Lani Guinier, Gerald Torres, and other scholars, and so features within this pantheon of change agents in political and possibly also constitutional arenas.³³⁴

Second, the *Blights Out for President* campaign continues Blights Out's onslaught on the omission/commission distinction with its "50 Years Later, We Still Need 'Decent Housing Fit for Human Beings'" sign. This slogan refers to item # 4 of the famous manifesto, *What We Want/What We Believe*, written for the Black Panther Party by Huey Newton and Bobby Seale in 1966.³³⁵ Along with calls for freedom, education, self-determination, and employment,³³⁶ the Panthers' "Platform and Program" asserted that:

We want decent housing, fit for shelter of human beings.

We believe that if the white landlords will not give decent housing to our black community, then the housing and the land should be made into cooperatives so that our community, with government aid, can build and make decent housing for its people.³³⁷

The Panthers demanded fit housing during the Great Migration, which saw the exodus of millions of African Americans from the South toward the North beginning in 1916.³³⁸ The members of this diaspora encountered housing discrimination, which led to the "creation of African American slums in the most distressed urban areas of the country."³³⁹ The Panthers thus called upon the "government"

334. See *supra* text accompanying notes 248–271.

335. See *What We Want Now! What We Believe*, 24 THE BLACK PANTHER at 3.

336. See *id.*

337. *Id.*

338. See CHARLES M. LAMB, HOUSING SEGREGATION IN SUBURBAN AMERICA SINCE 1960: PRESIDENTIAL AND JUDICIAL POLITICS 27 (2005) (dating the Great Migration between 1910 and 1970); Isabel Wilkerson, *The Long-Lasting Legacy of the Great Migration*, SMITHSONIAN MAGAZINE (Sept. 2016), <https://www.smithsonianmag.com/history/long-lasting-legacy-great-migration-180960118/> ("The migration began, like the flap of a sea gull's wings, as a rivulet of black families escaping Selma, Alabama, in the winter of 1916.").

339. Lamb, *supra* note 338, at 28.

to provide “aid” so that Black people could live in housing that—by implication—was designed for subhumans. In other words, the Panthers saw it as the government’s responsibility to affirmatively create decent housing options for Black people, or to be held accountable for sheltering human beings in “[in]decent” structures. As Newton told a Rolling Stone reporter in 1972, “You can tell the tree by the fruit it bears. You see it through what the organization is delivering as far as a concrete program. If the tree’s fruit sours or grows brackish, then the time has come to chop it down—bury it and walk over it and plant new seeds.”³⁴⁰

When *Blights Out* quotes the Black Panthers’ manifesto, then, it also carries forward the Panthers’ theory of causation, which finds no meaningful distinction between omission and commission when it comes to government behaviors that hurt Black people—the Panther manifesto calls for the government to cease its failure to provide decent housing by rendering “aid.” The Panthers’ and *Blights Out*’s rejection of the omission/commission distinction rests in the understanding that the key element is not acts or failures to act, but the *harm* produced by government behavior: The “fruit it bears.” As with the *Home Court Crawl* and *Live Action Painting*, then, *Blights Out*’s legal thought rejects Judge Dyk’s omission/commission distinction because New Orleans’ communities of color and vulnerable populations are hurt by property dispossession regardless of whether a positive act or failure to care occurs.

Third, *Blights Out* once again adds to our understanding of the “totality of the government’s actions” that we should consider when studying the question of whether and how the government took property from people in New Orleans. Their comprehension of this totality is so wide that it also connects with the rejection of an omission/commission distinction: In

340. Tim Findley, *Huey Newton: Twenty-Five Floors From the Street*, ROLLING STONE (Aug. 3, 1972), <https://www.rollingstone.com/culture/culture-news/huey-newton-twenty-five-floors-from-the-street-176820/>.

the signs “Development Without Displacement,” “Trauma is Planned into Architecture,” and “Look Me In the Eye,” Blights Out artists show that dispossession associated with Katrina did not just emanate from the flood, the MRGO, or the building of the LPV, but extends to a much wider window of events. As before, these include the government-permitted redevelopment and redistribution efforts that followed the devastation. Not only did the Army Corps’ building of the MRGO separate people from their homes, but the public auctioning and resulting private development that followed the scourge *displaced* them and *traumatized* them to such a degree that they left, became homeless, or felt homeless³⁴¹ because they are subjected to “Class Warfare” and newcomers (as in the case of *Live Action Painting*³⁴²) who will not “Look [them] in the Eye.” As Imani Jacqueline Brown explained to me during an interview in 2017:

Look me in the eye means if you walk down the street, if you meet my eye, you have to. And if you do, you have to acknowledge [people’s] . . . humanity, even if it’s just a smile or to say hello, say how are you doing? All right? And there is a special contract that everyone buys into just by being in this place. And we’ve seen it break down, when people don’t speak to each other and acknowledge each other’s humanities. And it hurts and it’s an attack.³⁴³

“Look Me in the Eye,” then, signifies that the change in the community that has followed the displacement of development has also led a particular dispossession of Black residents—that of being seen as human within New Orleans because of housing displacements, demographic shifts, and racism and classism. This, along with the language of warfare, trauma, dispossession, and the Black Panther’s accusations of “unfitness,” designates that, when looked at in

341. On this last point regarding emotions and takings, *see supra* note 302.

342. *See supra* text accompanying note 312 (Carl Joe Williams’ thoughts on the new neighbors).

343. Telephone Interview with Imani Jacqueline Brown, Co-founder, Blights Out (June 8, 2017).

its totality, both the Army Corps of Engineers' building of the MRGO, as well as a host of other government behaviors, including its permissions of sales and gentrification, has taken property from the people of New Orleans.

2. Blights Out for Mayor

In 2018, Blights Out “Ran for Mayor” of New Orleans by setting up a twelve billboards at the corner of Orleans Street and Galvez Avenue in the Tremé District,³⁴⁴ offering citizens a selection of five lawn signs,³⁴⁵ and posting a video.³⁴⁶ In their web announcement, Blights Out announced that it sought a “post-Katrina Truth and Reconciliation process. We seek the redress of policies and values imposed in the wake of disaster that reinforce ecological apartheid in our housing landscape and that threaten to turn our city into a gentrified fortress that shelters the wealthiest from the rising-up of seas and people.”³⁴⁷

In this action, Blights Out reiterates and reinforces its arguments that its art is a form of legal thought. This art-jurisprudence holds that omissions cannot be meaningfully distinguished from commissions, and that the “totality of the government’s actions” to be considered in regard to land dispossession must extend far beyond the MRGO and the building of the LPV wall. In analyzing these features of Blights Out’s legal theory, I will study three of Blights Out’s Mayoral billboards, being its “Blights Out For Mayor,” “October,” and “Disaster Capitalism” presentations.

344. See *Blights Out For Mayor*, BLIGHTS OUT, <http://www.blightsout.org/mayor> (last visited Nov. 9, 2019). For verification of the location, see this video identifying Galvez and Orleans as being in the Tremé and flooded by another storm in 2017. See WWLTV, *Flooding In Treme Restaurant On Orleans and Galvez*, YOUTUBE (Aug. 5, 2017), https://www.youtube.com/watch?v=oC6E1_8C6fU.

345. See *Blights Out For Mayor*, *supra* note 344.

346. *Id.*

347. *Id.*

a. Blights Out offers its art as a form of legal thought by “running for Mayor” and invoking Article VII, Section 25 of the Louisiana Constitution

As in the case of its “Blights Out for President” campaign,³⁴⁸ Blights Out staked its claim as a generator of legal thought by running for Mayor in 2018. It announced its intention to “run” both in its web statements³⁴⁹ as well as in a black and white, flag-shaped billboard that read: “Blights Out / For Mayor. / For New Orleans. / For America.” / Development Without Displacement / #puthousingfirst.”³⁵⁰ I call this the “Blights Out For Mayor” billboard.

In making this declaration, Blights Out artists imagined themselves as an aspiring executive distributor of legal rights and remedies. And, just as they criticized the federal approach to land justice in its Presidential campaign, here Blights Out critiques not only federal (as it seeks to become the Mayor for “America”) but also local and state policies (it simultaneously stumps to become Mayor of “New Orleans”) that have wrested people of color from housing in the days since 2005.

Blights Out also makes a specific legal argument in its invocation of Article VII, Section 25 of the Louisiana Constitution, which it deploys in (what I will call) its “Louisiana Constitution” billboard.³⁵¹ The billboard quotes the provision, which reads in part: “The legislature may postpone the payment of taxes, but only in cases of overflow, general conflagration, general crop destruction, or other public calamity. . . .”³⁵² Blights Out then also offers a dictionary-like definition of “housing crisis” as a “public calamity.”³⁵³ Section 25 has since been codified and permits

348. *See supra* notes 331–44.

349. *See Blights Out For Mayor, supra* note 344.

350. *Id.*

351. *Id.*

352. *Id.* (emphasis in original).

353. *Id.*

tax debtors who reside in a declared emergency zone to request postponement of their ad valorem taxes.³⁵⁴

Blights Out leave nebulous whether the judiciary should declare a state of housing emergency under the constitutional provision, whether the “Mayor of America” should do so, or whether the “Mayor of New Orleans” should take up this mantle. But, regardless of where this legal authority arises from, Blights Out seeks more than tax liability postponement under the Louisiana Constitution: In the billboard, it demands “Forgive[ness] for all Katrina-related debt from taxes and liens.”

Blights Out thus engages the language of the law to argue for forgiveness of taxes and liens, in order to bring about its stated goal of “post-Katrina” “truth and reconciliation” and “redress” for a housing crisis that has stripped locals of their homes. While its citation to the Louisiana Constitution depends upon a different legal theory than that of Fifth Amendment takings, Blights Out nevertheless announces that it seeks to have its art recognized as a mode of legal thought. It thus places itself well within the tradition of popular constitutionalism and the law-changing social movements described by Reva Siegel, Robert Post, Jack M. Balkin, Gerald Torres, and Lani Guinier.³⁵⁵

354. The Louisiana legislature codified this provision in La. Stat. Ann. § 47:2130 (2009). Under this statute, where an emergency is declared, a tax debtor may “request the postponement of the payment of ad valorem taxes on his property”

355. *See supra* notes 248–256.

b. Blights Out argues that no meaningful distinction between omission and commission exists, as those concepts pertain to housing dispossession post-Katrina

In its “October” billboard,³⁵⁶ Blights Out displayed the above-mentioned³⁵⁷ image and text designed by illustrator Hannah Chalew.³⁵⁸ The sign depicted a black-and-white drawing of a dilapidated home and the text: *Ecological apartheid (spatial segregation) is already etched into our housing landscape. Will our future city be a gentrified fortress designed to protect the wealthy from the rising-up of seas and people?* A black-and-white caption crowned the spectacle: *#TellYourMayor / We Demand / Truth and Reconciliation / On Gentrification.*

As in the case of *Home Court Crawl*, *Live Action Painting*, and *50 Years Later, We Still Need “Decent Housing Fit for Human Beings”*, Blights Out rejects any omission/commission distinction regarding levying responsibility for housing and home dispossession. The billboard communicates the devastating impacts that the government’s behavior has imposed upon the people pre- and post-Katrina, by showing the image of a shattered and moss-infected domicile. It calls this devastation “apartheid,” signaling the extremity of the deprivation and its racial meaning,³⁵⁹ and uses the passive voice—“is already etched”—to reveal a disinterest in the precise gestures (omission or commission) that led to this end. Moreover, government responsibility exists regardless of who

356. See *Blights Out For Mayor*, *supra* note 344. Few of the billboards have been temporarily marked on the Blights Out website, but this one appears with an “October” designation. *Id.*

357. See *id.* (last visited Nov. 9, 2019).

358. See *id.* (citing Chalew as the illustrator).

359. The etymology of apartheid exposes the word’s wrenching origins: see, *Apartheid*, ONLINE ETYMOLOGY DICTIONARY, <https://www.etymonline.com/word/apartheid> (last visited Nov. 9, 2019) (“apartheid (n.) . . . segregation of European from non-European people, from Afrikaans *apartheid* (1929 in a South African socio-political context), literally ‘separateness,’ from Dutch *apart* ‘separate’ (from French *à part*; see *apart*) + suffix *-heid*, which is cognate with English *-hood*.”).

affirmatively “designs” the “gentrified fortress” that will grow from the wastage of Katrina, as the “architect[]” is not named.

Further, and critically, Blights Out invokes the doctrine of “Truth and Reconciliation” as its preferred form of redress. South African officials work to address the national crime and trauma of apartheid through Truth and Reconciliation processes; Blights Out references this history and practice in its sign.³⁶⁰ Truth and Reconciliation undertakings permit communities to “construct a shared understanding of right and wrong by engaging in dialogue,”³⁶¹ and thus develop understandings of harm and trauma through group sourced narratives that are conscious of race and class dynamics, not through top-down binaries such as the omission/commission construct created by Judge Dyk.³⁶² Moreover, these communities understand that those who have committed the sins of omission may be just as guilty as active participants in such a crime. For example, Pumla Gobodo-Mdikizela, a participant in the South African Truth and Reconciliation process,³⁶³ calls bystanders “beneficiaries,” and emphasizes that they must be part of the justice process:

[F]or a true transformation to take place in South African society, victims, perpetrators, and bystanders alike must acknowledge the past. The Truth and Reconciliation Commission’s public process

360. See, e.g., CLAIRE MOON NARRATING POLITICAL RECONCILIATION: SOUTH AFRICA’S TRUTH AND RECONCILIATION COMMISSION 38 (2009) (describing the South African Truth and Reconciliation Committee’s work from November of 1995 to October of 1998, “taking testimonies from victims and perpetrators in regional ‘courts’ for the period of around thirty-three years under scrutiny, from March 1960 to December 1993.”).

361. Emily B. Mawhinney, *Restoring Justice: Lessons from Truth and Reconciliation in South Africa and Rwanda*, 36 *HAMLIN J. PUB. L. & POL’Y* 21, 25 (2015).

362. See *St. Bernard Par. Gov’t v. United States (Saint Bernard Par. II)*, 887 F.3d 1354, 1360 (Fed. Cir. 2018).

363. JILL EDELSTEIN, *TRUTH AND LIES: STORIES FROM THE TRUTH AND RECONCILIATION COMMISSION IN SOUTH AFRICA* 25 (2002) (quoting Gobodo-Mdikizela as saying, “in 1996, when I was invited to join the truth and Reconciliation Commission”).

was an opportunity to examine these complex roles both at individual and collective levels But many beneficiaries of apartheid privilege have responded to the call to public accountability with silence Reconciliation between victims and perpetrators is not enough. For social transformation to take place, reconciliation has to be between victims and beneficiaries.³⁶⁴

When *Blights Out* cites the Truth and Reconciliation process, then, it connects with a justice system that emphasizes trauma, impact, and White supremacy in determining the meaning of an individual or government act. As Gobodo-Mdikizela shows us, that process regards failures to aid or intervene as meaningfully destructive behaviors, in contrast to the approach of Judge Dyk.

c. Disaster Capitalism and the totality of the government's actions

Blights Out looks at a wide span of government and neoliberal behaviors to account for wrongful home dispossession during and after Katrina.³⁶⁵ Like in the cases of *Home Court Crawl*, *Live Action Painting*, *Development Without Displacement*, and *Trauma is Planned into Architecture*, the November billboard “Disaster Capitalism” finds fault in government inaction in the face of post-Katrina property redistribution. The November billboard makes specific reference, of course, to the concept of *disaster capitalism* coined by Naomi Klein in her 2007 book *THE SHOCK DOCTRINE: THE RISE OF DISASTER CAPITALISM*, where she excoriates “orchestrated raids on the public sphere in the wake of catastrophic events combined with the treatment of disasters as exciting market opportunities,”³⁶⁶ and specifically cites government support of freewheeling private enterprise that now transforms Katrina.³⁶⁷ *Blights Out*

364. *Id.* at 31.

365. *See, e.g., infra* text accompanying notes 366–368.

366. NAOMI KLEIN, *THE SHOCK DOCTRINE: THE RISE OF DISASTER CAPITALISM* 6 (1st ed. 2007).

367. *See id.* at 8.

offers its own gloss on Katrina-related disaster capitalism in its billboard, which reads: “Disaster Capitalism . . . : The practice (by a government, regime, etc.) of taking advantage of a major disaster to push the poor out of the inner city and turn every public service into an opportunity for profit by the already wealthy.”³⁶⁸

The relevant totality of the government’s actions here, then, would encompass not only the government’s affirmative efforts to bar people from their homes in the direct aftermath of the storm (“push the poor out of the inner city”)³⁶⁹ but also its status as a bystander or (in Pumla Gobodo-Mdikizela’s phrasing) “beneficiar[y]”³⁷⁰ that conspired with neoliberal agents to offer up the city and its services to the “already wealthy.”³⁷¹ Thus, once again, Blights Out emphasizes that the window for the totality of circumstances to be considered in the study of housing dispossession extends far beyond the circumstances of the storm.

VI. BLIGHTS OUT’S LEGAL THOUGHT AS IT APPLIES TO *SAINT BERNARD PARISH II*

Through their installations, Blights Out artists make several arguments that have jurisprudential application to *Saint Bernard Parish II*. First, Blights Out artists argue that government forces have wrongfully dispossessed New Orleanians of their homes. They argue this by holding a funeral for their housing,³⁷² referencing being “push[ed] . . . out,”³⁷³ asserting that they are being forced into “apartheid,”³⁷⁴ drawing memorial paintings of blighted

368. See *Blights Out For Mayor*, *supra* note 344.

369. See EDELSTEIN, *supra* note 363, at 31.

370. See *supra* note 364.

371. *Blights Out For Mayor*, *supra* note 344.

372. See *supra* note 292.

373. *Blights Out For Mayor*, *supra* note 344.

374. See *supra* note 1.

houses,³⁷⁵ and citing the Black Panthers' accusation that the government has failed to provide Black people decent housing fit for human beings.³⁷⁶ They allege that this deprivation has occurred in violation of a rule of law that they represent and brandish by their imaginary inhabitation of Presidential and Mayoral candidacies,³⁷⁷ citation to the Louisiana Constitution,³⁷⁸ and reference to the justice process known as Truth and Reconciliation.³⁷⁹ Applying these commitments to the context of *Saint Bernard Parish II*, then, Blights Out would disagree with Judge Dyk's conclusion that the government has not been proven to have taken property through its conduct surrounding Katrina.

Second, Blights Out artists find that this taking occurs in the wake of government omission. As noted, *Home Court Crawl*, *Live Action Painting*, and the two political campaigns all emphasize repeatedly that government inaction has left poor people of color to look upon "ruin,"³⁸⁰ upended their communities,³⁸¹ and left them without housing fit for human beings.³⁸²

Third, when examining the "totality of the government's action" to gauge the scope of this taking, Blights Out artists do not focus only on government's conduct in the immediacy and direct aftermath of the flood, but look at a wide window of events that include later backing of market forces that exclude Black people from their neighborhoods and city.³⁸³

The questions that follow include whether these aspects

375. See *supra* note 313.

376. See *Blights Out for President*, *supra* note 7.

377. See *id.*; *Blights Out for Mayor*, *supra* note 344.

378. See *Blights Out for Mayor*, *supra* note 344.

379. See MOON, *supra* note 360.

380. See LORI-PARKS, *supra* note 289 at 182.

381. See *Blights Out for Mayor*, *supra* note 344.

382. See *Blights Out for President*, *supra* note 7.

383. See, e.g., *supra* note 326.

of Blights Out's legal thought prove sufficiently legitimate that they may be applied to the question presented in *Saint Bernard Parish*. Recall that Jack Balkin's influential tests of the feasibility of popular constitutionalism relied upon social movement actors having "friends in high places" and ensuring that their claims are "on the wall."³⁸⁴ Thus, we must consider the extent to which Blights Out and its claims pass those tests. And, if they do, we must contemplate how they influence the takings claim analysis in *Saint Bernard Parish*.

A. *Does Blights Out Have Friends in High Places?*

Jack Balkin specifies that "friends in high places" means judges on the federal bench.³⁸⁵ Blights Out possesses no such friends as of yet.³⁸⁶ However, we can strike new territory in popular or community constitutionalism by recognizing the esteem of many different types of friends. Blights Out may not have judges in their pockets, but they do draw strength and influence from their community.

384. See, e.g., Balkin, "Wrong the Day it Was Decided," *supra* note 38, at 679 (suggesting that "conventions determining what is a good or bad legal argument about the Constitution, what is a plausible legal claim, and what is 'off-the-wall' change over time in response to changing social, political, and historical conditions.").

385. Balkin, *How Social Movements Change*, *supra* note 251, at 58.

386. A search of Westlaw evidences 0 references to Blights Out. This is contrast to the #metoo movement, which as of February 1, 2019, evidences 7 references to #metoo, some supportive, and some not so much. Compare the remarkable *United States v. Aegerion Pharm., Inc.*, 280 F. Supp. 3d 217, 228 (D. Mass. 2017) ("Any injustice rankles Americans, systemic injustice rankles them profoundly. Those of us who occupy the constitutional offices of the United States—in whatever branch we serve—must humbly acknowledge that there exists in America today a deep and pervasive sense of injustice." (citing Sophie Gilbert, *The Movement of #MeToo*, THE ATLANTIC (Oct. 16, 2017), <https://www.theatlantic.com/entertainment/archive/2017/10/the-movement-of-metoo/542979/>)), with *Chlad v. Chapman*, No. 17 C 5198, 2018 WL 4144627, at *15 (N.D. Ill. Aug. 30, 2018) ("[Petitioner] goes on to chide the court for being tone deaf to the #metoo movement and concludes that the absence of any discussion about her abuse "is indicative in-and-of-itself of the reversible, flawed reasoning" in the judge's opinion This argument is meritless.").

Blights Out's merit has been recognized by journalists writing for NextCity, The Miami Herald, The Gambit, Pelican Bomb, Art.Sy,³⁸⁷ and NOLA.com.³⁸⁸ Its organizational partners are Antenna, National Organization of Minority Architects (NOMA), Junebug Productions, HousingNOLA, Greater New Orleans Fair Housing Action Center (GNOFHAC), Ole & Nu Style Fellas Social Aid and Pleasure Club, RAO Real Estate Advisory, Justice and Beyond Coalition, Crescent City Community Land Trust (CCCLT), Newcomb Art Museum at Tulane University, May Gallery & Residency, NEXT City, New Orleans Master Crafts Guild, Hidden History Tours, and Loyola Law School Human Rights Clinic.³⁸⁹ Blights Out artists have been awarded grants and fellowships by Creative Capital and the Joan Mitchell Foundation.³⁹⁰ Further, artists such as the superstar Glenn Ligon³⁹¹ and MacArthur "Genius" Grant and Ford Foundation Fellowship winner Fred Wilson³⁹² have contributed to the collective's "Blights Out for Mayor" Kickstarter campaign.³⁹³

Further, it is a hope of mine that, in writing of Blights Out's work, and publishing this account in this law review, that I may introduce this arts collective to a legal community

387. See *Press*, BLIGHTSOUT.ORG, <http://www.blightsout.org/press/> (last visited Nov. 9, 2019).

388. Doug MacCash, *Prospect.3 'Home Court Crawl' blends theater and blighted architecture on Saturday, Dec. 13*, NOLA.COM (Dec. 10, 2014, 6:00 PM), https://www.nola.com/arts/index.ssf/2014/12/prospect3_home_court_crawl_com.html.

389. *About*, BLIGHTSOUT.ORG, <http://www.blightsout.org/about/> (last visited, Nov. 9, 2019).

390. See *Home*, BLIGHTSOUT.ORG, <http://www.blightsout.org/home/> (last visited Nov. 9, 2019).

391. See *Glenn Ligon*, GUGGENHEIM, <https://www.guggenheim.org/artwork/artist/glenn-ligon> (last visited, Nov. 9, 2019).

392. See *Fred Wilson*, FORD FOUNDATION, <https://www.fordfoundation.org/campaigns/the-art-of-change-meet-our-fellows/fred-wilson/> (last visited Nov. 9, 2019).

393. See *Blights Out For Mayor*, *supra* note 344.

filled with academics, lawyers, judges, students, and legislators who may become eventually their friends in high places. Such is the cherished hope of many who dedicate themselves to writing legal scholarship.

B. *Is the Claim That the Federal Government Took Property through Its Conduct During and after Katrina on the Wall?*

Judge Braden determined that the Army Corps' construction, expansion, maintenance, and failure to maintain the MRGO caused the flooding and destruction of homes that constituted a temporary taking under *Arkansas Game & Fish*.³⁹⁴ Since Braden is a federal judge, this establishes that the basic claim that takings occurred as a result of federal failures to care in connection with Hurricane Katrina are not outside the window of legal plausibility. Thus, Blights Out's essential case that the government has taken their property qualifies as cognizable, demosprudential legal thought, which offers a cogent critique of Judge Dyk's conclusions in *Saint Bernard II*.

But do the *foundations* of its takings claim pass muster? Blights Out's conclusion that an impermissible taking has occurred rests upon the two grounds that I have recognized in this Article. Again, Blights Out artists 1) recognize takings that are accomplished through government omission; and 2) expand the "totality of the government's actions" to include a much wider window of events than merely the building or maintaining of the MRGO and LPV.

In the following sub-sections I will see whether these claims qualify as on the wall according to existing Fifth Amendment law or property theory.

1. Is the claim that the takings were accomplished through federal failures to care off the wall?

394. See *Saint Bernard Par. Gov't v. United States (Saint Bernard Par. I)*, 121 Fed. Cl. 687, 690 (2015).

As discussed in Part II, Judge Braden insisted that the Army Corp temporarily took property in Saint Bernard Parish and the Lower Ninth Ward because of its positive acts (in the forms of building and maintaining);³⁹⁵ she also mentioned that the Army Corps failed to maintain the MRGO.³⁹⁶ While Braden mentioned plenty of commissions, Judge Dyk concluded that her references to government failures to maintain the MRGO tarnished her holding because it relied too much upon governmental failures of care.³⁹⁷

I believe that Dyk erred in his assessment that Braden fatally overemphasized omissions, because I take note of her abundance of citations to positive governmental acts.³⁹⁸ However, for the purposes of this article, I will accept his conclusion that she relied upon omissions in her takings analysis. I will thus query whether Blights Out's rejection of the omission/commission distinction proves "on the wall[-ishly]" persuasive that it offers a formidable push-back to Dyk's holding.

Blights Out rejects any omission/commission distinction when making its case that that the people of New Orleans have been deprived of property due to the events surrounding Katrina and the city's later related gentrification.³⁹⁹ As an organization inveighing against the "government" and "regime," it rests responsibility in the state for making the people vulnerable to Katrina,⁴⁰⁰ failing

395. *See id.* at 746.

396. *Id.*

397. *St. Bernard Par. Gov't v. United States (Saint Bernard Par. II)*, 887 F.3d 1354, 1360 (Fed. Cir. 2018) ("[T]he government's failure to properly maintain or to modify the banks played a significant role in plaintiffs' takings theory and the Claims Court's analysis.").

398. *See Saint Bernard Par. I* at 691–92.

399. *See supra* note 297.

400. On Blights Out's argument that the government should be held responsible for the disaster of Katrina, *see supra* note 296.

to forgive taxes and liens,⁴⁰¹ failing to provide decent housing fit for human beings for the people,⁴⁰² allowing houses to fall into a state of disrepair,⁴⁰³ and permitting the forces of neoliberalism to redistribute New Orleans housing to a Whiter and wealthier population.⁴⁰⁴ The anguish that the people have suffered and the damage that these changes have brought to the community thicken their claim of wrongful deprivation,⁴⁰⁵ as do the racial impacts of these omissions, which fall heavily upon people of color.⁴⁰⁶

Blights Out's charges of cognizable takings caused by government omissions is coherent within other branches of Community Constitutionalism, as my work in Boyle Heights, Los Angeles shows.⁴⁰⁷ However, the large spectrum of omissions that Blights Out asks us to recognize (such as the government's failure to put a stop to the depredations of neoliberalism) is not in line with mainstream jurisprudence's current adumbration of takings responsibility. Simply put, the concept of passive takings has only received institutional attention within the last few years⁴⁰⁸ and its adherents recognize "takings by omissions" in a much more reduced set of circumstances than those acknowledged by Blights Out—such as (as we will shortly see) when the government forbids self-help in environmental contexts and rising sea-levels

401. See *Blights Out For Mayor*, *supra* note 344.

402. See *Blights Out for President*, *supra* note 336.

403. See, e.g., *supra* note 324 and accompanying text (addressing the meaning of *Live Action Painting*).

404. See *Blights Out for Mayor*, *supra* note 344.

405. See, e.g., Interview with Carl Joe Williams, *supra* note 151.

406. *Id.*

407. See Murray, *The Takings Clause of Boyle Heights*, *supra* note 34, at 163 ("The strong version could snowball into a radical property constitutionalism that would strike down all neoliberal systems that deny poor people housing, regardless of state action.").

408. See, e.g., Christopher Serkin, *Passive Takings: The State's Affirmative Duty to Protect Property*, 113 MICH. L. REV. 345, 397 (2014).

destroy property.⁴⁰⁹

Blights Out, then, lays down a variety of innovative and unorthodox ideas about how takings-by-omissions claims against the government can and should proceed (i.e., when a government permits market forces to create gentrification). However, its rejection of the omission/commission distinction *itself* does not count as an exotic theory. Rather, Blights Out's argument that the omission/commission distinction lacks salience does find roots within the case law cited by Judge Dyk and also possesses impressive support among prestigious constitutional theory.

That is, the argument that takings may be accomplished by government inaction is not off the wall. First, as Dyk himself asserts, Judge Braden depended on findings of government inaction to establish takings in *Saint Bernard Parish I*.⁴¹⁰ Second, my reading of *Sanguinetti, Ridge Line*, and *Arkansas Game & Fish*, and *Sponenbarger* all demonstrate that those cases did not pivot on a hard omission/commission distinction.⁴¹¹ Moreover, in *Arkansas Game & Fish*, the government could be faulted for inaction, in failing to release water at a certain pace.⁴¹²

Third, in his seminal 2014 article *Passive Takings*, the influential⁴¹³ property theorist Christopher Serkin argues that government inaction should, in some instances, give rise to takings claims.⁴¹⁴ Serkin emphasizes passive takings that

409. *Id.* at 393 (“At least where there are no other available responses to sea-level rise because of the conditions on a specific lot, static height limits can function as a kind of prohibition on self-help (in the form of elevating the building) and could therefore create a passive takings claim.”).

410. *See* *St. Bernard Par. Gov't v. United States (Saint Bernard Par. II)*, 887 F.3d 1354, 1360 (Fed. Cir. 2018).

411. *See supra* text accompanying notes 186–227.

412. *See* *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 27–28 (2012).

413. My Westlaw review of Serkin's article reveals that, as of February 19, 2019, *Passive Takings* has been cited in forty-three law review articles.

414. *See* Serkin, *supra* note 408, at 370 (“[T]he government's relationship to

take place in the context of housing height restrictions that make populations vulnerable to rising sea-walls⁴¹⁵ and when governments engage in or ban “armoring” that may create ecological damage or fail to protect homeowners from storm surges.⁴¹⁶ Serkin relies upon several sources of authority for his analysis. While observing that the Supreme Court held that states bear no general affirmative duties to aid in *DeShaney v. Winnebago County Department of Social Services*,⁴¹⁷ Serkin teaches us that the Court there *did* insinuate that “the state may have an affirmative duty to protect if it created a danger or left people more susceptible to a danger.”⁴¹⁸ Along with this support excavated from *DeShaney*,⁴¹⁹ Serkin also looks to the theory of Hanoch

property sometimes creates affirmative duties, and property owners are entitled either to summon the regulatory power of the state to act on their behalf or alternatively to receive compensation for the government’s failure to act or protect their property.”).

415. *See id.* at 393.

416. *Id.* at 394 (“Whether the government prohibits or builds sea walls, its near-total control over the allocation of the inevitable harm serves as a doctrinal hook for passive takings liability.”).

417. *DeShaney v. Winnebago Cty.*, 489 U.S. 189, 189–90 (1989).

418. *See Serkin, supra* note 408, at 376 (citing *DeShaney*, 489 U.S. at 201).

419. Serkin also takes passing note of the support for this position found in *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 379 (1st Cir. 1975) (“The purpose of the [Nonintercourse] Act [is to] guarantee the Indian tribes’ right of occupancy . . . and clearly there can be no meaningful guarantee without a corresponding federal duty to investigate and take such action as may be warranted in the circumstances.”)

See Serkin, supra note 408, at 404. *But see* Joseph William Singer, *Nine-Tenths of the Law: Title, Possession & Sacred Obligations*, 38 CONN. L. REV. 605, 625 (2006) (assessing that the *Passamaquoddy* finding of trust obligation was modified by the federal right of prosecutorial discretion, and that the decision had in any event been superseded by other decisions) (citing *United States v. Navajo Nation*, 537 U.S. 488 (2003) and *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003)).

Of equal notice in this field is also *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 475 (2003), where the Supreme Court, upholding a *decision by Dyk himself*, determined that the U.S. government was subject to fiduciary duties of management and conservation of lands it held in trust for the White Mountain Apache Tribe where it occupied and exercised control over those lands. *See also* Joseph William Singer, *Nine-Tenths of the Law: Title, Possession &*

Dagan, who argues for takings liability where regulatory burdens are not offset by reciprocal advantage⁴²⁰ and that of Gregory Alexander and Eduardo Peñalver, who find property law enriched by the social obligations required by human flourishing.⁴²¹ Within this body of jurisprudence, Serkin mines support for the conclusion that “focusing too narrowly on an affirmative-act requirement [in takings cases] can obscure the imposition of real and cognizable harm.”⁴²²

Serkin also draws upon the “control principle” of Douglas Husak,⁴²³ who writes that, in criminal law, “sufficient control over a situation can substitute for an explicit act; control

Sacred Obligations, 38 CONN. L. REV. 605, 625 (2006) (“The Supreme Court ruled that tribes cannot sue the United States for breach of trust unless a statute gives them a right to sue for money damages for such a breach . . . [or unless] the United States itself takes control over the land as it did in *United States v. White Mountain Apache Tribe*.”) (citations omitted). While *White Mountain Apache Tribe* concerns fiduciary duties and not takings claims, and while the Army Corps of Engineers did not occupy or control the entirety of Saint Bernard Parish or the Lower Ninth Ward, perhaps *White Mountain Apache Tribe* could also help build a foundation for a passive takings claim where there the federal government has exercised meaningful control or occupied a portion of the area allegedly taken. See *White Mountain Apache Tribe*, 537 U.S. 465. Of course, that Dyk found for the tribe in that case adds a special *frisson* for the purposes of its application to the facts of *Saint Bernard Parish II*. See his opinion at *White Mountain Apache Tribe v. United States*, 249 F.3d 1364, 1377 (Fed. Cir. 2001), *aff’d and remanded*, 537 U.S. 465 (2003) (“We think that, to the extent that the government has actively used any part of the Tribe’s trust property, and has done so in a manner where its control over the buildings it occupies is essentially exclusive, the portions of the property that have been so used can no longer be classified as being held in merely a “bare trust” under *Mitchell I*. Rather, the government’s decision to use such trust property for its own purposes carries a responsibility to act as a fiduciary.”).

420. See Serkin, *supra* note 408, at 370 (citing Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741, 769–70 (1999)).

421. Serkin, *supra* note 408, at 370 (citing Gregory S. Alexander & Eduardo M. Peñalver, *Properties of Community*, 10 THEORETICAL INQUIRIES L. 127, 134–36 (2009)).

422. *Id.* at 374.

423. *Id.* at 378 (“Control, instead, means that the state has effectively determined the allocation of costs. This definition is closely analogous to Husak’s control principle as a basis for criminal liability. The intuition, again, is that sufficient control over a situation can substitute for an explicit act; control imposes an affirmative duty to act.”).

imposes an affirmative duty to act.”⁴²⁴ Serkin imports this idea into takings jurisprudence, and finds it expressed in the *Arkansas Game & Fish* case: There, since “the government almost completely controlled the allocation of costs from flooding—imposing costs either on the farmers if it released the water more quickly over a shorter duration or on the timber owners if it released the water more slowly over a longer period,”⁴²⁵ it bore responsibility for temporary takings regardless if the flooding emanated from omission or commission, since “that degree of control renders nonsensical any attempt to distinguish between acts and omissions in each of these scenarios. Such a level of control is sufficient to create a passive takings claim.”⁴²⁶

Serkin *does* note that his passive takings theory creates a possible inequality problem, in that it distributes resources to presumably wealthy owners of beachfront properties.⁴²⁷ He concludes that the inequality dilemma does not render his theory illegitimate, because the same risk presents itself in traditional takings analyses, “[a]nd the point here is simply that no reason exists to treat inaction any differently.”⁴²⁸ However, Serkin also does cite to progressive property theorists who argue that takings claims should be construed in favor of the politically powerless or the poor, and so hints at an interesting future development in passive takings jurisprudence⁴²⁹ that might be more ready to find

424. *Id.*

425. *Id.* at 380.

426. *Id.* On the role of control in creating a duty, *see supra* note 420 (mentioning the relevance of the Supreme Court and Judge Dyk’s own Court of Appeals decisions in *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 475 (2003) and *White Mountain Apache Tribe v. United States*, 249 F.3d 1364, 1377 (Fed. Cir. 2001)).

427. Serkin, *supra* note 408, at 400 (“Forcing the government to pay when zoning height limits interact with sea-level rise can effectuate an unappealing transfer of wealth from taxpayers to a small group of beachfront property owners who are probably already well-to-do.”).

428. *Id.*

429. *Id.* at 365 (“Professor Dagan argues, in contrast, that takings protection

takings where the government has placed vulnerable communities in danger via omission.

Thus, support for Blights Out's position on omission/commission in the context of property justice can be found in *Arkansas Game & Fish*,⁴³⁰ the holding of Braden,⁴³¹ and the work of Serkin, who himself relies upon *Deshaney*, Dagan, Alexander, Penalver, and Husak.⁴³² In fact, *all* of these resources work together to make a strong case for the meaninglessness of the act/failure distinction as it pertains to *Saint Bernard Parish II*. Meshing together the art of the Blights Out collective with Serkin's theory and the facts of Katrina, we see federal government had a Hukasian control over "flooding hazards,"⁴³³ which (as I will show more in the next sub-section⁴³⁴) made the people more, not less, susceptible to danger (a la *Deshaney*); the vulnerable populations of New Orleans did not enjoy any of Dagan's reciprocal advantage from the government's failures to attend to those hazards;⁴³⁵ and the resulting dispossession of

should be explicitly progressive, safeguarding the poor over the wealthy in order to offset the natural political pressures in the other direction.). *See also* Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741 (1999) (illustrating this point); Daniel A. Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENT. 279, 306 (1992) ("[B]ecause the legislature will usually offer compensation voluntarily, the takings clause can be defended as a prophylactic barrier against a serious form of discrimination against politically disfavored groups.") (cited in Serkin, *supra* note 408, at note 80).

430. *See* Ark. Game & Fish Comm'n v. United States, 568 U.S. 23, 27–28 (2012).

431. *St. Bernard Par. Gov't v. United States (Saint Bernard Par. I)*, 121 Fed. Cl. 687, 744 (2015).

432. *See* Serkin, *supra* note 408, at 370, 375.

433. This, again, is a quote from *Sponenbarger*. *United States v. Sponenbarger*, 308 U.S. 256, 256 (1939). On the question of whether the people of New Orleans did, in fact, suffer greater risk as a result of government inaction, *see infra* notes 471–485, arguing that governmental response to "flood[ing] hazards" encompassed more than the building and failure to maintain the MRGO or LPV, but also included FEMA's failure of care and other catastrophes.

434. *See infra* text accompanying notes 471–485.

435. On reciprocal advantage, *see* Serkin, *supra* note 408, at 370; on lack of reciprocal advantage, *see, e.g.*, Blights Out, *supra* note 2 (Blights Out claims that

property has so stymied Peñalver and Alexander's human flourishing that Blights Out artists held a quasi-funeral for their homes in *Home Court Crawl*⁴³⁶ and complain that the people's lodgings are unfit for human beings.⁴³⁷

As this analysis shows, Balkin's "on the wall" analysis does not just proceed from the law and legal theory to the work of Blights Out. Blights Out's arguments *also mutually reinforce the "passive takings" theory* for two reasons: Blights Out's emotionally-charged performances support the "omissions" thesis under a "law and the emotions" school of thought that seeks to incorporate affect in the "intelligent and responsible engagement by law."⁴³⁸ Second, Blights Out possesses a special status as it is composed of community members who experience the real world effects of takings decisions in New Orleans: Based on the ethics of community constitutionalism⁴³⁹ and "artifact"-rich jurisprudence, which seeks to privilege the "buried"⁴⁴⁰ perspectives of vulnerable populations, Blights Out artists' community credibility resonates with and strengthens Serkin's Michigan Law Review-published theory⁴⁴¹ on passive takings in this particular study of takings.

Furthermore, to the extent that readers may grow concerned that the expansion of takings analyses offered by Blights Out's legal thought could ricochet into yet another tool of the wealthy to extract lucre from the less-advantaged, observe how Blights Out *continually* emphasizes race and class vulnerability in their analysis:⁴⁴² In so doing, they offer

people of color in New Orleans are living in "apartheid").

436. See TURNER, *supra* note 293, at 103.

437. See Blights Out, *supra* note 332.

438. Abrams & Keren, *supra* note 271, at 2000.

439. See Murray, *The Takings Clause of Boyle Heights*, *supra* note 34.

440. See *id.*

441. See *generally*, Serkin, *supra* note 408, at 345.

442. Of special importance here is Blights Out's interest not only in people who own their homes, but also those who rent. See, e.g., Interview with Carl Joe

yet more support for a passive takings jurisprudence that remains alert to inequality, and aspires most to give back to the poor and marginalized. *Blights Out*, then, buttresses Serkin's tacit suggestion that passive takings should skew toward the poor, as well as Dagan's inequality-centered takings analyses.⁴⁴³

In the end, Serkin, Braden, the Supreme Court cases, and the moral, historical, and emotional and local weight of *Blights Out*'s rejection of the omission/commission distinction weighs in favor of a reconsideration, and rejection, of Dyk's reversal of Braden on the grounds that she over-emphasized government failures of care.⁴⁴⁴ Importantly, the efforts of *Blights Out*'s artists supports this conclusion, by showing us that the omission/commission distinction fails to recognize the real hurt the government has subjected the people of New Orleans to,⁴⁴⁵ and so should be rejected as a prime mover in takings law.

2. Is *Blights Out*'s theory of the relevant "totality of the government's actions" off the wall?

As discussed above, Judge Dyk reversed Judge Braden because he concluded that the plaintiffs had failed to establish that the construction or operation of MRGO caused their injury.⁴⁴⁶ Dyk maintained that a valid causation

Williams, *supra* note 151. ("Right after Katrina happened there was a lot of price gouging, and at the time I had a little small place I was living at 400 bucks, and it was a small spot, but it was cheap, but it went up like 750 bucks right after Katrina. It wasn't under a lease so they could do that."). *Blights Out*'s conceptions of legal rights in property, then, are coherent with other community constitutionalisms that I have studied, including those of Boyle Heights residents, who sought property interests for renters. See Murray, *The Takings Clause of Boyle Heights*, *supra* note 34, at 126 (discussing the rights of renters with Aldo Medina).

443. See Serkin, *supra* note 408.

444. *St. Bernard Par. Gov't v. United States (Saint Bernard Par. II)*, 887 F.3d 1354, 1360 (Fed. Cir. 2018) ("[o]n a takings theory, the government cannot be liable for failure to act, but only for affirmative acts by the government.").

445. See *supra* text accompanying notes 382–382.

446. *St. Bernard Par. II*, 887 F.3d at 1362.

analysis needed to consider how events would have unfolded if the government had simply done nothing.⁴⁴⁷ Dyk determined that the plaintiffs undermined their ability to make such proofs since they fought against any consideration of the Barrier plan's effects on flooding.⁴⁴⁸ Dyk chastised the plaintiffs for failing to "ask[] not whether *the whole of the government action* caused the plaintiffs' injury,"⁴⁴⁹ and for omitting to take account of "*other government actions*" that "may well have placed the plaintiffs in a better position than if the government had taken no action at all."⁴⁵⁰ Citing cases such as *Arkansas Game*, he specified at length that the causation analysis must consider "*all government actions.*"⁴⁵¹ Dyk also cited *Sponenbarger*, which requires that takings claimants offer proofs that takings occurred within a government "*program measured in its entirety*"⁴⁵²—there, where the government "undert[ook] to safeguard a large area from existing flood hazards"⁴⁵³ through "a comprehensive ten-year program for the entire valley"⁴⁵⁴

What was the federal government's response to Katrina, as measured in its entirety? As demonstrated above,⁴⁵⁵ Blights Out artists offer a *very* wide window within which to view federal, Katrina-related conduct to see whether it

447. *Id.*

448. *Id.* at 1363 ("Plaintiffs on appeal are clear that in their view the LPV levees cannot be considered in the causation analysis.").

449. *Id.* at 1364 (emphasis added).

450. *Id.* at 1363 (emphasis added).

451. *Id.* at 1364 (citing *Ark. Game & Fish Comm'n v. United States*, 736 F.3d 1364, 1372 n.2. (Fed. Cir. 2013)).

452. *Id.* (citing *United States v. Sponenbarger*, 308 U.S. 256, 266–67 (1939)).

453. *Sponenbarger*, 256 U.S. at 265.

454. *Id.* at 262. Dyk also cited *John B. Hardwicke Co. v. United States*, 467 F.2d 488 (Ct. Cl. 1972), where the Court of Claims considered the building of two dams when considering whether there was a taking. See *Saint Bernard Parish II* at 1364.

455. See *supra* text accompanying notes 369–371.

wrongfully takes property: It considers not only the events of the storm (which it pondered through its story circles, initiated in 2015 in honor of Katrina’s anniversary),⁴⁵⁶ but also looked forward thirteen years⁴⁵⁷ to later changes in New Orleans’ property values and demographics. Blights Out artists attribute this gentrification to the acts and omissions of the government and its “regime.”⁴⁵⁸ Thus, Blights Out is in accord with Dyk’s assessment that takings claims remain alert to the *entirety* of,⁴⁵⁹ the *totality* of,⁴⁶⁰ and *all*⁴⁶¹ government action (and omission) that bears a connection to Katrina, and finds that in no way has the sum of government conduct and inaction left the people in a “better” situation.⁴⁶²

Still, Blights Out’s wide scope probably moves beyond the “totality” imagined by Judge Dyk. In his analysis of *Arkansas Game and Sponenbarger*, Dyk appears to mean that term to relate to actions designed to deal with “flood hazards”⁴⁶³—he observes specifically how, in *Arkansas*

456. Interview with Mariama Eversley, *supra* note 327; see also *An Invitation is a Call to Action, or, A Composite Prose or Portrait of What Folks from Blights Out are Feeling, Thinking, & Talking About on the 10th Anniversary of Katrina*, BLIGHTS OUT (Aug. 21, 2015), <http://www.blightout.org/home> (“On August 15, 2015, members of Blights Out—natives and newcomers—were asked to share one word to describe how they were feeling as the 10th Anniversary of Hurricane Katrina approached. Dueling, conflicting, entwined emotions about the future were exposed: fear and anxiety tempered with optimism and hope. These single words sparked a profound conversation about what it means to belong to and become part of a place and a community.”).

457. My study of Blights Out stops in 2018.

458. See Blights Out, *supra* note 16.

459. *St. Bernard Par. Gov’t v. United States (St. Bernard Par. II)*, 887 F.3d 1354, 1364 (Fed. Cir. 2018).

460. See *id.* at 1364.

461. See *id.* at 1365.

462. *Id.* at 1363 (“The result is that plaintiffs failed to take account of other government actions—specifically the LPV project including the construction of a vast system of levees to protect against hurricane damage—that mitigated the impact of MRGO and may well have placed the plaintiffs in a better position than if the government had taken no action at all.”).

463. *Id.* at 1361 (citing *United States v. Sponenbarger*, 308 U.S. 256, 265 (1939)).

Game, the Supreme Court focused on the building of a dam as well as the letting of waters.⁴⁶⁴ It should be said that the ten-year window⁴⁶⁵ noted in *Sponenbarger* does hew to a similar timeline advocated by Blights Out artists.⁴⁶⁶ Nevertheless, perhaps Blights Out's citation of gentrification and government support of market forces veer too far away from the precedent of *Arkansas Game*, and the art collective's vast vantage will be considered "off the wall."⁴⁶⁷

Yet, even if we constrain ourselves to consider "all government actions"⁴⁶⁸ to manage (qua *Sponenbarger*) Katrina-related "flood hazards,"⁴⁶⁹ then Blights Out's generous vision of the "totality of government actions" and omissions⁴⁷⁰ inspires us to consider quite a few other federal government behaviors that conspired to separate New Orleanians from their property.

What else did the Federal government do, or not do, in relationship to Katrina's "flood hazards?" The list is long. On the plus side for the government: Once the storm hit, FEMA *did* offer some supplies to Superdome shelterers⁴⁷¹ and 114,000 households *were* housed in FEMA trailers after

464. *Id.* at 1364–65 (“[I]n that case, the government built a dam and then released water (a deviation from policy) that flooded the plaintiff’s property. We explained that ‘the proper comparison would be between the flooding that occurred prior to the construction of [the dam] and the flooding that occurred during the deviation period,’ emphasizing that the causation analysis considers causation based on the entirety of government action, not merely the deviation from the original water-release policy.”).

465. *United States v. Sponenbarger*, 308 U.S. 256, 262 (1939).

466. *See* Blights Out, *supra* note 6.

467. *See* Balkin, “*Wrong the Day it Was Decided*,” *supra* note 38.

468. *See St. Bernard Par. II*, 887 F.3d at 1364.

469. *Sponenbarger*, 308 U.S. at 265.

470. *See supra* Part V.

471. Matthew Davis, *Fema 'knew of New Orleans danger*, BBC, <http://news.bbc.co.uk/2/hi/americas/4331330.stm> (last updated Oct. 11, 2005, 7:52 PM) (reporting that FEMA “positioned resources” at the Superdome but that they turned out to be woefully inadequate).

Katrina.⁴⁷² Further, the National Guard airlifted approximately 88,000 people to safety (from all of Louisiana and Mississippi),⁴⁷³ and Bureau Chief Lt. General Steven Blum congratulated his troops for being “in the water” in New Orleans “within four hours of the storm” and “saving lives” in “on the streets and in the air.”⁴⁷⁴

But while these aid missions saved lives, other government conduct proved so disastrously inept that it needlessly disconnected residents from their communities and houses. For one thing, the federal government did not alert to—or seem to care about—that it created a foreseeable risk of storm surge by building the MRGO and destroying wetlands.⁴⁷⁵ Further, after the storm hit, FEMA committed a catastrophic failure to come to the aid of residents placed at risk from the flood,⁴⁷⁶ leading to such atrocities as a nightmarish body count in the streets,⁴⁷⁷ unimaginably painful conditions at the Superdome,⁴⁷⁸ and a waste of ice that could have helped overheated patients at New Orleans’

472. *Hurricane Katrina Statistics Fast Facts*, CNN (Updated Aug. 8, 2019, 6:48 PM), <https://www.cnn.com/2013/08/23/us/hurricane-katrina-statistics-fast-facts/index.html>.

473. John Orrell, *Hurricane Katrina Response: National Guard’s “Finest Hour,”* THE U.S. ARMY (Aug. 27, 2010), https://www.army.mil/article/44368/hurricane_katrina_response_national_guards_finest_hour.

474. Ernest E. Rogers III, *The Army National Guard and The Department of Homeland Security*, U.S. ARMY WAR COLLEGE (last visited Nov. 9, 2019) <https://apps.dtic.mil/dtic/tr/fulltext/u2/a521959.pdf>.

475. See, e.g., *St. Bernard Par. Gov’t v. United States (Saint Bernard Par. I)*, 121 Fed. Cl. 687, 699 (2015) (“In 1958, the United States Fish & Wildlife Service . . . warned the Army Corps [of Engineers] that [the channel] could result in major ecological change of the area.”).

476. U.S. HOUSE OF REPRESENTATIVES, *FAILURE OF INITIATIVE 275* (Feb. 15, 2006) (“With only nominal amounts of medical supplies pre-positioned by FEMA and HHS, a great deal of medical provisions had to be supplied after Katrina made landfall. In areas like New Orleans, it took days to respond to the catastrophe and deliver medical supplies to the Superdome and Convention Center. The delays were a result of poor planning.”).

477. See *supra* note 105.

478. U.S. HOUSE OF REPRESENTATIVES, *supra* note 87, at 7.

Memorial Hospital, the site of “mercy” killings.⁴⁷⁹ George Bush and his threats of “zero tolerance” that would be exhibited by the National Guard intimidated residents with threats of violence and “overwhelming force”⁴⁸⁰ that may have caused them to fear that the Guard would remove them from their homes,⁴⁸¹ and take over the city as occupying troops.⁴⁸² Moreover, the National Guard airlifted New Orleanians to places like Salt Lake City, but the federal government did not give the passengers adequate resources for communicating with NOLA residents or knowing how to get back.⁴⁸³

It may even be possible (though, admittedly, less so) to identify federal conduct related to “flood hazards” in the events of Danziger Bridge, since the NOLA police shootings of James Brissette and Ronald Madison on September 5 occurred during the local government’s panicked reaction to the storm—but the malfeasance of federal prosecutors later led to a diminution of the sentences that the officers received ultimately for the homicides and cover-up.⁴⁸⁴ While I lack

479. Carrie Kahn, *New Orleans Hospital Staff Discussed Mercy Killings*, NPR (Feb. 16, 2006, 4:40 PM), <https://www.npr.org/templates/story/story.php?storyId=5219917>.

480. See U.S. HOUSE OF REPRESENTATIVES, *supra* note 87, at 171.

481. Mark Guarino, *Misleading Reports of Lawlessness After Katrina Worsened Crisis, Officials Say*, THE GUARDIAN (Aug. 15, 2016, 7:00 AM), <https://www.theguardian.com/us-news/2015/aug/16/hurricane-katrina-new-orleans-looting-violence-misleading-reports> (“Mike Kelly, 60, a former sniper in Iraq who was shipped to New Orleans with the national guard, said people they encountered were often afraid of being forced to leave their houses.”).

482. Cf. *id.* (“After an initial confrontation, the officers left. ‘I own this town. You don’t. Now get the fuck out of here,’ Kelly said he told them.”); Jonah Walters, *A Guide to Hurricane Katrina and Its Aftermath*, JACOBIN, <https://www.jacobinmag.com/2015/08/hurricane-katrina-bush-gulf-new-orleans-climate-change-racism-fema/> (last visited Nov. 9, 2019) (“In the weeks and months that followed Katrina, working-class residents of New Orleans saw their city transformed into a literal police state, where movement was monitored and storm victims were marked as criminals and delinquents by hostile police and National Guard forces.”).

483. See *infra* note 492.

484. See *Danziger Bridge Officers sentenced 7 to 12 years for shooters, cop in*

any causal proofs of this, I will suggest that this trauma and resulting disgust⁴⁸⁵ may have further severed New Orleanians' connection with their city and so their houses.

How did this sum of the totality of government conduct take property? It shows us that the federal government did not disunite people from their homes just by creating a hurricane delivery system in the form of MRGO (which may or may not have been offset to some degree by the LPV). While Judge Braden, in *Saint Bernard Parish I*, noted that owners could not reach their houses for a “significant” amount of time due to flooding,⁴⁸⁶ that does not paint the entire picture of why people were severed from their homes. “All government conduct” also frightened, shocked, and deterred people from returning to their domiciles—either by allowing New Orleans to descend into death and chaos and triggering a diaspora,⁴⁸⁷ or by actually, physically preventing residents from having access to their properties.⁴⁸⁸ Again, property abandonment and people’s inability to interact with their houses exacerbated the damage that New Orleans

cover-up gets 3, supra note 121.

485. See Love Wins All the Time, comment to Andy Grim, *5 NOPD officers will get new trial in Danziger Bridge case*, *Appeals Court Rules*, NOLA.COM (Aug. 18, 2015, 9:44 PM), https://www.nola.com/crime/index.ssf/2015/08/5_nopd_officers_will_get_new_t.html (“Heartbreaking”); Shrev Birdman, comment, *id.* (Aug. 18, 2015, 7:59 PM) (“This is just racist strategy to get these cops . . .”).

486. *St. Bernard Par. Gov’t v. United States (Saint Bernard Par. I)*, 121 Fed. Cl. 687, 746 (2015).

487. See Dennis Devine, *Katrina Survivors Touch Down in San Diego*, SAN DIEGO UNION-TRIB (Sept. 5, 2005, 2:00 AM), <https://www.sandiegouniontribune.com/sdut-katrina-survivors-touch-down-in-san-diego-2005sep05-story.html> (“His wife shuddered thinking of the terrifying tide of corpses floating in the flood. ‘I couldn’t go back to that,’ Denise Powell said. ‘Some of them could be my family.’”); Jamie Goward, *We will never return, say survivors of drowned city*, THE GUARDIAN (Sept. 10, 2005, 7:43 PM), <https://www.theguardian.com/world/2005/sep/11/hurricanekatrina.usa> (“We’re heading up north to Chicago to get on to higher ground. To a city with a different energy,’ [former NOLA resident Igor] Szymanski said. He feels the Windy City won’t leave him isolated as New Orleans did, should it suffer a natural catastrophe.”).

488. See *supra* note 125.

properties suffered, leading to the “blight”⁴⁸⁹ documented by Blights Out in *Live Action Painting*⁴⁹⁰ and irretrievable loss of property.

As former NOLA resident Linda Santi (who is not a part of Blights Out) described the reasons for property abandonment to me in a telephone interview on December 27, 2018,

You couldn't get to your house [And once you went away,] it was hard to come back. Emotionally and physically. Remember that . . . not everyone had cell phones . . . it was incredibly difficult to talk communicate to people . . . it was hard and with flip phones . . . You didn't have a lot of intelligence and you didn't have a way back and your car was ruined because [say,] you stayed [and then were airlifted away] . . . and if that was the case, [people] . . . had just landed wherever the plane dropped them, which [in my case] was Salt Lake City . . . so just trying to find out what was going on and what you had to do and where everybody was, was incredibly hard for people . . . it just worked your last nerve

[But if you did come back to New Orleans,] there were buses that [would] let you go past [your house. These buses started] at The Sanchez Community Center on Claiborne.⁴⁹¹ [The military put] shrinks [on the buses] and [we would all] would ride on the bus . . . so you could drive past your house and see if it was gone or standing, but you couldn't get out.

[On these buses,] it was remarkable to hear the fatalistic humor [— at first, people would say things like] “oh look, there's Uncle Peet's truck, why's it on my roof? . . . Or, “that's Mr. Gerald's couch, what's that doing on the pole?” And people would kind of at the beginning laugh about how crazy everything was and then the bus would get

489. Gillian B. White, *A Housing Crisis Amid Tens of Thousands of Abandoned Homes*, THE ATLANTIC (Aug. 20, 2015), <https://www.theatlantic.com/business/archive/2015/08/new-orleans-blight-hurricane-katrina/401843/> (“New Orleans's abandoned houses, their entrances sealed with graffiti-covered plywood, are common. They pepper the landscape becoming more and more frequent as you drive from ritzier neighborhoods to poorer ones. The most ominous look as if they're being reclaimed by the land, with tall grass and unpruned shrubs shrouding them, weeds and vines growing through every crack.”).

490. See *supra* text accompanying notes 304–326.

491. See Katy Reckdahl, *The Andrew 'Pete' Sanchez Multi-Service Center*, NRPA (Sept. 5, 2017), <https://www.nrpa.org/parks-recreation-magazine/2017/september/the-andrew-pete-sanchez-multi-service-center/> (describing the corner as “a hub”).

so overwhelming, and everybody would just get quiet. [*She cries.*]⁴⁹²

Blights Out's wide vision of the government behavior, combined with *Arkansas Game & Fish's* and *Sponenbarger's* limiting factor of "flood hazards," together give us a wider scope of "all government action" related to the storm than that considered by Judge Dyk. From this perspective, could a reasonable person⁴⁹³ find that the government placed the people of Saint Bernard Parish and the Lower Ninth Ward in a worse position relative to their property⁴⁹⁴ than if it had acted otherwise or not acted at all? It is definitely possible. And, as we see with the emotive testimony of Linda Santi, it is difficult to discern how such a conclusion would be considered off the wall.

VII. CONCLUSION

Communities possess their own legal thought. Artists do too. In *Blights Out*, we see a fusion of these jurisprudences, in the form of a body of work by artists in New Orleans that leverages specific arguments about "causation" and the concept of the "totality of the government's actions." These arguments have direct bearing upon the legal problems addressed in *Saint Bernard Parish I* and *II*.

In *Saint Bernard Parish I*, Judge Braden held that the U.S., via the Army Corps of Engineers, had temporarily taken property from people in the Lower Ninth Ward and Saint Bernard Parish by building, expanding, maintaining, and failing to maintain the MRGO: She determined that the MRGO caused the flooding and so constituted a taking under

492. Interview with Linda Santi, *supra* note 111.

493. Courts engage their reason to determine whether government behavior caused takings. *See, e.g., Pashley v. United States*, 156 F. Supp. 737, 738 (Ct. Cl. 1957) ("We think the proof shows that the flooding of plaintiffs' property was caused by the erection of the dam.").

494. *St. Bernard Par. Gov't v. United States (Saint Bernard Par. II)*, 887 F.3d 1354, 1363 (Fed. Cir. 2018) (querying whether the government put the plaintiffs in a better position).

Arkansas Game & Fish.⁴⁹⁵ On appeal, Judge Dyk reversed, holding that Braden had impermissibly pivoted her takings analysis upon government inaction, and because her causation analysis proved flawed, as she had failed to consider the ameliorating effects of the LPV.⁴⁹⁶

The artists of Blights Out maintain that the “government,” or the “regime,” has wrongfully dispossessed poor people of color in New Orleans of property through systematic and wide-ranging neglect that extends from Katrina in 2005 to gentrification in 2018. In works such as *Home Court Crawl*, *Live Action Painting*, and *50 Years Later, We Still Need Housing Fit for Human Beings*, Blights Out contends that property may be wrested from the people via government omissions.⁴⁹⁷ And in works such as the “October” billboard⁴⁹⁸ (which describes ecological apartheid that will create a gentrified forest protecting the wealthy from the rising-up of seas and people), *Development Without Displacement*, *Trauma is Planned into Architecture*, and the November/*Disaster Capitalism* billboard, the artists look at a wide sequence of events to gauge that taking.

The theories of popular and community constitutionalism, demosprudence, and “artifacts” give us license to consider these resources when studying the question of whether Judge Dyk’s holding in *Saint Bernard Parish II* stands up to scrutiny. Moreover, when asking whether Blights Out’s jurisprudence is “off the wall,” we see how its essential arguments about the irrelevance of the omission/commission distinction and its generous attitude toward “totality” withstand Jack Balkin’s famous tests. Furthermore, we also discern that when we add Blights Out’s insights to existing jurisprudence—Christopher

495. *St. Bernard Par. Gov’t v. United States (Saint Bernard Par. I)*, 121 Fed. Cl. 687, 746 (2015).

496. *St. Bernard Par. II*, 887 F.3d at 1365.

497. See, e.g., *supra* text accompanying notes 298–99.

498. See *Ecological Apartheid*, *supra* note 2.

Serkin's theory of passive takings, say—that the legitimizing feedback works both ways.

In the end, we learn that Judge Dyk's decision that inaction cannot leverage a takings finding and his narrow obsession with the LPV crack under the pressure imposed by *Blights Out's* passionate and incisive theories of causation and "totality." Together with plain readings of Supreme Court opinions and prestigious property theory, the artists' insights teach us that, in 2005, the federal government could and did take property from the people of New Orleans within the meaning of the Fifth Amendment's Takings Clause.