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The Takings Clause and the Separation of Powers: An Essay

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The protection of private property lies at the very core of environmental law. After all, except on the high seas, just about all of the "environment" either *is* somebody's private property or lies just above it. Environmental regulation is, bluntly, the regulation of private property. The basic purpose of environmental laws is to help assure that private owners treat their property with appropriate ecological respect. The reason we need environmental laws is that private owners are not always inclined to act in ways that respect our shared environment.

The most fundamental environmental problem is this: across our nation there are literally hundreds of millions of acres of important natural resource lands—farms, forests, wetlands, reservoir watersheds, shore lands, endangered species habitat—lands that have relatively little commercial value in their present natural condition, but which would have much greater commercial value if their natural values were degraded or destroyed. Stated differently, private property often will yield a much greater profit to its owner if it is used in ways that will harm or obliterate important environmental assets and values. For this reason, private owners are understandably tempted to supplant and eliminate the long-term natural values of their lands in order to carry out projects that will yield them the greatest returns in their own lifetimes. When faced with the grand trade-off between present gratification and future generations, a lot of people naturally favor themselves.

Free markets are, in this context, almost inevitably driven to fail. This "market failure" is inevitable because people whose time horizons go out only a few decades determine the market valuations of future returns. Many people tend to have little interest in

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returns that will accrue long after the ends of their own lifetimes and, as a result, the market tends to value these more distant returns at or near zero.[1] The fertile, well-watered farm land of New Jersey, for example, may be capable of pushing up crops to relieve human hunger for the next 5000 years, as much of the fertile land of India, Egypt, and China has already done. But this long-term potential is of little practical concern to the farmer who wants to do the best he can for himself and his family during his own lifetime. Such a farmer may, therefore, be understandably tempted to sell the land to a developer who will pave it over and destroy its biological productivity forever. Because the dazzle of near-term gain can blind people to slower but perpetual potentials, untold future natural productivity is jeopardized by the operation of normal market forces. The face of the earth and fate of our national land is being irrevocably shaped by the market forces of our generation.

Now, overall, there are really only two practical policy choices: either we adopt environmental laws that will protect and defend our nation's one and only national land base from shortsighted modifications and poorly planned development, or we can surrender the fate of our national land, and the quality of our descendants' lives, to the self-oriented decisions of a relative few—the tiny percentage of the American population that happens to own the lion's share of the nation's undeveloped land. That is it: either adopt comprehensive environmental laws regulating and restricting the ways in which people can modify the uses of private property—especially ecological assets—or cross our fingers, say a prayer, and *hope* that the self-interest and self-oriented motivations of the relative handful of large land owners, in our generation, will produce good results for all of future time.

I want to stress that most property owners do *not* pose a development threat to long-term environmental values. That is because most owners of real property are content with the uses to which their property is already being put; in any event, they cannot legally change the use. That is to say, most American landowners hold small parcels of land located in cities and suburbs, places where ordinary zoning regulations have long made it unlawful to put land to a different use just because there would be a

1. For example, using a 3% inflation-adjusted (or "real") interest rate, the present value of a $1000 return to be received in the year 2150 would be about $12.

profit to be made in doing so.[2] For most of this vast preponderance of American landholders—ordinary homeowners and proprietors of small businesses—their property has already been developed to more or less the maximum extent permissible under the zoning laws. A homeowner might find that he or she could double, quadruple, or increase tenfold the value of his or her property by converting it from a residence to a commercial storefront, a doctor's office, or a welding shop, but under ordinary zoning laws this normally cannot be done. Most people would probably agree, moreover, that such changes *should* not be done because they would be profoundly undesirable. That is why zoning laws are widely popular.

As applied in cities and developed suburbs, the net effect of the ordinary zoning laws essentially amounts to "existing use zoning."[3] That is, in most cities virtually all of the land base is zoned to remain in the uses that already exist. Under such a regulatory regime, individuals may lose the chance to score a profit by intensifying the use of their land, but the prohibition on their doing so is generally accepted. The fundamental goal is the protection of the interests of others. It is recognized that each person's "private" property is part of the "environment" of everybody else, and the private use of privately owned land is not a totally private affair.

By contrast, the situation is entirely different for the smallish group of people who hold the vast bulk of the American land base, including most of the undeveloped and environmentally vulnerable lands of our nation. The owners of most of these lands never have been legally restricted to the lands' "existing" uses in the way that is normal for most American owners (those owning land in cities). What is more, the owners of environmentally sensitive lands typically have no expectation that they even *ought* to be restricted in the land-use choices they make. On the contrary, de-

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2. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), is the landmark case upholding the constitutionality of traditional zoning regulations. *See also* Gorieb v. Fox, 274 U.S. 603, 608 (1927) (upholding set-back restrictions and stating that "zoning laws prescribing . . . the height of buildings . . . and the extent of the area to be left open for light and air . . . are, in their general scope, valid under the federal Constitution."). *See generally* DANIEL R. MANDELKER, LAND USE LAW §§ 4-1 to 4-40 (5th ed. 2003).

3. For a more detailed explanation of "existing use zoning," see my earlier article *Law and a New Land Ethic*, 74 MINN. L. REV. 339 (1989). For further information and a model of an "existing-use zoning" ordinance, see also http://www.law.pace.edu/jhumbach/publications_online.htm (last visited Sept. 26, 2003).

spite the fact that their choices can affect not only themselves but also the quality of life of all Americans, present and future, the expectations expressed by larger-tract owners are often exactly the opposite—that "nobody" has any business telling them what to do with their land (and *our* nation's environment). Hence, the battles over private property rights.

Now we could, of course, decide that private property rights ought to be protected as a paramount point of policy, much the way we accord protection to free speech, choice of religion, and other such guarantees in the Bill of Rights. If we did so, however, we would essentially be leaving the future of America's undeveloped lands and natural resources to the relative handful of people who happen to own them in our generation. We have not, however, decided to give such primacy to private property. On the contrary, the very reason our environmental protection laws have been enacted is that our nation has decided (if somewhat half-heartedly) *not* to leave our nation's land-resource future to a relative handful of persons. Instead, the enactment of our environmental laws expresses our nation's decision that *all* Americans have a legitimate voice in the future of American land, the national land base on which we all depend and which our descendants all must share.

America is a republic—literally, a "thing of the people." What this means is that our country's destiny belongs, first and foremost, to the people as a whole, not to a narrow class of larger-scale landowners—as it was in eighteenth century England, against which we fought a Revolution to escape. America's future and that of the American land belongs to the *whole* people, and our body of environmental laws represents our nation's democracy-driven choice that some uses of private land are simply too socially intolerable to allow.

Unfortunately, however, one of the constants of post-Medieval history is that the large-landowner classes have never much cared for democracy-driven choices. The present situation in the United States is no different. Today it is expressed in the form of landowner antipathy towards environmental laws. When environmental laws have real bite—depriving owners of near-term bonanzas they might otherwise reap—the owners are inclined to resist. In recent years, this resistance has taken the form of landowner demands for "compensation." When a law deprives an owner of the ability to profit by changing the use of private land,

the argument goes, the taxpayers should pay compensation for the opportunity (value) lost.

Before looking at the legal terms of this argument, we should consider the moral context. Basically, landowners' claims for "compensation" seem to be based on the idea that we have two kinds of laws in this country. First, there are the laws that people are supposed to obey. Obedience is expected even though a person might have to pass up certain private advantages that might otherwise accrue. Then (some seem to assume) there is a second kind of laws, the ones that people should *not* have to obey unless they get paid for the inconvenience of doing so. Laws prohibiting the degradation or destruction of important ecological resources fall into this second category. When holders of large undeveloped tracts find it inconvenient or burdensome to comply with these laws, they claim they are entitled to "just compensation," payment from the taxpayers for the burden of obeying the law.

Fundamentally, the reason we have laws at all is because some behavior is simply too socially intolerable to allow. It may be robbing banks or filling wetlands, or whatever, but the common feature of the behavior prohibited by law is that it cannot be socially tolerated. Now ordinarily, when people engage in socially intolerable behavior, it is not a defense that the behavior is profitable. For example, when customs agents seize a shipment of cocaine belonging to a drug dealer, no one thinks the dealer should receive compensation because the government has taken his "private property" and his chance to make a profit. The laws that prohibit drug trafficking are examples of the first kind of law that I mentioned earlier—the ones people are supposed to obey: importing cocaine is simply too socially intolerable to allow, period.

And so it is with a wide range of laws. For example, in the land-use area, a person may wish to utilize property as a house of ill-fame, as a child porn shop, or as a garden for raising marijuana—or for any of a number of socially intolerable uses. Nobody suggests, however, that people are entitled to be paid compensation for the profits they forgo in *not* making such uses. What is different about laws that forbid construction on tidal wetlands, that prohibit destruction of valuable farmland, or that prevent the extermination of whole species through the destruction of habitat? What is different about laws that forbid developments that will contaminate valuable drinking water reservoirs or pollute the air we all breathe? There does seem to be a difference, in the minds of at least some. For these kinds of laws—environmental protection

laws—seem to fall into the second category. People seriously contend that, if the government wants to prevent *these* socially intolerable actions, it must be ready to pay "just compensation" for the lost profits that such actions could have produced.

What we are seeing here, of course, is pure and simple selective morality. The alleged constitutional basis for this selective morality is the so-called "takings clause" found in the Fifth Amendment of the United States Constitution.[4] On first reading, it may not be easy to see how the clause could serve as a basis for claiming compensation for obeying the law. What the takings clause says is: "[N]or shall private property be taken for public use without just compensation."[5]

For present purposes, the key word is "taken." By using the word "taken," the clause seems to refer most obviously to situations in which the government makes direct physical appropriations of property, *i.e.*, when it "takes" the land (or other property) away.[6] That is, moreover, pretty clearly what the Framers of the Constitution had in mind.[7] Indeed, for the first 130 years of the Republic, there was not much doubt that the takings clause only actually applied to direct takings of private property.[8]

For most of the twentieth century, however, the takings clause has led very much of a dual existence—constituting a straightforward compensation requirement for cases of *physical* invasions of private property while also vaguely promising a possibility of compensation, under ill-defined circumstances, when the government affects property values by *regulation*.[9] Broadly speaking, so-called regulatory takings refer to takings of private

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4. U.S. CONST. amend. V.

5. *Id.*

6. The text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings. Its *plain language* requires the payment of compensation whenever the government acquires private property for a public purpose. . . . But the Constitution *contains no comparable reference to regulations* that prohibit a property owner from making certain uses of her private property.

Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 321-22 (2002) (emphasis added).

7. *See* William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 711 (1985).

8. At the time of *Mugler v. Kansas*, the Supreme Court went to pains to insist that, for the takings clause to apply, there must be a "physical invasion of the real estate of the private owner, and a practical ouster of his possession." Mugler v. Kansas, 123 U.S. 623, 668 (1887) (quoting Trans. Co. v. Chicago, 99 U.S. 635, 642 (1878)). The *Mugler* case is discussed *infra* text accompanying notes 41-59.

9. *See Tahoe-Sierra Pres. Council*, 535 U.S. at 321-22.

property interests by governmental actions that do *not* involve any physical invasion or impingement. Within this broad conception, however, the task of defining when a regulatory action actually becomes a compensable taking has proved elusive. After more than 100 years of interpretive effort,[10] there has been no real progress in formulating a coherent, principled, and widely accepted basis for the "regulatory takings" concept. Thus, in the dual existence led by the takings clause, permanent physical takings are virtually always compensable[11] while so-called regulatory takings virtually never are.

Fundamentally, the reason for this discrepant treatment is that so-called "regulatory takings" are a specious category. Indeed, I think it does not go too far to say that the conception of regulatory takings has no underlying "principle" at all, except a veiled skepticism about democratic government. The skepticism is not entirely irrational. Wealthier landowners recognize that those with little to lose may be all too willing to support property restrictions at the expense of those who may lose a lot.

Now there is nothing wrong with a healthy skepticism about government, but it is hard to see how the solution to the problem of over-regulation is to require the government to "regulate by purchase."[12] While it is true that making the government pay a "price" to enact regulation would cut down on over-regulation, it must be recognized that such a price will not only deter bad laws but hinder the adoption of needed ones as well.

At any rate, the fundamental reason for the discrepant treatment of physical and regulatory takings is that, in the final analysis, it is the government's *job*, its very role, to restrict behavior by regulation, and almost everything the government does is likely to have an effect on economic values. There is simply no way that the government could compensate for all the negative effects that its actions have on property values.[13] There must be limits.[14]

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10. It is probably fair to say that *Mugler v. Kansas* marks the beginning of the Supreme Court's active input into the regulatory takings interpretive controversy. The turning point came in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), discussed *infra* text accompanying notes 62-84.

11. *But cf.* United States v. Caltex, 344 U.S. 149 (1952) (denying compensation for private terminal facilities which the United States Army deliberately destroyed to prevent them from falling into enemy hands). Such examples of "emergency" or the like all have ample special features that clearly predominate the physical-invasion aspects of the government's action.

12. Andrus v. Allard, 444 U.S. 51, 65 (1979).

13. Indeed, in the case that first recognized the concept of a "regulatory taking," the Supreme Court wrote: "Government hardly could go on if to some extent values

One possible approach is to find such limits in the text of the takings clause itself, such as by recognizing a suitable limiting definition of the critical term "property." Such a limiting definition might, for example, confine compensable "property" to something on the order of Holfeldian "rights" but not Holfeldian "privileges."[15] As I have shown in an earlier article, by carefully formulating two distinct conceptions (for convenience referred to as "rights" and "freedoms"), it is possible to provide an account of the Supreme Court's takings cases that neatly divides them along the same lines as they are in fact divided.[16]

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incident to property could not be diminished without paying for every such change in the general law." Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922). What the Court did not explain is what countervailing principle would require the government to "regulate by purchase" in those cases where only valuable uses of property happened to be uses that are too socially intolerable to allow.

14. *See Tahoe-Sierra Pres. Council*, 535 U.S. at 323-24 (2002) ("Land-use regulations are ubiquitous and most of them impact property in some tangential way. . . .")

15. *See* WESLEY NEWCOMB HOLFELD, FUNDAMENTAL LEGAL CONCEPTIONS 35-50 (Cook ed. 1919), also found in 23 YALE L.J. 16 (1913). Briefly, Holfeld argued that it was crucial to clear thinking to distinguish "rights" (meaning essentially the legal advantage of being able to enforce some duty held by one or more others) from "privileges" (meaning the freedom to do something untrammeled by any right of others to stop you, *i.e.*, having a privilege means not being burdened by a duty).

16. See my earlier article, *A Unifying Theory for the Just-Compensation Cases: Takings, Regulation and Public Use*, 34 RUTGERS L. REV. 243, 251-76 (1982) [hereinafter *Unifying Theory*]. *Compare, e.g., Tahoe-Sierra Pres. Council and* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987), *with* Lucas v. S.C. Coastal Council, 505 U.S. 1003 (2002) *and* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987). The critical, and potentially most controvertible move in the previous article was to treat a deprivation of freedom as a taking of "rights" when the freedom deprivation is so extensive that it renders the right nugatory—the "functional equivalent" of a taking of the rights themselves. *See Unifying Theory*, *supra*, at 273. The Supreme Court later (in *Lucas)* repeated and endorsed this echo of Holmes' original conception, though it took a perhaps rather more generous view of "functional equivalent." *Lucas*, 505 U.S. at 1014.

The policy explanation that I gave for the rights/freedoms dichotomy was largely the same as that enunciated for the physical/regulatory distinction in *Tahoe-Sierra Preservation Council*, 535 U.S. at 323-24 ("Treating [ubiquitous land-use regulations] as *per se* takings would transform government regulation into a luxury few governments could afford [whereas] physical appropriations are relatively rare, easily identified and usually represent a greater affront to individual property rights.")

The primary difference between the defined conceptual distinction described in *Unifying Theory* as in "fact" dividing the cases and the one the Supreme Court ostensibly adheres to is this: The Supreme Court treats a "mere" deprivation of "freedom" as occasion for "complex factual assessments of the purpose and economic effects of government actions." *Tahoe-Sierra Pres. Council*, 535 U.S. at 323 (quoting Yee v. Escondido, 503 U.S. 519, 523 (1992)). According to an historical survey done for *Unifying Theory*, however, a mere deprivation of "freedoms" in fact means that no compensable taking will be recognized. In other words, absent a finding that there was a freedom-deprivation amounting to a functional equivalent of a taking of

The regulatory takings cases do not, however, make any such conceptual distinction[17] and they do not define, even roughly, what would fall within the ambit of "property immune from regulation." This somewhat striking omission convinces me that the real issue in the regulatory takings cases is not about property rights at all.[18] The real issue is about the allocation of governmental power, specifically, *who* should decide, so as to bind us all, what is and is not "too socially intolerable to allow"? It is a question, in other words, that goes to the very structure of government. When various interests in society disagree about issues of policy and values, *who decides*? In the environmental protection sphere, who decides which uses of land are, and are not, too unacceptable? When property owners invoke the takings clause in an effort to get a court to trump legislation, the implicit contention is inevitably that the ultimate governmental power to decide should reside not in the democratically elected legislatures but in the courts.

That the real question is about the structure of government, not about "rights," is clearly enough shown by the conventional contexts in which regulatory takings cases arise. Almost invariably the private litigant's primary technical request for relief is for the court to overturn the results of the democratic legislative process. The immediate object is to convince the court that it should not adhere to the policy choices made by the representatives of the people.

The history of takings law also amply demonstrates that the essential question of regulatory takings is about the constitutional structure of government, not the content or extent of private rights. Indeed, the modern law of regulatory takings began not with the takings clause but elsewhere, especially in the Constitution's due process clauses.

The original due process clause is contained in the Fifth Amendment. It states, "no person shall . . . be deprived of life, liberty or property, without due process of law."[19] The other due process clause (the one that operates as a constraint on the states)

"rights," the Supreme Court has never required compensation to be paid for a mere regulation.

17. Although one of them comes close. *See Tahoe-Sierra Pres. Council*, 535 U.S. at 322-23.

18. Obviously, property rights and the government's power to affect them are central, but not so much as the basis for resolving the question as for the motivation for raising it in the first place. The motivation is, of course, to protect (and, perhaps, amplify) private wealth embodied in private property rights.

19. U.S. CONST. amend. V.

is in the Fourteenth Amendment, and it says essentially the same thing.[20] The due process limitations on exercises of governmental power have, as we know, been conventionally divided into two broad categories, "procedural due process" and so-called "substantive due process." The basic idea of procedural due process is pretty intuitive: Before the government's agents or functionaries can deprive a person of property (or liberty or life) certain procedures—"process"—must first be observed. Procedural due process is, as the name implies, about "process."

Substantive due process is also about "process," though perhaps in not quite so obvious a way. Whereas the primary concern of procedural due process is that the government's agents and functionaries follow all the requirements of extant "law" before depriving people of property (or liberty, or life), the primary concern of substantive due process is that the law itself be validly created. The requirement of substantive due process is a corollary of the concept of limited government—a government of limited powers. As the Supreme Court has written: "There are, of necessity, limits beyond which legislation cannot rightfully go. [T]he courts must obey the Constitution rather than the law-making department of government, and must, upon their own responsibility, determine whether, in any particular case, these limits have been passed."[21] In other words, substantive due process is a kind of rule of *ultra vires*. The Constitution expressly imposes a number of limitations on the government's powers—for example, with respect to free expression, freedom of the press, regulation of assembly, and the establishment of religions. In addition to these express limitations on the government's power, the Supreme Court has also recognized that there are other limitations, implicit and more general, as well—such as the requirement that the governmental power be exercised in the public interest. In this regard, what is of particular concern for the present discussion is a species of substantive due process, sometimes known as "economic due process."

> The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise

20. U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .").

21. Mugler v. Kansas, 123 U.S. 623, 661 (1887).

> of its police powers is not final or conclusive, but is subject to the supervision of the courts.[22]

Under the umbrella of "economic due process," the Supreme Court of an earlier time undertook to evaluate and selectively strike down a number of legislative enactments (including land-use regulations)[23] on the ground that the legislation was outside the legislature's power to enact.

The primary "test" of economic process was stated succinctly in the case of *Lawton v. Steele*.[24] At issue in *Lawton* was a statute that prohibited certain kinds of fishing nets and authorized government agents to take and destroy the offending nets wherever found.[25] The Court upheld the statute but in doing so spelled out the following test to be used by the courts in reviewing legislative acts:

- The interests of the public generally must require the interference;
- The means must be reasonably necessary to accomplish the public purpose;
- The means must be not unduly oppressive upon individuals.[26]

The doctrine of economic due process fell into disrepute during the New Deal era, after the Supreme Court struck down a number of measures that Congress had adopted to alleviate the Great Depression. By 1938, the Court itself had largely emasculated the doctrine. It did so by adopting, in *United States v. Carolene Products Co.*,[27] what has come to be known as the "rational basis" test: "[R]egulatory legislation affecting ordinary commercial transaction is not to be pronounced unconstitutional unless . . . it is of such a character as to preclude the assumption that it rests upon some rational basis. . . ."[28] A statute "depriving" a person of property could be struck down on "economic due process" grounds only

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22. Lawton v. Steele, 152 U.S. 133, 137 (1894).

23. Washington *ex rel.* Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928); Nectow v. Cambridge, 277 U.S. 183 (1928).

24. 152 U.S. 133 (1894).

25. 152 U.S. at 135.

26. *Id.* at 137.

27. 304 U.S. 144 (1938). *See also* Carmichael v. S. Coal & Coke Co., 301 U.S. 495, 508-09 (1937) (explaining that there could be no constitutional challenge to economic legislation where the legislature acted rationally).

28. *Id.* at 152.

if it could be found to have no rational basis—an almost insuperable test to meet.[29]

Meanwhile, at the same time that the jurisprudence of "economic due process" was evolving, there were also some interpretive developments concerning the takings clause itself, creating the foundation for what has become the doctrine of "regulatory takings." Remember, as I mentioned earlier, the original understanding of the takings clause was that it applied only to *physical* takings of property. However, in an 1871 case, *Pumpelly v. Green Bay Co.*,[30] the Supreme Court made a substantial inroad on that notion. The *Pumpelly* case was brought by a landowner against his downstream neighbor who had built a dam that caused water to back up, flooding the complainant's property.[31] The defendant had built his dam under a license granted by the state, and he asserted that he therefore had a "right, under legislative authority, to build and continue the dam without legal responsibility for those injuries."[32] The question thus became whether "the State had a right to inflict [the damages sustained by the plaintiff] without making any compensation for them."[33] The takings clause was asserted as the basis for concluding that the state did not have such a right.[34]

The linchpin of the defendant's argument was that "there is no *taking* of the land within the meaning of the constitutional provision, and that the damage was a mere consequential result" of a legitimate governmental action, fostering the improvement of a

29. *See* Ferguson v. Skrupa, 372 U.S. 726, 730 (1963). A post-1938 case in which the Court seems to have struck down legislation at least partially on "substantive due process" grounds is *Moore v. City of East Cleveland*, 431 U.S. 494, 499-500 (1977) (questioning whether limited definition of "family" in zoning regulations rationally furthers some legitimate state purpose). However, the opinions in *Moore* are deeply divided, and the interest injured by the legislation was as much a "family" interest as a property one.

30. 80 U.S. 166 (1871). Actually, the *Pumpelly* case was decided under the takings clause of the Wisconsin Constitution (now WIS. CONST. art. 1, § 13). However, to simplify this brief history, that is a distinction which can be safely glided over since it seems to have had no enduring substantive impact. *See* Sinnickson v. Johnson, 17 N.J.L. 129 (N.J. 1839). The main importance for the case itself was that, at the time, it was not yet thought that the takings clause in the Fifth Amendment applied to the states. *Pumpelly*, 80 U.S. at 176-77. The "incorporation" of the takings clause so it applied against the states was to come later in *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 235-41 (1897).

31. *Pumpelly*, 80 U.S. at 177.

32. *Id.* at 176.

33. *Id.*

34. *Id.*

navigable stream.[35] If indeed there was no "taking" within the meaning of the Constitution, then the case would be governed by the essentially due process consideration of whether the public interest (in navigation) sufficiently justified any deprivations that the plaintiff sustained. The defendant argued, moreover, that this was not a case of a "taking" in the constitutional sense because "[t]he defendant's lands have not been *taken or appropriated.* They are only affected. . . ."[36] In other words, the plaintiff still *had* his land; it was just under some water.

The Supreme Court disagreed with the defendant's contention concerning the inapplicability of the takings clause. It declared instead "where real estate is actually invaded by super-induced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to *effectually destroy or impair* its usefulness, it is a taking, within the meaning of the Constitution. . . ."[37] The destruction of private property is the equivalent of "taking" it for purposes of the taking clause.[38] Because there was no provision for just compensation in the dam-licensing statutes at issue in *Pumpelly*, they were void,[39] and therefore provided no legal defense.[40]

The next great landmark in the regulatory-takings series was *Mugler v. Kansas*.[41] Mugler was a commercial brewer in Kansas. In 1881, Kansas decided it would be a good idea to outlaw beer. The state proceeded to institute "prohibition" by adopting a constitutional amendment and implementing it by statute.[42] For Mugler, this was a disaster. His brewery was "erected for the purpose of manufacturing beer, and cannot be put to any other use. . . ."[43] His investment was left with "little value"[44] or "no value."[45]

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35. *Id.* at 177 (emphasis in the original).

36. *Pumpelly*, 80 U.S. at 174 (emphasis in the original).

37. *Id.* at 181 (emphasis added).

38. *See id.* at 179 (stating, "a serious interruption to the common and necessary use of property may be . . . equivalent to the taking of it. . . .").

39. *Id.* at 182.

40. *Id.* at 181.

41. 123 U.S. 623 (1887).

42. *Mugler*, 123 U.S. at 654-55.

43. *Id.* at 654.

44. *Id.*

45. *Id.* at 664. "[O]r, at least, will be materially diminished in value. . . ." *Id.* The Court did not seem to think it made a difference which of these resulting values was in fact the case.

Subsequently Mugler was indicted and convicted of manufacturing and selling intoxicating beverages.[46] In the United States Supreme Court, he sought to have the Kansas legislation declared void.[47] As his constitutional bases, he asserted both the takings clause and the due process clause.[48] The takings-clause argument relied in part on *Pumpelly v. Green Bay*. Just as the owner in *Pumpelly* suffered a "taking" when his land had been flooded with water, so Mugler's brewery was flooded with regulation. Either way, the government's action would be subject to the "fundamental maxim of all free governments," allegedly recognized in *Pumpelly*, "that whenever the necessities of the public require that the property of a citizen shall be taken or destroyed, compensation must be made for the loss."[49]

The Supreme Court disagreed. It held that Mugler's case fell under the due process clause rather than under the takings clause.[50] According to the Court, governmental impairments of land-use "not directly encroaching upon private property . . . do not constitute a taking within the meaning of the constitutional provision, or entitle the owner of such property to compensation. . . ."[51] *Pumpelly* was distinguished as involving a "physical invasion of the real estate [by the flooding], and a practical ouster of his possession."[52] As for mere land-use regulations, the court said: "A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit."[53]

Mugler's due process contentions also failed. The Supreme Court rejected the notion that the Fourteenth Amendment could be read to restrain the states' exercise of the "police powers" to protect public heath, safety, morals and welfare,[54] or to decide what is necessary for that purpose.[55] "[A]ll property in this coun-

46. *Id.* at 653.
47. *Mulger*, 123 U.S. at 653.
48. *Id.* at 664.
49. Mulger v. Kansas, 1887 U.S. LEXIS 2204 (Dec. 5, 1887) (statements of Mr. George G. Vest, counsel for plaintiff in error).
50. *Mugler*, 123 U.S. at 668.
51. *Id.* at 668.
52. *Id.* (quoting Trans. Co. v. Chicago, 99 U.S. 635, 642 (1878)).
53. *Id.* at 668-69.
54. *Id.* at 664, 669.
55. Nor can legislation (prohibiting uses declared "injurious to the health, morals, or safety") come within the Fourteenth Amendment, in any case, unless it is apparent

try is held under the implied obligation that the owner's use of it shall not be injurious to the community."[56]

But who decides, so as to bind us all, what is and is not "injurious to the community"? That was the pivotal question in the case—not *whether* beer is too socially intolerable to allow, but *who decides* whether it is. "[F]or this purpose," the Court quoted, "the largest legislative discretion is allowed," adding "the discretion cannot be parted with any more than the [police] power itself."[57] It is up to the legislature and not to the courts to decide what is, and is not, too socially intolerable to allow.

Accordingly, the Supreme Court in *Mugler* did not make a decision about the content or extent of Mugler's property rights, or whether the legislature had good cause to ban beer, but rather about the *structure* of government. As times change, and as knowledge, needs, and values evolve with the times, the "governmental power" must reside somewhere to protect and advance the public interest "as the special exigencies of the moment may require. . . ."[58] Under our constitutional structure the governmental power to keep the laws up-to-date resides in the democratically elected legislature, not in the courts.[59]

With the annual volume of legislation, one hardly has to be reminded how changing conditions can require changes in the law. Examples of policy reversal abound. A hundred or so years ago, at the time of *Mugler*, beer was too socially intolerable to allow (in Kansas) and margarine was too socially intolerable to allow (in Pennsylvania)[60] while, at roughly the same time, Coca Cola contained cocaine.[61] The "noxious" swamps and bogs of yesteryear are the valued wetlands of today. Beaches and riverbanks, once thought to be ideal places to build a house, are now viewed, in the light of some expensive disasters, in a very different way. What is "too socially intolerable to allow"? It depends. Not so long ago it was beer and margarine but not opiates while today it is exactly the opposite. If the laws are to be kept in harmony with the times, somebody has to decide what changes the public interest re-

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that its real object is not to protect the community, or to promote the general well-being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law. *Mugler*, 123 U.S. at 669.

56. *Id.* at 665.
57. *Id.* at 669 (citations omitted).
58. *Id.*
59. *Id.* at 669.
60. Powell v. Pennsylvania, 127 U.S. 678 (1888).
61. *See* United States v. Housley, 751 F. Supp. 1446, 1447 (D. Nev. 1990).

quires—and, hence, the crucial question of our constitutional structure: "Who decides?" When litigants and courts invoke the takings clause and "property rights" to overturn determinations by the elected legislature, the point is to transfer that ultimate decision-making power from the legislature to the courts.

It was precisely such a removal of power from the legislature that occurred in the third landmark case in this series: *Pennsylvania Coal Co. v. Mahon*.[62] As the reader probably knows very well, *Pennsylvania Coal v. Mahon* was the first case in which the Supreme Court recognized that there could be such a thing as a regulatory taking. The case is well-known, and I will not discuss it at length, but I want to note two things: First (and this often passes notice), *Pennsylvania Coal* was not actually *decided* under the takings clause but under the due process clause—as essentially a case of economic due process. The rationale for the actual decision in the case was that the Pennsylvania statute failed all three elements of the *Lawton v. Steele* test, quoted above:[63]

1) The interests of the *public generally did not require the interference* with the coal company's right to mine coal out from under people's houses:
"This is the case of a single private house. . . . But usually in ordinary private affairs the public interest does not warrant much of this kind of interference. A source of damage to such a house is not a public nuisance. . . . The extent of the public interest is shown by the statute to be limited. . . ."[64]

2) The *means were not reasonably necessary* for the accomplishment of the purpose:
"Furthermore, it is not justified as a protection of personal safety. That could be provided for by notice."[65]

3) The *means were unduly oppressive*:[66]
"[The statute] purports to abolish what is recognized in Pennsylvania as an estate in land—a very valuable estate—

62. 260 U.S. 393 (1922). For any who may possibly be unaware, the issue in *Pennsylvania Coal* was the validity of a state statute that prohibited the mining of "certain coal"—specifically that which lay beneath homes, streets, and various other surface improvements. The statute's object was to prevent the disastrous subsidence that could occur in the aftermath of undermining, which deprives surfaces structures of vertical support.

63. *See supra* text accompanying note 26.

64. *Pa. Coal Co.*, 260 U.S. at 413-14.

65. *Id.* at 414.

66. *Id.*

> and what is declared by the Court below to be a contract hitherto binding the plaintiffs."[67]

Therefore, the *Pennsylvania Coal* opinion concludes: "[*W*]*e* should think it clear that the statute does not disclose *a public interest sufficient to warrant* so extensive a destruction of the defendant's constitutionally protected rights."[68] The analysis so far is pure "economic due process" judicial "supervision"[69] of the legislature, and it was enough to decide the case.

The second thing I want to mention about the *Pennsylvania Coal* decision is that, contrary to its general reputation, it can *not* be fairly regarded as a landmark for the protection of private property rights. Rather, what the case did, merely, was accord constitutional protection to one group of property owners at the expense of another group of property owners—specifically, it protected the interests of the big coal companies at the expense of ordinary homeowners. Therefore, as a charter for the protection of private property rights, the *Pennsylvania Coal* case was decidedly wanting when it comes to the most important item of private property that most Americans own.[70]

At any rate, after deciding that the interests of American homeowners were not of sufficient public concern to justify interference with great industrial interests, the *Pennsylvania Coal* decision went on to lay out, famously, what the Supreme Court has later called an "advisory opinion"[71] on the takings clause. It was in this portion of the opinion that Justice Holmes penned the famous lines: "To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it,"[72] and "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[73]

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67. *Id.*

68. *Id.* (emphasis added).

69. *See* Lawton v. Steele, 152 U.S. 133, 137 (1895) ([The legislature's] determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."). *Accord Mugler*, 123 U.S. at 664.

70. It is a bit ironic that the *Pennsylvania Coal* case is so frequently touted by property-rights advocates as the supreme protector of private property when, in fact, the case specifically held that there was not much public interest in protecting the kind of private property that, for most people, is their single most important and valuable asset, their homes.

71. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 484 (1987).

72. *Pa. Coal Co.*, 260 U.S. at 414.

73. *Id.* at 415.

While the *Pennsylvania Coal* opinion did not say *how* far is "too far," it did make clear that a mere regulation of use could effectuate a taking—by going "too far." Hence, the birth of "regulatory takings."

Another forty years went by in which the Supreme Court did not explain how far is "too far." By the early 1980s, however, two different formulations for deciding "takings" cases were being repeated by the Supreme Court in regulatory cases. For convenience, I will refer to these as the "three-part test" and the "two-part test."[74] They may be summarized as follows:

- Three-part test (*Penn Central*)—factors having "particular significance":
  - Economic impact;
  - Extent of interference with reasonable investment-backed expectations;
  - "Character" of the interference.[75]

- Two-part test (*Agins v. City of Tiburon*). A taking occurs if a regulation:
  - Does not substantially advance a legitimate state interest, *or*
  - Deprives the owner of economically viable use of the land.[76]

The three-part test originated in the case of *Penn Central Transportation Co. v. New York City*.[77] The Court denied that there was any "set formula" for deciding takings cases,[78] but it described the three factors in the test as having "particular significance."[79] Apparently the three factors were to be looked at together, a kind of seat-of-the-pants weighing of non-comparables.

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74. See my extensive treatment of these two formulations in my earlier article, *Economic Due Process and the Takings Clause*, 4 PACE ENVTL. L. REV. 411 (1987) [hereinafter *Economic Due Process*].

75. By "character" the Court meant whether the government's interference with private property constitutes a physical intrusion, or whether it was a mere adjustment of the burdens and benefits of living together in a civilized society, in other words, a regulation. Penn. Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978). *But cf.* Hodel v. Irving, 481 U.S. 704, 717 n.2, 718 (1987) (treating "character" factor as looking to whether the government's action was "extraordinary" in going beyond what was "appropriate" to achieve the government's valid objectives).

76. Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

77. 438 U.S. 104, 124 (1978).

78. *Id.* at 124.

79. *Id.*

Meanwhile, the Court was also framing its "takings" rationales in terms of a different test, the two-part test. The general conceptual elements of the two-part test were also mentioned in *Penn Central*,[80] but the test's canonical formulation came a couple of years later in *Agins v. City of Tiburon*, *viz.*, land-use regulation can effect a taking if it does not "substantially advance legitimate state interests, . . . *or* it denies an owner economically viable use of his land. . . ."[81] If either part of the two-part test applies to a regulation on land use, the regulation will be a taking.

The Supreme Court employed the two-part test and the three-part test more or less simultaneously for a number of years but, curiously, it rarely referred to both in the same case.[82] Maybe it was simply that some of the justices felt more comfortable with the amorphous "no set formula" three-part analysis, while others liked the more structured discretion of the two-part test.

The case of *Lucas v. South Carolina Coastal Council*[83] represented a kind of apogee for the two-part test.[84] In *Lucas*, an owner of beachfront lots claimed a right to compensation for a taking after a state agency designated his lots as effectively non-buildable under the South Carolina's Beachfront Management Act.[85] Justice Scalia wrote the opinion of the Court, which held that the owner was entitled to compensation.[86] In doing so, the Court regarded the key distinction to be whether the complaining owner's land had other valuable uses in addition to the ones deemed by the legislature to be too anti-social to allow. As long as such other valuable uses exist, the legislature has the power to prohibit

80. *Id.* at 127.

81. *Agins*, 447 U.S. at 260 (emphasis added) (citations omitted).

82. *See Economic Due Process*, *supra* note 74, at 417-45.

83. 505 U.S. 1003 (1992).

84. Although the opinion mentions the factors of the three-part test in a footnote, and states they are "keenly relevant to takings analysis generally," *Lucas,* 505 U.S. at 1019 n.8, the majority opinion essentially ignores the constitutional force of the factors as such. In particular, as Justice Kennedy pointed out in his concurring opinion, "The finding of 'no value' should have been considered under the Takings Clause by reference to the owner's reasonable, investment-backed expectations. . . . Where a taking is alleged from regulations which deprive the property of all value, the test must be whether the deprivation is contrary to reasonable, investment-backed expectations." 505 U.S. at 1034 (Kennedy, J., concurring). The continued importance of the three-part test, especially the "investment-backed expectations" factor was decisively reinforced ten years later in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 321-32 & 336 (2002). *See also* Palazzolo v. Rhode Island, 533 U.S. 606, 608 (2001).

85. *Lucas*, 505 U.S. at 1008-09.

86. *Id.* at 1026-32.

harmful uses. As Justice Scalia wrote: It is "a reality we nowadays acknowledge explicitly with respect to the full scope of the State's police power" that "government may, consistent with the Takings Clause, affect property values by regulation without incurring an obligation to compensate. . . ."[87] If such other valuable uses are absent, however, then the legislature may not prohibit the anti-social uses (the only "valuable" uses) by ordinary regulation—it must "regulate by purchase."[88] Under the second prong of the two-part test, compensation is required if a government action deprives land of *"all* economically beneficial uses. . . ."[89]

I will say a few things about the larger significance of the *Lucas* case in a moment, but first I want to focus attention on a curious thing about the two-part test of takings, namely, the fact that this test looks like a resurrection, with a bit of linguistic tweaking, of the old "economic due process" doctrine as formulated in *Lawton v. Steele*. To see this more clearly, observe first that the elements of the two-part test are actually three in number, and they correspond almost exactly to the three elements of economic due process that were a hundred years ago announced in *Lawton v. Steele*.[90] Here is a table of the counterparts:

> "Legitimate state interest" ↔ "needs of the public require the interference"
> "Substantially advances" ↔ "means reasonably necessary to accomplish the public purpose"
> "Does not deny economically viable use" ↔ "not unduly oppressive on individuals"

Actually it should be no surprise that the two-part test looks so much like the old economic due process test. When the two-part test first emerged (originally in *Penn Central*, and then in *Agins*), the Supreme Court cited "economic due process" cases as precedents.[91] Thus, both analytically as well as historically it looks

87. *Id.* at 1023.

88. Andrus v. Allard, 444 U.S. 51, 65 (1979).

89. *Lucas*, 505 U.S. at 1019 (emphasis in original).

90. *See supra* text accompanying note 26.

91. The *Penn Central* opinion, 438 U.S. at 125, cited *Nectow v. City of Cambridge*, 277 U.S. 183, 188-89 (1928), which was plainly decided on the basis of economic due process analysis: "[T]he invasion of the property . . . was serious and highly injurious . . . and, since a necessary basis for the support of that invasion is wanting, the action of the zoning authorities comes within the ban of the Fourteenth Amendment and cannot be sustained." *See Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (also citing *Nectow*). The *Penn Central* opinion, 438 U.S. at 126-27, also cited *Goldblatt v.*

very much as though the two-part test for takings has become a kind of placeholder for the old doctrines of economic due process that the Supreme Court nominally abandoned over sixty years ago. Through the application of the two-part test of "taking," the basic ideology of economic due process breathes new life.

And what is the basic ideology of economic due process? Primarily, it is the idea that the validity of legislative acts is to be tested by the courts against the three kinds of policy considerations set out in *Lawton v. Steele*—public need, suitability of means, and impact on private interests.[92] It is the legal principle that "judicial review"—judicial "supervision"[93] of legislative decision making—extends to reconsidering the crucial policy choices as to what is and is not too socially intolerable to allow, *viz.*, whether the public interest requires government interference ("legitimate state interest"), whether the legislature's chosen means to an end are reasonably necessary ("substantially advances"), and whether the means are unduly oppressive ("denies economically viable use"). In other words, the basic ideology of economic due process is that the constitutional structure of government—specifically, the division of power between the legislature and the judiciary—gives courts the power to second-guess elected legislatures on the "wisdom" of economic legislation.

Thus, by way of the two-part test of takings, the Supreme Court in *Lucas* has effectively reclaimed some of the ground that it relinquished when, in the late 1930s, it announced that federal courts would henceforth apply a "rational basis" test in deciding due process challenges to the constitutionality of economic legislation.[94] Although, after *Lucas*, the "rational basis" test may still apply to cases where the land in question also has valuable non-prohibited uses,[95] *Lucas* made clear that it does *not* apply in those

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Town of Hempstead, 369 U.S. 590 (1962), which in turn was based on the economic due process landmark, *Lawton v. Steele*, 152 U.S. 133 (1894).

92. *See supra* text accompanying note 26.

93. *See Lawton*, 152 U.S. at 137 ("[The legislature's] determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."). *Accord* Mugler v. Kansas, 123 U.S. 623, 664 (1837).

94. *See supra* text accompanying note 27.

95. An intriguing open question is whether the first prong of the two-part test of takings is to be treated as a serious constraint on legislative actions, *i.e.*, whether there is to be strict scrutiny on the questions of whether challenged legislation indeed responds to a "legitimate state interest" and whether it "substantially advance[s]" that interest. *See Agins*, 447 U.S. at 260. At the very least, the *Lucas* opinion evidences deep skepticism about relying on legislative recitations of justifications in applying these tests—saying that since such justifications "can be formulated in

situations where the legislature has identified and prohibited harms that are inseparable from the only "economically beneficial" uses that the land happens to have.[96] In this latter kind of case, according to *Lucas*, legislated prohibitions designed to prevent harms (such as destroying ecological values for the sake of short-term gain) will be valid only if they "do no more than duplicate the result that could have been achieved in the courts. . . ."[97]—for example, under the law of nuisance.[98] Thus, it is the courts, not elected legislatures, who are to have the last word on whether proscribed conduct is really and truly too socially intolerable to allow.

Moreover, the *Lucas* Court made clear that the lower courts are not to use judicial review in takings cases as an occasion to expand upon the "result[s] that could have been achieved in the courts" in order to uphold legislative determinations—for example by stretching the law of nuisance or otherwise devising novel "common-law" notions about what is too socially intolerable to allow. On the contrary, the Court admonished that, in deciding "what existing state law permits," a legislated land-use regulation "may be defended only if an *objectively reasonable application* of relevant precedents would exclude those beneficial uses in the circumstances in which the land is presently found."[99]

It may be debated whether environmental protection laws were the Supreme Court majority's primary target here, but they were certainly among the most directly hit. It is precisely *environmentally sensitive* lands (such as ocean dunes and wetlands) that are among those most likely not to have any other "economically beneficial" uses if the right to strip them of their long-term natural values is taken away.

The Supreme Court predicted that its rule in *Lucas* would not hamstring legislatures except in "extraordinary circumstance[s]" or "relatively rare situations" because government regulation seldom has the effect of depriving a landowner of "all economically beneficial uses."[100] That rosy prediction is, however, questiona-

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practically every case, this amounts to a test of whether the legislature has a stupid staff." *Lucas*, 505 U.S. at 1025 n.12.

96. There is language in *Lucas* indicating that takings of all economically beneficial value would constitute a *per se* taking only when the property involved is land, as opposed to personal property. *See Lucas*, 505 U.S. at 1027-28.

97. *Id.* at 1029.

98. *Id.*

99. *Id.* at 1031 n.18.

100. *Id.* at 1017-18.

ble. No doubt the Court is correct that, no matter what (realistic) regulation is applied, it will rarely occur that affected land parcels will end up with literally *no* value—in the sense that there is no one in the market who would pay anything for it whatsoever. There will always probably be at least some speculative value[101] and, beyond that, also some residuum of marketable usefulness for which, at the right price, some buyer might be found.[102] In the final analysis, then, whether "all value" takings are rare or not depends a great deal on how one is to understand the concept of "*all* economically beneficial uses." Will it mean what it says—that the land must be made literally devoid of market value (including speculative value)—or will there be some sort of *de minimis* qualification under which the courts are to disregard low-value uses such as buffers, bird-watching, viewsheds, or the like?

The factual context of *Lucas* supplies at least some basis for believing that minimal residual values will not prevent a compensable taking from occurring.[103] In addition, the Court has said later (in *dictum*), "a State may not evade the duty to compensate on the premise that the landowner is left with a *token interest.*"[104] At any rate, if the courts do disregard minimal residual values, we

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101. There are invariably speculators willing to gamble that even the most severe restrictions will eventually be lifted or modified so as to render the property usable again. If the existence of such a residual market for the property could defeat a claim for a regulatory taking, no regulatory taking could ever be proved and the concept would be rendered meaningless. In fact, when courts have determined that property has been rendered unfit for economically viable activity, they have found a Fifth Amendment taking even though the property obviously continued to have market value.

Fla. Rock Indus. v. United States, 8 Cl. Ct. 160, 167 (1985).

102. A major exception would be lands subject to environmental regulations that require their owners to make extensive expenditures—for the clean up of deposited toxics, for example. It is not at all far-fetched to think of a parcel of land whose maximum potential-use value is far less than the legally required clean-up costs. This would constitute a pretty clear case of a government regulation that deprives an owner of "all economically beneficial use." An old authority for allowing such an elimination of "all economically beneficial use" is *Moeschen v. Tenement House Dep't*, 203 U.S. 583 (1906), *aff'g without opinion*, 72 N.E. 231 (N.Y. 1904) (upholding requirement that outdoor privies be replaced with indoor toilets even when the cost of replacement exceeded the value of the premises, thus rendering them of negative value).

103. *Lucas*, 505 U.S. at 1009 n.2. The opinion pointed out that the state's law "did allow the construction of certain nonhabitable improvements, *e.g.*, 'wooden walkways no larger in width than six feet,' and 'small wooden decks no larger than one hundred forty-four square feet[,]'" but these did not suffice to prevent the conclusion that the owner was entitled to compensation under the Constitution. *Id.*

104. Palazzolo v. Rhode Island, 533 U.S. 606, 631 (2001) (emphasis added).

may find that ecologically vulnerable lands may present recurring occasions for courts to overturn legislative determinations to preserve by regulation. Elected legislatures might determine that harms such as filling in (otherwise) low-market-value wetlands or destroying endangered-species habitat are too socially intolerable to allow but, unlike the beer in *Mulger*, the margarine in *Powell*, or narcotic drugs today, state legislatures cannot prevent such harms by police power regulation. Only a court would have the power to treat these new kinds of mischief as "illegal"—by acting to extend the common law (*e.g.*, of nuisance)—and the *Lucas* opinion, as already mentioned, would take a dim view of even that.[105] More broadly, given the reality that many environmental assets may have little or no value as market (economic) assets—often precisely because of their "public" value—the *Lucas* case may indeed amount to a rather appreciable restructuring of governmental authority, a significant transfer of environmental policy-making power from the elected legislatures to the courts. A substantial new inroad has been created to reduce the power of legislatures to protect the natural environment on which we all depend.

105. *Lucas*, 505 U.S. at 1031 n.18.