

January 2003

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Recommended Citation

David L. Callies, *The Quiet Revolution Redux: How Selected Local Governments Have Fared*, 20 Pace Env'tl. L. Rev. 277 (2003)

DOI: <https://doi.org/10.58948/0738-6206.1169>

Available at: <https://digitalcommons.pace.edu/pelr/vol20/iss1/12>

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The Quiet Revolution Redux: How Selected Local Governments Have Fared

DAVID L. CALLIES*

I. Introduction

This country is in the midst of a revolution in the way we regulate the use of our land. It is a peaceful revolution, conducted entirely within the law The *ancient regime* being overthrown is the feudal system under which the entire pattern of land development has been controlled by thousands of individual local governments, each seeking to maximize its tax base and minimize its social problems, and caring less what happens to all the others.

The tools of the revolution are new laws taking a wide variety of forms but each sharing a common theme – the need to provide some degree of state or regional participation in the major decisions that affect the use of our increasingly limited supply of land.¹

So began the introduction to *The Quiet Revolution in Land Use Control*. As the rest of that introduction indicates, the purpose of the study was to discuss and analyze the new laws enacted by selected states, all of which “took back” some of the police power authority conferred upon local government to regulate the use of land. The study summarized six issues that recurred throughout the nine principal² and seven secondary³ state

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1. FRED BOSSELMAN & DAVID L. CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROL* 1 (1971).

2. Hawaii, Vermont, San Francisco Bay, Twin Cities, Massachusetts (twice), Maine, Wisconsin, and the New England River Basin.

3. Alaska Joint State-Federal Natural Resources and Land Use Planning Commission, Tahoe Regional Planning Agency, Hackensack Meadowlands Development Commission, Adirondack Park Agency, Delaware Coastal Zone Act, Colorado Land Use Act, and the Washington Land Planning Commission.

land use regimes upon which the study reported. These were:⁴

1. A new concept of land;
2. A new role for the state;
3. A reduced role for local government;
4. A balancing of planning and regulation;
5. Constitutional limits on regulation; and
6. Choice of state agency.

Much has changed since 1970,⁵ when the research for *The Quiet Revolution* finished. First, local governments have vastly improved their planning processes in many parts of the country; the rationale for preserving land has changed in some states. Second, the legal landscape for challenging land use controls on constitutional grounds has shifted considerably. At the time of our Quiet Revolution study, federal courts had declined to so much as entertain a regulatory taking challenge in nearly half a century, since Justice Holmes penned his famous language about the constitutional impropriety of a regulation that went "too far."⁶ State courts, which heard such challenges uniformly, found exceptions to the "too far" federal regulatory takings rule, so that by the mid-1970s, the rule was virtually moribund.⁷ Today, however, the constitutionality of land use controls that strip a landowner of all economically beneficial use of land is questionable following nearly a dozen U.S. Supreme Court cases on per se and partial regulatory takings, and unconstitutional land development regulations, many of which involve state-wide land development regulations. It is therefore, worth a look not only at how selected cities, villages, counties, and other local governments are coping with land use issues, but also at the new judicial climate, to see what has changed.

4. BOSSELMAN & CALLIES, *supra* note 1, at 314-26.

5. For a recent summary of state programs see ROBERT H. FREILICH, FROM SPRAWL TO SMART GROWTH: SUCCESSFUL LEGAL, PLANNING, AND ENVIRONMENTAL SYSTEMS 209-52 (1999).

6. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

7. FRED BOSSELMAN ET AL., *THE TAKING ISSUE* chs. 1-4, 9, 16 (1973).

II. Quiet Revolution Country: Have Things Changed? A Selective Look.

A. Honolulu, Hawaii, Where "It All Began"

Hawaii was the centerpiece of The Quiet Revolution, where "it all began."⁸ Hawaii passed its bellwether (but not trend-setting) statewide land use law dividing all the land in the state into four districts (agriculture, conservation, urban, and rural) in 1961.⁹ The law gave a state administrative agency, the Land Use Commission ("LUC"), basic authority over land development patterns¹⁰ by leaving it to the LUC to make the basic decisions about whether land should be developed (urban zone),¹¹ conserved as watersheds and so forth (conservation)¹² or used principally for agriculture (agriculture).¹³ The purpose of the law was primarily to protect agriculture lands, used primarily for large sugar and pineapple plantations, from urban sprawl.¹⁴ The LUC still fulfills this role, and the percentage of land in each classification has changed almost imperceptibly over the past thirty years, with the vast majority of the state's land evenly split between the conservation zone (48%) and the agriculture zone (48%).¹⁵ Indeed, a look at the land use maps in Oahu, formally the City and County of Honolulu—the most heavily populated (by far) of the state's four major island counties—clearly demonstrates that land development patterns have remained largely the same. There has been incremental growth in existing urban areas, with the exception of the new "second city" of Kapolei, sprouting west of Pearl Harbor on former plantation agricultural land.¹⁶ Much of the watershed remains in the conservation district under the control of another state agency, the Department of Land and Natural Resources,¹⁷ whose Land Board divides that substantial acreage into a series of subzones and permits very limited (usually single-family homes

8. BOSSELMAN & CALLIES, *supra* note 1, at 5.

9. HAW. REV. STAT. § 205-2(a) (2001).

10. *Id.* § 205-1.

11. *Id.* § 205-2(a)(1).

12. *Id.* § 205-2(e).

13. *Id.* § 205-2(a)(3).

14. *See id.* § 205-2(a)(3).

15. *See* DAVID L. CALLIES ET AL., CASES AND MATERIALS ON LAND USE 690 (3d ed. 1999).

16. *See generally* Kapolei, Hawaii, available at <http://www.kapolei.com/home.html> (describing the location and plans for the area, with current and future maps) (last visited June 3, 2002).

17. *See* HAW. REV. STAT. § 205-5(a) (2001); HAW. REV. STAT. § 183-31 (2000).

on large tracts) use in only one, the so-called "general" subzone (although in the past the Board has permitted both a golf course and a college campus on conservation land).¹⁸ While the state's four counties (it has no cities, villages or any other units of local government) share the power over land use in the agriculture zone (a matter of some contention, as appears below), it is only in the urban zone¹⁹—less than 4% of the state's land area—that the counties act free of the LUC's authority and control.

While it is arguable that the LUC has fulfilled its statutory purpose, many question whether it has not served its purpose and should be eliminated.²⁰ This is for several reasons. First, there is virtually no significant plantation agriculture remaining in the state.²¹ Only a single major island, Oahu, has significant acreage in such large-scale agriculture—pineapple—and only two sugar plantations remain, one on Kauai and the other on Maui.²² The agriculture zone has therefore become largely an open space holding zone increasingly vulnerable to attack under *Lucas v. South Carolina Coastal Council*²³ as a taking of property because there is no economically beneficial use permitted on much of the land so classified.²⁴ What limited, relatively large-lot residential development is permitted in the zone is just that — limited, usually to high-end residential development. Even that is under attack by many who would like to preserve the land and challenge the common county perception that residential use divorced from "real" agricultural production is in fact a permissible use in an agricultural district.²⁵ Golf courses are a permitted use on much of the land, either by right or as a special use on prime agricultural land,²⁶ but with well over fifty golf courses in the state and tour-

18. DAVID L. CALLIES, PRESERVING PARADISE: WHY REGULATION WON'T WORK 19-20 (1994).

19. HAW. REV. STAT. § 205-2(b) (2001).

20. CALLIES ET AL, *supra* note 15, at 691.

21. See CALLIES, *supra* note 18, at 12.

22. See Anthony Sommer, *Final Harvest for Sugar Fields*, THE HONOLULU STAR BULLETIN, Nov. 16, 2000, available at <http://starbulletin.com/2000/11/16/news/story3.html>.

23. 505 U.S. 1003 (1992).

24. See *id.*

25. Testimony of Christopher Yuen, Planning Director of the County of Hawaii, In re Appeal of Continental Properties (Zoning Board of Appeals Nov. 9, 2001) (on file with author).

26. HAW. REV. STAT. § 205-2(d) (2001).

ism in a long slump, the market for such courses is in the main saturated.²⁷

The conservation district is the second of the two large land classifications by the state LUC. It consists of both public and private land (some estimate that as much as half is private) and amounts to nearly half the land area of the state.²⁸ Controlled exclusively by the board of directors of the Department of Land and Natural Resources (DLNR), the district originally consisted primarily of forest and water reserve zones (initially named and established as such²⁹) and lands for the preservation of historic and scenic areas. These lands are used for conserving wildlife, providing park lands, wilderness and beach reserves, preventing floods, and as "open space areas whose existing openness, natural condition, or present state of use, if retained, would enhance the present or potential value of abutting or surrounding communities, or would maintain or enhance the conservation of natural or scenic resources."³⁰

The conservation district is regulated by the governing Board of Land and Natural Resources (BLNR or Land Board) of the DLNR. The Land Board has, by administrative rule, divided the conservation district into four so-called "subzones" and permits various land uses in each, all as authorized by statute.³¹ Also by statute, these uses may include not only farming and the operation of nurseries and orchards, but also "recreational pursuits" and residential uses.³² There are currently four subzones: protected, limited, resource, and general. Regulations promulgated by the Land Board set out the uses permitted in each.³³ The first two subzones are more or less self-descriptive. The protected subzone is to protect valuable resources in such designated areas as restricted watershed, marine, plant, and wildlife sanctuaries; significant historical, archaeological, geological, and volcanological features and sites; and other unique areas. The primary permit-

27. OFFICE OF STATE PLANNING, GOLF COURSE DEVELOPMENT IN HAWAII: IMPACTS AND POLICY RECOMMENDATIONS 3 (1992).

28. DAVID L. CALLIES, REGULATING PARADISE: LAND USE CONTROLS IN HAWAII 9 (1984); Madalyn Purcell, *Residential Use of Hawaii's Conservation Districts*, 14 U. HAW. L. REV. 633 (1992).

29. HAW. REV. STAT. § 183-41 (as modified by amendments to HAW. REV. STAT. § 205-2).

30. *Id.* § 205-2(e).

31. *Id.* § 205-2.

32. *Id.*

33. HAW. ADMIN. RULES § 13-5-10 to 25; see also CALLIES, REGULATING PARADISE, *supra* note 28, at 9.

ted uses in a protected subzone are research, education, and some recreation, as long as no permanent facilities are contemplated. The limited subzone is for areas in which natural conditions restrict human activity (40 percent slopes, flooding, volcanic activity), with timber harvesting and flood control added. The resource subzone adds aquaculture to the list of permitted uses. The general subzone adds very little more "of right": water collection and storage, and transmission facilities. Only in special subzones and by means of conditional permits, variances, and nonconformities are economic uses besides agriculture, forestry, and aquaculture permitted.

The capacity of the four counties for effective land use control has increased significantly, and as each such local government has regional jurisdiction which stops, if at all, at the ocean (two counties have jurisdiction over other than their main island base), the continued utility of a statewide body overseeing such land use decisions—at least for the reasons originally articulated—is weak.³⁴ Thus, all three of the so-called "neighbor island" counties (Kauai, Maui and Hawaii) have separate and well-staffed planning departments as well as sophisticated general and area-specific plans with a strong and detailed land use component.³⁵ Oahu has, for at least twenty-five years, used a comprehensive and lengthy land use ordinance to control the use of land, which by charter must conform to both general and area-specific development plans.³⁶ The latter were once so specific as to resemble zoning ordinances in their own right, complete with nearly a dozen district classifications mapped at a micro scale down to the street and block level.³⁷ What, then, is the need for overseeing state agencies to second-guess their regional land use planning and regulatory decisions?

B. Portland, Oregon

Oregon, at the forefront of the Smart Growth movement, mandated in 1975 that local governments must control urban sprawl and protect open space.³⁸ The general strategy involved creating boundaries beyond which urban growth could not extend,

34. CALLIES ET. AL., *supra* note 15, at 690-91.

35. *Id.*

36. CALLIES, *supra* note 18, at 24.

37. CALLIES ET. AL., *supra* note 15, at 690-91.

38. OR. REV. STAT. §§ 197.005-.860 (1999).

thus compacting development and protecting rural areas.³⁹ The comprehensive state plan required each city and county to create and implement its own plans in compliance with the state's nineteen goals, and established a seven-member Land and Development Commission (LDC) to oversee conformity of local governments' plans and land use controls.⁴⁰ If the local government plans comply, the LDC "acknowledges" the plans, and if they do not, there is generally time for adjustments.⁴¹ If the LDC does not acknowledge a local plan (which has not yet happened), the local planning decisions must be based on the statewide goals.⁴² Upon acknowledgement, the local plans and regulations are implemented equally, and thereby bind state agencies.⁴³

Concurrent with the legislation and enactment of the statewide land use plan, the Oregon Supreme Court decided that local zoning ordinances may be more restrictive, but not less, than the comprehensive plan for a certain region.⁴⁴ The Oregon Supreme Court also found passage of statewide land use plans, which meant that all land use and zoning laws must comply with the state's legislated goals.⁴⁵

For example, Portland's Urban Growth Boundary Program (UGB) provides that Portland residents elect a regional government called the Metropolitan Service District (Metro) that regulates land use and development in twenty-four adjoining cities and three counties.⁴⁶ Most new construction is denied beyond the Urban Growth Boundary, which follows a twenty-minute radius from downtown Portland.⁴⁷ Metro has denied building permission

39. See *id.* §§ 197.005, 197.010.

40. See *id.* § 197.075.

41. *Id.* § 197.040.

42. See *id.* § 197.180.

43. See *id.*

44. *Fasano v. Bd. of County Comm'rs*, 507 P.2d 23 (Or. 1973) (finding that although a county planning commission may revise a comprehensive plan to keep up with the times, changes must only be made when adequately justified and when they are consistent with the character of the area and with the original objectives of the plan); *Baker v. City of Milwaukee*, 533 P.2d 772, 779 (Or. 1975) (holding that the comprehensive plan may be changed according to a community's needs, but the zoning ordinances must comply and conform with the plan); see also *Marracci v. City of Scappoose*, 552 P.2d 552, 553 (Or. Ct. App. 1976) (holding that a comprehensive plan sets the maximum, but not the minimum land use intensity; the latter may be set by zoning ordinances).

45. *Foland v. Jackson County*, 807 P.2d 801, 803 (Or. 1991).

46. See Bernard H. Siegan, *Smart Growth and Other Infirmities of Land Use Controls*, 38 SAN DIEGO L. REV. 693, 717 (2001).

47. See *id.* at 717-18.

to conglomerates such as Wal-Mart and Home Depot,⁴⁸ as well as begun efforts to reduce maximum lot sizes for single-family homes,⁴⁹ promote high-rise construction, and reduce individual automobile traffic.⁵⁰ A problem with deciding where to build and at what density involves balancing outcomes.⁵¹ Low-density development inside the boundaries promotes requests for UGB extensions, while higher density development inside the boundary drives up prices, and forces low-income housing to the edges.⁵² The Metro 2040 Growth Concept, an effort to balance the opposing development pressures, supplements the state goals.⁵³ Metro 2040 requires local governments to meet housing capacity standards and gives first priority to boundary expansions that provide the most efficient and effective urban services.⁵⁴ Portland's housing prices continue to climb, and the city is one of the state's most expensive, which can be seen as either a detriment to those who live there or as a testament that the plan works because so many people want to live there.⁵⁵

Land use disputes from local, regional, and state levels go before the Land Use Board of Appeals (LUBA).⁵⁶ Many of these disputes originate in the Portland area, and most of the decisions have come down on the side of the Metro and for managed, not stunted, growth.⁵⁷ As long as the land use conforms with current

48. *See id.* at 718.

49. *See* Metro, *Regional Affordable Housing*, at <http://www.metro-region.org/growth/tfplan/affordable.html> (last updated May 31, 2001).

50. *See* Metro, *2040 Concepts for Growth: Transportation Element*, at <http://www.metro-region.org/transpo/growthlink/transgrowthlink.html> (last updated Dec. 15, 1999); *see also* PORTLAND, OR. METRO. CODE § 3.01.010(e) (1993).

51. *See* Daniel R. Mandelker, *Managing Space to Manage Growth*, 23 WM. & MARY ENV'T L. & POL'Y REV. 801, 816 (1999).

52. *Id.*

53. *Id.* at 816-17.

54. *Id.* at 817; *see also* PORTLAND, OR. METRO. CODE §§ 3.01.010(e)(1), (2).

55. *See* SIEGAN, *supra* note 46, at 718-19.

56. OR. REV. STAT. § 197.825 (1999).

57. *See, e.g.*, Home Builders Ass'n of Metro. Portland v. Portland Metro. Area Local Gov't Boundary Comm'n, 4 OR. LUBA 245, 247-52 (1981) (upholding the Metro's denial of a land annexation petition because of a lack of school facilities); Atwood v. City of Portland, 2 OR. LUBA 397, 403-04 (1981) (denying a request to reverse a zoning change that allowed for a 31-unit apartment because the change met goals for encouraging residential infill in areas with adequate facility support); Tichy v. Portland City Council, 6 OR. LUBA 13, 24 (1982) (upholding a zoning change that met the comprehensive plan's goal for the area); City of Wilsonville v. Metro. Serv. Dist., 15 OR. LUBA 44, 48-53 (1986) (affirming a denial of annexation of 46 rural acres within the Metro UGB because the land would not be an efficient use of land); and BenjFran Dev., Inc. v. Metro. Serv. Dist., 15 OR. LUBA 319, 321-29 (1987) (upholding denial of request for major amendment to UGB).

zoning regulations, land within the UGB is available for controlled growth, while from LUBA's perspective, land outside the UGB should as remaining rural and essentially undeveloped.⁵⁸

The boundary line remains relatively inflexible, unless it is found to meet statewide goal requirements.⁵⁹ Recently, for example, the state appellate court upheld a LUBA decision to add 354 congruent acres to the Metro UGB both because state law requires Metro to ensure enough "urbanizable" land for twenty years of residential building, and because most of the land added had been designated as next in priority to be included in the Metro area.⁶⁰ One of the few LUBA cases involving Metro that the Oregon Court of Appeals has not affirmed was one in which Metro tried to comply with the requirement of providing enough residential land for the future, expanding the UGB solely in one sub-region, without considering the entire region's need or explaining why the particular sub-region needed as much as 830 additional acres.⁶¹ The appellate court has found a distinct need for consistency between Metro's planning documents on the regional and local level (regional functional plan and an urban growth report) when deciding whether to expand the UGB.⁶²

On November 7, 2000, Oregonians passed, by fifty-four percent of the vote, a ballot measure calling for a constitutional amendment that would require state and local government compensation to landowners whose property values were reduced be-

58. See MANDELKER, *supra* note 51, at 814.

59. These statewide goal requirements cause local governments to apply the seven following factors in determining the size of the UGB:

1. Demonstrated need to accommodate long-range urban population growth requirements consistent with [Land Conservation and Development Commission] goals;
2. Need for housing, employment opportunities, and livability;
3. Orderly and economic provision for public facilities and services;
4. Maximum efficiency of land uses within and on the fringe of the existing urban area;
5. Environmental, energy, economic and social consequences;
6. Retention of agricultural land as defined, with Class I being the highest priority for retention and Class VI the lowest priority; and
7. Compatibility of the proposed urban uses with nearby agricultural activities.

DEPARTMENT OF LAND CONSERVATION & DEVELOPMENT, OREGON'S STATEWIDE PLANNING GOALS AND GUIDELINES (1995).

60. *Citizens Against Irresponsible Growth v. Metro*, 38 P.3d 956 (Or. Ct. App. 2002).

61. *Residents of Rosemont v. Metro*, 21 P.3d 1108 (Or. Ct. App. 2001).

62. See *1,000 Friends of Oregon v. Metro*, 26 P.3d 151 (Or. Ct. App. 2001).

cause of land regulations and development restrictions.⁶³ The measure sets no payment limits and would require compensation for property value loss and for costs incurred in required environmental, historical, archaeological, cultural or low income housing preservation.⁶⁴ The following month, when the measure was to take effect, a trial court issued a temporary injunction preventing the measure from taking affect. In February 2000, the court struck down the measure in a consolidated case on state constitutional grounds because the initiative did not include all the language in the final measure, and the measure contained several different provisions that should have been voted upon separately.⁶⁵ In March 2000, the court declared that the measure was not part of the constitution, and authors of the measure appealed to the Oregon Supreme Court, with oral arguments heard on September 11, 2001, and a decision expected in mid-2002.⁶⁶

C. Florida

From the late 1960s through the early 1970s, Florida began enacting statutes to manage, distribute and control growth, partly in an effort to preserve natural resources that had been damaged or destroyed in previous decades:⁶⁷ Florida Air and Water Pollution Control Act (1967),⁶⁸ County and Municipal Planning for Future Development Act (1969),⁶⁹ Beach and Shore Preservation Act (1971),⁷⁰ Florida Environmental Land and Water Management Act (1972),⁷¹ Florida Water Resources Act (1972),⁷² Florida State Comprehensive Planning Act (1972),⁷³ and Land Conservation Act (1972).⁷⁴ These conservation acts provided a foundation for the

63. Measure 7, amending OR. CONST. art. I, § 18 by adding six subsections.

64. See Measure 7, § (e).

65. McCall v. Kitzhaber, No. 00C19871, slip. op. at 10, 18 (Or. Cir. Ct. Feb. 22, 2001); League of Or. Cities v. Oregon, No. 00C20156, slip. op. at 10, 18 (Or. Cir. Ct. Feb. 22, 2001).

66. See Hunnicutt v. Myers, 39 P.3d 190, 191-92 (Or. 2002); see also David Steves, *Court Weighs Property Compensation Case*, REGISTER-GUARD, Sept. 11, 2001, available at <http://www.registerguard.com/news/20010911/1d.cr.measure7.0911.html> (last visited Apr. 14, 2002).

67. See James C. Nicholas & Ruth L. Steiner, *Growth Management and Smart Growth in Florida*, 35 WAKE FOREST L. REV. 645, 650 (2000).

68. *Id.* at 650 (citing FLA. STAT. ch. 403.011 (1999)).

69. FLA. STAT. ch. 163.3161 (2001).

70. *Id.* ch. 161.011.

71. *Id.* ch. 380.012.

72. *Id.* ch. 373.013.

73. *Id.* ch. 186.001.

74. *Id.* ch. 259.01.

planning acts of the late 1970s and 1980s:⁷⁵ Local Government Comprehensive Planning and Land Development Regulation Act (1975),⁷⁶ State Comprehensive Plan (1985),⁷⁷ and Growth Management Act of 1985.⁷⁸ Together, this legislation formed a planning system for the rapidly developing coastal state.

Under Florida's Environmental Land and Water Management Act (1972)⁷⁹ the state began designating areas of critical state concern.⁸⁰ There are now five such areas: the Big Cypress Conservation Act (1973),⁸¹ the Green Swamp Area (1974),⁸² the Florida Keys Area Protection Act (1976),⁸³ the City of Key West (1976),⁸⁴ and the Apalachicola Bay Area Protection Act (1979).⁸⁵ Local governments and property owners fought these designations, particularly in the Florida Keys.⁸⁶ Local governments perceived the designations as usurping their authority and questioning their abilities.⁸⁷ Property owners viewed the designations as taking some or all of their property and development rights.⁸⁸ Although Florida's Supreme Court upheld both the state-designated areas of critical concern⁸⁹ and regional management of developments,⁹⁰ local governments continued to balk at critical area designation.⁹¹

In response, the state created an alternative: Resource Planning and Management Committees (RPMCs).⁹² Local governments seemed to prefer this method, which incorporated elected officials and property owners into the deciding committees.⁹³ For example, RPMCs created "mutually acceptable development regulations for Charlotte Harbor, Hutchinson Island, and the Suwan-

75. See Nicholas & Steiner, *supra* note 67, at 650.

76. FLA. STAT. ch. 163.3161 (2001).

77. *Id.* ch. 187.101.

78. 1985 Fla. Laws ch. 85-55.

79. FLA. STAT. ch. 380.012 (2001).

80. *Id.*

81. FLA. STAT. ch. 380.055.

82. *Id.* ch. 380.0551.

83. *Id.* ch. 380.0552.

84. See *id.*

85. FLA. STAT. ch. 380.0555 (2001).

86. See James C. Nicholas & Carol Crawford, *The Florida Keys: A Case Study of Critical Area Designation*, FLA. ENVTL. & URB. ISSUES, June 1976, at 12.

87. *Id.*

88. *Id.*

89. *Askew v. Cross Key Waterways*, 372 So. 2d 913 (Fla. 1978).

90. *Graham v. Estuary Props., Inc.*, 399 So. 2d 1374 (Fla. 1981).

91. See Nicholas & Crawford, *supra* note 86, at 12.

92. FLA. STAT. ch. 380.045 (2001).

93. See Nicholas & Steiner, *supra* note 67, at 654.

nee River.”⁹⁴ This process, although less contentious, is also no longer used.⁹⁵ Both it and the designation process remain on the books, however.⁹⁶

Regional Planning Councils review developments with regional impact (beyond one county).⁹⁷ Applications for regional impact developments (DRIs) are lengthy and expensive.⁹⁸ The process averages two years and costs millions of dollars because the development must be approved by local, regional, and state agencies.⁹⁹ Perhaps because of all the negotiations at the beginning of the process,¹⁰⁰ however, most DRIs are approved, well planned, and environmentally savvy.¹⁰¹ The extensive approval process also vests many development rights.¹⁰² Recent environmental complaints, however, center on the ability of many transportation and fuel companies to avoid the review.¹⁰³

The Florida State and Regional Planning Act of 1984 mandated the state to create a comprehensive state development plan and to assure that each of the eleven planning regions be consistent with that state plan.¹⁰⁴ The 1985 amendments then required local governments to create and implement detailed development plans that complied with the state and regional plans.¹⁰⁵ This laborious planning process is so detailed that it even includes requirements for services to be included in any development plans at the local level.¹⁰⁶ The state pays for much of the required infrastructure, provided that the local plans manage growth properly and that development occurs in areas already served by state infrastructure.¹⁰⁷

94. *Id.*

95. *Id.* at 654.

96. *Id.* at 655.

97. FLA. STAT. ch. 380.06(1) (2001).

98. See Nicholas & Steiner, *supra* note 67, at 655.

99. *Id.*

100. *Id.* at 655 n.100.

101. See *id.* at 656.

102. See FLA. STAT. ch. 380.06(26) (2001).

103. See *Leon County v. Dep't of Cmty. Affairs*, 666 So. 2d 1003 (Fla. Dist. Ct. App. 1996) (interpreting the DRI statute narrowly to include only those developments listed within the statute, even though the subject 22-mile petroleum pipeline (not part of the statute) project included a storage facility (part of the statute), because the facility would hold two percent less than the statute required for review); Christopher C. Sanders, *Environmental Law*, 26 STETSON L. REV. 971 (1997).

104. FLA. STAT. ch. 186.001-.901.

105. See *id.* chs. 163.3161-.3215.

106. *Id.* ch. 163.3161(3).

107. *Id.* ch. 163.3177(10)(h).

Florida's underlying concurrency premise is that the required infrastructure for developments be in place before the impacts of the development occur.¹⁰⁸ This is exemplified by Florida's transportation management system, which began in the 1990s out of the realization that transportation infrastructure was falling far behind population growth.¹⁰⁹ To confine urban development within specified areas, Transportation Concurrency Management Areas promote redevelopment of existing road networks to provide more efficient public and private transit in urban areas.¹¹⁰ Community revitalization not only manages growth, but also saves time and money. Thus, in 1999, amendments to the Growth Management Act allow for transportation concurrency exceptions if the project provides only for urban redevelopment, and not expansion; develops multi-option transportation districts; exempts public transport from concurrency requirements; and provides for exemptions if the developer contributes proportionate funds for the traffic impacts.¹¹¹

Growth management remains a work in progress in Florida. Last year, a Florida appellate court wrote one of the strongest affirmations of a comprehensive land use plan;¹¹² but the year before, Florida's governor expressed dissatisfaction with the state plan.¹¹³ Governor Jeb Bush created a Governor's Growth Management Study Commission in July 2000, which held public hearings in eight cities spanning the state trying to find ways around what has become "a more complicated, more costly process" that has not fulfilled its promise.¹¹⁴ With an expected population increase of fifty percent in the next thirty years, the commission sought to develop ideas for better growth management, infrastructure preparation, and resource preservation.¹¹⁵ The commission's

108. See Steven M. Seibert, *Growth Management Programs: A Comparison of Selected States* 11, available at <http://www.dca.state.fl.us/growth/> (last visited Oct. 2002).

109. See Nicholas & Steiner, *supra* note 67, at 667-69.

110. FLA. STAT. ch. 163.3180(7) (2001).

111. See *id.* ch. 163.3180.

112. See *Pinecrest Lakes, Inc. v. Shidel*, 795 So. 2d 191 (Fla. Dist. Ct. App. 2001) (upholding the lower court's order to demolish and remove several multi-story buildings inconsistent with the county's land use plan, finding that county consistency with the state-mandated comprehensive plans was not discretionary).

113. See Fla. Exec. Order No. 2000-196 (July 3, 2000), available at <http://www.dca.state.fl.us/growth/pdf/Executive%20Order.pdf> (last visited July 3, 2000).

114. FLORIDA'S GROWTH MANAGEMENT STUDY COMMISSION, A LIVEABLE FLORIDA FOR TODAY AND TOMORROW, FINAL REPORT 11 (2001), available at <http://www.floridagrowth.org/pdf/gmssc.pdf> (last visited Oct. 2002).

115. *Id.* at 13-15.

final report presented eighty-nine recommendations for change to the 2001 Legislature, focusing on simplifying planning regulation procedures and giving the state a more supportive, rather than supervisory, role over local governments.¹¹⁶ The eight core goals included such specifics as using regional agreements to phase out the DRI process by 2003,¹¹⁷ requiring local governments to create public school facilities concurrent with planned growth,¹¹⁸ and creating incentives for urban revitalization¹¹⁹ and rural restoration.¹²⁰

Despite these recommendations, there was little progress in the 2001 Legislature. The 2002 Legislature has two growth management bills before it: one requiring public education facilities for a local comprehensive plan,¹²¹ and another that addresses DRI reform, and water supply and educational planning concurrence.¹²² The proposed DRI reform includes exempting airport construction and petroleum tank farms from the complete review process.¹²³

What stands out in Florida and Oregon is the crucial link between local and regional land use controls, with the clear emphasis on local controls as the "cutting edge." Local land use controls have not withered away in Hawaii, Florida or Oregon. They have, in fact, grown in importance and sophistication. Given what the federal courts—and in particular the U.S. Supreme Court—have done since re-entering the land use field, it is a good thing local land use controls have grown, as discussed in Part III below.

III. Regulatory Taking: Moribund No Longer

Recall that by the early 1970s state interpretation of regulatory taking had virtually eroded the doctrine into insignificance.¹²⁴ Indeed, one report which followed hard upon *The Quiet*

116. See *id.* at 19-46.

117. *Id.* at 32.

118. *Id.* at 37.

119. FLORIDA'S GROWTH MANAGEMENT STUDY COMMISSION, *supra*, note 114, at 37-41.

120. *Id.* at 43-46.

121. H.R. 269, 2001 Leg. (Fla. 2001).

122. S. 382, 2001 Leg. (Fla. 2001).

123. See *id.*

124. See, e.g., *Steel Hill Dev., Inc. v. Town of Sanbornton*, 469 F.2d 956, 962-63 (1st Cir. 1972) (forest conservation districts); *Candlestick Props., Inc. v. S. F. Bay Conservation & Dev. Comm'n*, 89 Cal. Rptr. 897, 906 (Cal. Ct. App. 1970) (shorelines); *Maher v. City of New Orleans*, 235 So. 2d 402, 405-06 (La. 1970) (historic preservation); *In re Spring Valley Dev.*, 300 A.2d 736, 754 (Me. 1973) (pond shore); *Potomac Sand &*

Revolution in Land Use Controls and designed to allay fears that the revolutionary state laws would lead to successful constitutional challenges, argued forcefully for the overruling of *Pennsylvania Coal Co. v. Mahon*,¹²⁵ the genesis for regulatory taking jurisprudence, on just such grounds.¹²⁶ However, commencing with *Penn Central Transportation Co. v. City of New York*¹²⁷ in 1978, the Court commenced a re-examination of the taking issue resulting in at least two distinct analytical rules by which to judge when a regulation goes “too far.” These rules form the basis of today’s regulatory taking jurisprudence, resulting in a vulnerability of state and regional regulations to preserve agricultural land, open space and natural resources – key goals of state and regional Quiet Revolution laws – which was absent from the legal landscape when state government passed such laws in the 1960s and early 1970s.

As a preliminary matter, recall that the law of takings is divided into two principal parts: physical and regulatory.¹²⁸ In the first category is that which we call eminent domain or compulsory purchase. Such takings occur when government intends to take land or an interest in land, for some public use or purpose. Aside from that public use or purpose limitation, government may physically take any land or interest in land that it wants—the reason is otherwise irrelevant—so long as it pays the landowner the just compensation required under the U.S. Constitution’s Fifth Amendment.¹²⁹ No matter how minute the taking—even if it is so little as the installation of wires on a private building¹³⁰—the government must pay compensation. As we shall see below, these elements are important with respect to one of the two post-Quiet Revolution regulatory rules from the Supreme Court. The second category of takings is, of course, regulatory taking which traces its

Gravel Co. v. Governor of Md., 293 A.2d 241, 252 (Md. 1972) (tidal waters); McNeely v. Bd. of Appeal, 261 N.E.2d 336, 345 (Mass. 1970) (local business district); Golden v. Planning Bd., 285 N.E.2d 291, 304-05 (N.Y. 1972) (growth management); Just v. Marinette County, 201 N.W.2d 761, 772 (Wis. 1972) (wetlands).

125. 260 U.S. 393 (1922).

126. FRED BOSSELMAN ET AL., *THE TAKING ISSUE: AN ANALYSIS OF THE CONSTITUTIONAL LIMITS OF LAND USE CONTROL* (1973).

127. 438 U.S. 104 (1978).

128. David L. Callies, *Takings: An Introduction and Overview*, 24 U. HAW. L. REV. 1 (2002).

129. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982).

130. *Id.* at 455.

genesis from *Pennsylvania Coal Co. v. Mahon*¹³¹ and Justice Holmes' "too far" language: if a regulation goes "too far" it may be a taking under the U.S. Constitution.

A. Per Se Takings and the Elimination of All Economically Beneficial Use

The first of these regulatory taking rules is the categorical or per se rule of *Lucas v. South Carolina Coastal Council*¹³² in 1992: if a land use regulation leaves the affected landowner with no economically beneficial use of land, then government has taken the land by regulation in the same fashion as if it had done so by eminent domain. Since there is no defense to a physical taking (condemnation, exercise of eminent domain, compulsory purchase) it makes no difference why government chooses to regulate that land.¹³³ The theory is that a particular landowner ought not to bear the burden of virtual confiscation, which in all fairness should be borne by the polity as a whole. Of course, a landowner is only entitled to that degree of property rights protection against confiscation of rights the landowner in fact possesses. Thus, if the regulation abates a nuisance or reflects a background principle of a state's law of property¹³⁴ (like a resource subject to a customary right or the public trust doctrine)¹³⁵ then government may regulate without compensation even if depriving a landowner of all viable economic use of the land. Otherwise, the Fifth Amendment requires compensation as if the property were physically taken or condemned.

In the *Lucas* case, the application of a state coastal protection statute forbidding residential (indeed any) construction seaward

131. *Pa. Coal Co.*, 260 U.S. at 419.

132. 505 U.S. 1003 (1992).

133. BOSSELMAN, *supra* note 126, at 8.

134. *Lucas*, 505 U.S. at 1030-31; see also Louise A. Halper, *Why the Nuisance Knot Can't Undo the Takings Muddle*, 28 IND. L. REV. 329 (1995).

135. David L. Callies, *Custom and Public Trust: Background Principles of State Property Law?*, 30 ENVTL. L. REP. (ENVTL. L. INST.) 10003 (2000); David L. Callies & J. David Bremer, *Background Principles*, in *TAKING SIDES ON TAKING ISSUES* (Thomas E. Roberts ed., 2002); David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 COLUM. L. REV. 1375 (1996); Paul Sullivan, *Traditional and Customary Revolutions: The Law of Custom and the Conflict of Traditions in Hawaii*, 20 U. HAW. L. REV. 99 (1998). For a case holding custom to be a background principle of a state's law of property, see *Stevens v. City of Cannon Beach*, 854 P.2d 449 (Or. 1993); for public trust, see *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355 (N.J. 1984); *Bell v. Town of Wells Beach*, 557 A.2d 168 (Me. 1989); *Purdie v. Attorney General*, 732 A.2d 442 (N.H. 1999).

of a beach line resulted in such a categorical taking when the law prevented the owner of two beach lots from constructing houses located just seaward of that line. The purposes of the statute included habitat preservation and ecosystem conservation. No matter, said the Court. Picnicking and camping—the remaining uses—were not economically beneficial or viable (the land still had value) and so the application of the South Carolina statute resulted in the equivalent of a physical taking. Just as in a physical taking, the rationale—so long as it was public and not private—was irrelevant and compensation was required.

As the Court noted in the *Lucas* opinion, such per se or categorical takings will be rare, though certainly coastal zone and conservation area preservation where regulation permits no economically beneficial use will be particularly vulnerable. The U.S. Court of Claims and the Federal Circuit, which takes appeals therefrom, have been particularly strict in requiring compensation to property owners whose land has been left economically useless after the denial of Corps of Engineers § 404 dredge and fill permits.¹³⁶

Also, as the *Lucas* facts clearly demonstrate, state coastal zone regulations are vulnerable to the extent that they permit no economically beneficial use of private land and are not shielded by such as protection of customary access rights as in Oregon,¹³⁷ and public trust access rights as in New Jersey.¹³⁸ In both Maine and New Hampshire, courts have rejected attempts to prevent use of private land in order to provide access to beach areas held in public trust by the state.¹³⁹ Moreover, classifications such as the aforementioned state conservation district in Hawaii, are certainly suspect to the extent the boundaries of the district include private land and permit no demonstrably viable, economically viable or beneficial uses.

B. Partial Takings

Clearly the more common of the regulatory takings situations will be those in which land use controls result in partial takings of

136. *Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374 (Fed. Cir. 2000); *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994); *Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994).

137. *Oregon ex rel. Thornton v. Hay*, 462 P.2d 671 (Or. 1969); see also *Stevens v. City of Cannon Beach*, 854 P.2d 449 (Or. 1993).

138. *Matthews v. Bay Head of Improvement Ass'n*, 471 A.2d 355 (N.J. 1984).

139. *Purdie v. Attorney General*, 732 A.2d 442 (N.H. 1999); *Bell v. Town of Wells Beach*, 557 A.2d 168 (Me. 1989).

land or interests in land. Here, the courts attempt to balance the extent of economic harm to the landowner, and in particular the effect on the landowner's distinct or reasonable investment-backed expectations against the character of the governmental action. These tests—or at least the most widely-accepted version—come from the U. S. Supreme Court's decision in *Penn Central Transportation Co. v. City of New York*.¹⁴⁰ The Court used the term "distinct" rather than "reasonable" with respect to expectations of the landowner, but so many courts now use the term "reasonable" that the rule has "morphed" accordingly. Also, the context of the "character of governmental action" portion of the rule makes it pretty clear that the Court had in mind the distinction between physical and regulatory takings. However, once again, current literature and jurisprudence appears to have changed the meaning to an investigation into the values that the government is trying to protect. Thus, for example, is the regulation for the protection of health and safety or welfare?¹⁴¹ The Court, in *Lucas*, stressed the importance of this rule and the source of the rule (*Penn Central*),¹⁴² and has continued to emphasize its importance in recent cases.¹⁴³

One of the most important questions which courts address in deciding regulatory takings cases is the denominator or relevant parcel question: if a landowner owns additional interests in property besides the one which is subject to a regulatory taking claim, should the court include those other interests in deciding what kind (total or partial) or indeed whether, there has been a regulatory taking? Thus, for example, the U.S. Supreme Court has recently refused to view a three-year moratorium on all land development as a discrete segment of property for regulatory takings purposes, preferring instead to view a longer continuum. The Court also restated in strong terms its preference for including all of a landowner's interests—the so-called "whole parcel" doctrine.¹⁴⁴ In 1987, the Court also refused to separate out a mineral estate for separate regulatory takings treatment.¹⁴⁵ However, the

140. 438 U.S. 104 (1978).

141. See *First English Evangelical Lutheran Church v. County of Los Angeles*, 210 Cal. App. 3d Supp. 1353 (Cal. App. Dep't Super. Ct. 1989).

142. *Lucas*, 505 U.S. 1003, 1019 n.8 (1992).

143. See *Palazzolo v. Rhode Island*, 533 U.S. 606, 632-36 (2001) (O'Connor, J., concurring); see also *Tahoe Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002) (Stevens, J.).

144. *Tahoe Sierra Pres. Council, Inc.*, 535 U.S. 302 (2002).

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

Federal Circuit has on several occasions considered only a small parcel for which the Corps of Engineers denied dredge and fill permits in holding that government had taken property by regulation, refusing to consider surrounding property on a variety of grounds.¹⁴⁶ Several state courts have also considered the relevant parcel question, often with different results, but setting out useful criteria for deciding when nearby (usually adjoining) property is part of the denominator and when it is not.¹⁴⁷

C. Unconstitutional Land Development Conditions

The U.S. Supreme Court also formulated a rule for dealing with conditions such as impact fees, dedications and in-lieu fees on land development permits like building and coastal zone permits and subdivision plat approvals.¹⁴⁸ Such conditions are unconstitutional unless they:

1. further a legitimate state interest;
2. are related by means of an essential nexus to a need or problem generated by the land development seeking the land development permit; and
3. are proportional to that need or problem.

There is considerable debate over the limitations, if any, on this so-called "heightened scrutiny" of land development conditions. Thus, for example, some courts have limited this scrutiny to ad hoc decisions and refused to apply it to legislatively-levied land development conditions.¹⁴⁹ Other courts limit the scrutiny to land dedication conditions only, observing that both of the U.S. Supreme Court decisions setting out the test involved such dedications.¹⁵⁰ These questions aside, many courts have upheld¹⁵¹ and

146. *Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374 (Fed. Cir. 2000); *Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994); *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994).

147. *See, e.g., Avalon Bay Comtys., Inc. v. Town of Orange*, 775 A.2d 284 (Conn. 2001); *see also K&K Constr., Inc. v. Dep't of Natural Res.*, 575 N.W.2d 531 (Mich. 1998).

148. *See Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

149. *See, e.g., Ehrlich v. Culver City*, 519 U.S. 929 (1996).

150. Indeed, the Court itself so observed in *Monterey v. Del Monte Dunes, Ltd.*, 526 U.S. 687 (1999), but stopped well short of saying that the test was so limited, only observing that the Court had not yet applied it beyond dedications.

151. *See, e.g., N. Ill. Home Builders Ass'n v. County of Du Page*, 649 N.E.2d 384 (Ill. 1995).

struck down¹⁵² land development conditions on constitutional grounds.

In conclusion, the legal landscape is considerably altered in Quiet Revolution country. The U.S. Supreme Court has not overruled *Pennsylvania Coal v. Mahon*¹⁵³ and done away with regulatory takings, as advocated in *The Taking Issue* in 1973. Far from it. The Court has instead reinvigorated the doctrine, clearly establishing both per se rules for "total" takings (landowner left with no economically beneficial use) and partial takings, together with a new "unconstitutional land development conditions" doctrine into the bargain. One can hardly fail to notice that the target of the Court's decisions have been, more often than not, state land use regulatory statutes either protecting natural (usually coastal) resources¹⁵⁴ or local implementation of state or federal resource protection or have been growth management statutory programs.¹⁵⁵ It is therefore arguable that a safer haven for legitimate protection of environmental resources lies in local land use controls firmly rooted in the tradition of *Village of Euclid v. Ambler Realty Co.*,¹⁵⁶ *Nectow v. City of Cambridge*,¹⁵⁷ and other cases which upheld local zoning restrictions in principle while raising appropriate cautions about how such local land use controls should be applied.

IV. Conclusion: Energized Local Government: "Taking Back" Controls?

Local land use controls have not withered away despite the "overlap" of state land use regulation in some form in a number of states.¹⁵⁸ Of course, the state has always been the repository of

152. See, e.g., *Christopher Lake Dev. Co. v. St. Louis County*, 35 F.3d 1269 (8th Cir. 1994) (striking down a county drainage system requirement); *Walz v. Town of Smithtown*, 46 F.3d 162 (2d Cir. 1995) (finding a total lack of nexus between water service and road widening); *Steel v. Cape Corp.*, 677 A.2d 634 (Md. Ct. Spec. App. 1996); *Art Piculell Group v. Clackamas County*, 922 P.2d 1227 (Or. Ct. App. 1996); *Nielsen v. Merriam*, No 40106-8-I, 1998 WL 390442 (Wash. Ct. App. July 13, 1998); *Burton v. Clark County*, 958 P.2d 343 (Wash. Ct. App. 1998); *Manocherian v. Lenox Hill Hosp.*, 643 N.E.2d 479 (N.Y. 1994).

153. 260 U.S. 393, 415 (1922).

154. See, e.g., *Nollan*, 483 U.S. 825; *Lucas*, 505 U.S. 1003; *Palazzolo*, 533 U.S. 606.

155. See, e.g., *Del Monte Dunes*, 526 U.S. 687; *Dolan*, 512 U.S. 374.

156. 272 U.S. 365 (1926).

157. 277 U.S. 183 (1928).

158. Examples include Hawaii, Vermont, Florida, Oregon, Georgia, Washington, Maryland, New Jersey, California, Arizona, Texas, Connecticut, Massachusetts, New York, North Carolina, Pennsylvania, and Virginia. Their programs are all amply described in such books as *STATE AND REGIONAL COMPREHENSIVE PLANNING* (Peter A.

the police power in our governmental system and therefore, local land use regulation has always been not only subject to state control, but indeed has rarely been possible without state enabling acts. Nevertheless, not only have traditional land use controls such as zoning¹⁵⁹ and more flexible "growth management" plans and regulations been used,¹⁶⁰ but there is a growing trend toward environmental protection at the local level as well. Long the province of federal and state statutes dealing with Clean Air, Clean Water, Hazardous Waste and Coastal Zone/Wetland Protection, environmental protection appears to be going local.¹⁶¹

This is a very good thing since it is largely state regulatory programs and regulations which have borne the brunt of increasingly successful regulatory takings challenges. It is the local land use regulation which is firmly grounded in U.S. Supreme Court jurisprudence following *Euclid v. Ambler Realty Co.*¹⁶² and *Nectow v. City of Cambridge*¹⁶³ in the 1920s upholding zoning despite Holmes' language in the immediately preceding *Pennsylvania Coal Co. v. Mahon*¹⁶⁴ decision and culminating in the more modern *Penn Central Transportation Co. v. City of New York*,¹⁶⁵ upholding a local historic preservation land use regulation rather than a state or regional land use control.

Buchsbaum & Larry Smith eds., 1993); ERIC DAMIAN KELLY, *MANAGING COMMUNITY GROWTH: POLICIES, TECHNIQUES, AND IMPACTS* (1993); J. BARRY CULLINGWORTH, *PLANNING IN THE USA: POLICIES, ISSUES, AND PROCESSES* (1997); JOHN M. DEGROVE & D. MINESS, *PLANNING AND GROWTH MANAGEMENT IN THE STATES* (1992).

159. CLIFFORD WEAVER & RICHARD BABCOCK, *CITY ZONING – THE ONCE AND FUTURE FRONTIER* (1979).

160. See, e.g., FREILICH, *supra* note 5, at 167-208, 253-78.

161. See, e.g., John R. Nolon, *What is the Role of Local Government in Environmental Law?*, 225 N.Y. L.J. 506 (2001); JOHN R. NOLON, *OPEN GROUND: PRESERVING THE LANDSCAPE THROUGH LOCAL LAND USE LAW* (2002).

162. 272 U.S. 365 (1926).

163. 277 U.S. 183 (1928).

164. 260 U.S. 393, 415 (1922).

165. 438 U.S. 104 (1978).