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Private Property Investment, Lucas and the Fairness Doctrine

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I. Looking at Both Sides of the "Takings" Issue

In a recent visit to the campus of Pace Law School, Jerold Kayden, a Senior Fellow at the Lincoln Institute of Land Policy, paid this institution a worthy compliment. After working with us for a time, he noted, with favor, that our property and land use faculty members are in close touch with our environmentalists. I imagine that Mr. Kayden respects this cooperation because it mirrors the type of collaboration between property rights defenders and environmental advocates that ought to be taking place in society generally.

Unfortunately, conferences and conversations on the *Lu-*

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My thanks to Eyleen Hawkins, my research assistant, for her help in organizing these colloquium remarks for presentation here. Some of the points explored here have been incorporated into an article on regulatory takings law that was published in the JOURNAL OF LAND USE AND ENVIRONMENTAL LAW, Vol. 8, No. 1, September 1992. It is entitled: *Footprints on The Shifting Sands of The Isle of Palms, A Practical Analysis of Regulatory Takings Cases.*

cas[1] case tend to be confrontational rather than collaborative. Worse, the property rights and environmental movements employ "spin masters" to turn the case to their advantage to the considerable confusion of property owners and regulators who are trying in earnest to understand the Supreme Court's view on the matter. In the interests of looking at the issues from both sides at this colloquium, let me enter the discussion from the perspective of the property owner. These remarks are not intended to advocate the interests of the new property rights movement. In fact, those advocates will be disappointed by what I say. Rather, I aspire to view the issue of real property regulation as broadly as possible, reaching beyond the jurisprudence of regulatory takings cases into the realms of real estate transactions law and comprehensive land use planning.

II. Inherent Property Rights

The recent emergence of an aggressive property rights movement, a counterpoint in the 1990's to the aggressive environmental rights movement of the 1970's, is due in large part to the perceived over-regulation of property. The language used by judges, journalists and commentators signals the arrival of this interest group on the regulatory scene and reflects, to an extent, its sentiments. For example, one recent law review article discussing the impact of regulations on property values is entitled "Predatory Municipal Zoning Practices."[2] Justice Scalia saw in the facts of the *Nollan v. California Coastal Commission* case an "out-and-out plan of extortion."[3] The New York Times recently characterized the forces behind the plethora of cases that challenge regulations as takings under the Fifth Amendment as a property rights "movement."[4] The Washington Post wrote that these forces are "an

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1. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992), *rev'g and remanding*, 404 S.E.2d 895 (S.C. 1991).

2. Bruce W. Burton, *Predatory Municipal Zoning Practices: Changing the Presumption of Constitutionality in the Wake of the "Takings Trilogy,"* 44 ARK. L. REV. 65 (1991).

3. 483 U.S. 825, 827 (1987).

4. Keith Schneider, *Environment Laws Face a Stiff Test from Landowners*, N.Y. TIMES, Jan. 20, 1992, at A1.

increasingly militant property rights movement."[5]

There is additional evidence that a major assault on property regulation is underway. The Spokesmen for the Alliance for America, a recently formed organization chartered to fight environmental laws, called the environmental movement an "evil empire," using such terms to elicit contributions to their campaign.[6] The Wise Use Movement, a grassroots coalition of 250 groups, asserts that private property owners should be allowed to use their land as they see fit. The Heritage Foundation sees in the U.S. Constitution an inherent property right. In a recent Issue Bulletin (No. 173), the Foundation wrote that: "Each American correctly considers it her or his birthright to be free to acquire land on which to build a home or to use however she or he sees fit, so long as this use does not interfere physically with the rights of neighbors."[7] Such organizations are becoming more unified as a result of their fundraising and lobbying efforts, and they are achieving wide notoriety due to the media attention they actively seek and receive.

Jennifer Nedelsky, in her book *Private Property and the Limits of American Constitutionalism*, attributes to the founders of the federal republic a deep interest in the protection of private property.[8] She postulates that the security of property was integral to the economic and political success of the new nation. She writes that "[i]f property could not be protected, not only prosperity, but liberty, justice and the international strength of the nation would ultimately be destroyed."[9] Nedelsky also argues that the "focus on property as the paradigmatic right to be insulated from the democratic process created a general notion of rights as natural and uncontested

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5. Kirstin Downey, *A Conservative Supreme Court Addresses Property Rights*, WASH. POST, Feb. 16, 1992, at H1.

6. Timothy Egan, *Fund-Raisers Top Anti-Environmentalism*, N.Y. TIMES, Dec. 9, 1991, at A18.

7. William G. Laffer III, *The Private Property Rights Act: Forcing Federal Regulators to Obey the Bill of Rights*, HERITAGE FOUND. REP. ISS. BULL. 173 (1992), at 13.

8. JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY (1990).

9. Laura S. Underkauffler, *The Perfidity of Property*, 70 TEX. L. REV. 293, 299 (1991) (citing NEDELSKY, *supra* note 8, at 6).

in nature."[10] She adds: "property was treated as a sacred value that required protection, not evaluation."[11]

III. Flexible Definition of Property

Whether a property right exists that is immune from police power regulation is a much-debated topic. Despite the amount of energy expended to uncover such a right, no case has ever identified it in any quantifiable or irreducible form. The evidence that such efforts are in vain is considerable.

In 1878, Professor von Jhering wrote "there is no absolute property, i.e., property that is freed from taking into consideration the interests of the community, and history has taken care to inculcate this truth into all peoples."[12] In his book *Real Property*, Powell notes that a property owner "must expect to find the absoluteness of his property rights curtailed by the organs of society, for the promotion of the best interests of others for whom these organs also operate as protective agencies."[13] Professor John Cribbet writes that: "[I]t is still incorrect to say that the judiciary protects property. Rather, the judiciary calls property that which they protect, and that which they protect is forever in transition."[14]

These authors believe that the regulation of property rights will increase as the complexity of society increases. Powell notes that "[t]he necessity for such curtailments is greater in a modern industrialized and urbanized society than it was in the relatively simple American society of 50, 100, or 200 years ago."[15] Cribbet agrees:

> As our concepts of property have evolved, the balance has shifted from an excessive emphasis on individual rights toward a greater dominance of the social interest.

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10. *Id.* at 300 (citing NEDELSKY, *supra* note 8, at 184-85).

11. *Id.* (citing NEDELSKY, *supra* note 8, at 186).

12. R. VON JHERING, DER GEIST DES ROMISHEN RECHTS AUF DEN VERSCHIEDENEN STUFFEN SEINER ENTWICKLANG 7 (4th ed. 1878).

13. 5 POWELL, REAL PROPERTY, § 745, at 493 (1970).

14. John Edward Cribbet, *Concepts in Transition: The Search for a New Definition of Property*, 1 U. ILL. L. REV. 41 (1986).

15. 5 POWELL, *supra* note 13, at 493.

> Whether this has been altogether a good and wise shift . . . has been, and will be, the subject of much debate. The fact that a shift has occurred, however, is difficult to deny.[16]

IV. The Need for Collaboration

The balance between individualism and dominance of the social interest is at the core of Professor Cribbet's recent writing and fairly characterizes the exploration of the U.S. Supreme Court in recent regulatory takings cases.[17] *Lucas* is among a number of cases that have ferreted out overreaching regulations and warned regulators not to engage in such excesses. Since there is no fixed definition of what property is, both sides of the debate should concern themselves with the proper balance between the freedom to use as the owner sees fit and society's need to regulate that use in the community's interest. It is in achieving this balance, not in a search for fundamental constitutional principles, that the interests of both sides will be protected and the case law can be understood. All of this amounts to a call for collaboration in regulating property only as far as necessary to protect legitimate public objectives; collaboration of the type Jerold Kayden lauded at Pace Law School.

The dangers of not collaborating to find a reasonable balance between property rights and the public interest clearly are visible in recent legislative initiatives that respond to the lobbying of the property rights movement. The Private Property Rights Act of 1991,[18] which was supported by the Bush administration but not adopted by Congress, would have subjected all federal regulations to a "takings impact analysis" and constrained the issuance of needed and useful environmental regulations.[19] At least thirteen states — Alabama, Ari-

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16. Cribbet, *supra* note 14, at 42.

17. *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 825 (1982); Kaiser Aetna v. United States, 444 U.S. 164 (1979); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).

18. The Private Property Rights Act of 1991, S. 50, 102d Cong., 1st Sess. (1991).

19. *Id.*

zona, California, Delaware, Kentucky, Maine, Missouri, New Hampshire, New York, Oklahoma, South Carolina, Vermont and Washington — have recently considered property rights legislation in one or both of their legislative houses. These proposals either require state agencies to conduct takings impact analyses prior to the issuance of new regulations or they define a compensable taking and require payment for diminutions in property value if a use-restricting regulation is enacted.

Such legislative proposals are less likely to succeed if the need for them is not felt by lawmakers. This need is less likely to be felt if regulators proceed fairly, giving the impact of their regulations on property owners the type of consideration that would be mandated by these proposed statutes. More importantly, regulations that intrude on such uses only as far as necessary to accomplish their environmental or other public objectives are less vulnerable to invalidation in the courts by judges trained to respect private rights as well as legislative discretion.

If this call to maximum fairness in regulations is ignored, regulators run the risk of offending the sensibility of the legislators and judges and having their regulations scrutinized more rigorously. If a regulation is designed to be fair, the Court's "sense of justice" is less likely to be offended. Sensing fairness, the Court is less likely to conclude that the takings clause is implicated, and will tend to adopt a deferential posture in reviewing the regulation in question. Legislators, sensing fairness in regulatory regimes, will be less moved by their propertied constituents to limit the discretion of regulatory agencies.

V. Private Market Obstacles to the Development of the Lucas Lots

A. The Capacity of the Lucas Lots to be Developed

An exploration of the reasonableness of the South Carolina regulation that prevented David Lucas from building any permanent structures on his two beach front lots should begin, like a buyer's due diligence analysis of the property, with

an examination of its inherent characteristics and its suitability for development.

The Isle of Palms, where these lots are located, is a highly dynamic area. Its shoreline is a shifting one. The shifts are due to wave action and tidal currents in an inlet between the Isle of Palms and an island to its north. Currents carry sand from this northern island into the inlet, where the sand collects in bars or shoals. If the inlet channel shifts, as it does periodically, shoals can break off and move toward the Isle of Palms, creating sand bars. These masses can cause waves to bend around their edges, causing erosion on the Island on either side. Since the late 1940's, the shoreline of the Isle of Palms, although generally moving seaward, has shifted occasionally as these currents have moved. Sometimes the shoreline has been 200 feet or more inland of its current position seaward of the Lucas lots. During these times, the Lucas lots have been under water; houses built on them would have been flooded.

The State of South Carolina argued before the U.S. Supreme Court that, due to the unstable nature of the barrier island, there was a high risk that structures and their occupants would be vulnerable to adverse weather conditions. As borne out by Hurricane Hugo, extreme winds break up structures on barrier island beachfronts and carry them like projectiles onto adjacent areas; severe storms sever septic tanks and sewer lines causing costly contamination of coastal waters. The cost to the public for cleanup and relief following such catastrophes is considerable.

Lucas owned an equity interest in the development company that had built homes on the Isle of Palms. He purchased his two lots from that same company. As a licensed realtor and property developer with experience in developing properties on the fragile barrier island where his land is located, he should be charged with knowledge that the lots he purchased were limited in their capacity to be developed and sold. This is explained below by reference to prevailing trends in the brokerage, insurance and mortgage fields that affect any home builder, seller or purchaser in the area.

B. Liability to Disclose Property Defects

The traditional property perspective in the purchase of realty begins with the common law concept of caveat emptor, "let the buyer beware." Upon purchase, the buyer accepts the risk of all defects in the property. From this concept flows the notion that purchasers of real property must conduct "due diligence" analyses of properties before they buy. Should they fail to do so, or to protect themselves from property defects in the contract and deed, they have no subsequent claim against the seller for conditions they should have discovered prior to purchase. Having conducted such an analysis and purchased the property, owners, in the vernacular of regulatory takings cases, are said to have certain "reasonable investment-backed expectations" in their purchase. Among the matters they should have investigated is the regulatory environment affecting the land, its physical condition, and the availability of insurance and financing for their properties. Absent a contract provision to the contrary, the seller takes no responsibility for these matters subsequent to purchase. The buyer assumes this risk and must carefully analyze the regulatory environment, the business prospects for development and the physical characteristics of the property during the pre-purchase phase of the transaction.

When a regulation that severely diminishes the property's value is adopted after the contract to purchase is signed, the buyer is in the position of the plaintiff in *Stambovsky v. Ackley*, a recent New York decision.[20] The owner, Mrs. Ackley, had created a local perception that the single-family house Mr. Stambovsky had contracted to buy from her was haunted by a jovial Revolution-era ghost. Mr. Stambovsky, unfamiliar with local lore, found out about this reputation only after he had signed the contract, but before the passing of title. The court found that the contract was inequitable and should be rescinded because the seller had created a condition that materially affected the property's value and that he could not, despite due diligence, discover the defect. In the court's

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20. 169 A.D.2d 254, 572 N.Y.S.2d 672 (1991).

words, "Who you gonna' call?" to inspect for ghosts.[21]

Property rights advocates logically view the specter of regulations that materially affect property values in this same way, particularly when they are passed, as in *Lucas*, after purchase. If "who you gonna' call?" applies, and there was no notice of the need for the regulation, the purchaser may be treated unfairly. But, when the inherent properties of the land or patent environmental conditions in the area suggest the need for limitations on the use of the property in the broad public interest, the inequitable nature of the regulation abates. Whether we, as a society, are in agreement as to whether a buyer should expect regulation for environmental reasons is the key question that plagues regulatory takings jurisprudence. There is considerable evidence emerging from the context of real estate transactions law that buyers should become more knowledgeable in this area.

As an active participant in the local real estate industry, Lucas knew, or should have known, of the provisions of the 1977 South Carolina Coastal Zone Management Act[22] which placed prospective purchasers on notice of the nature of the limitations on the development adjacent to the shoreline and of the potential for future restrictions on that development. The state, in fact, had appointed a Blue Ribbon Commission to investigate these problems further and propose solutions to them in 1986, before Mr. Lucas purchased his lots. The appointment of this Commission and its charge were well covered in the state and local press at the time.

In *Stambovsky*, the seller was not liable for the diminution of value; the contract was simply rescinded as inequitable.[23] In New York, sellers are liable at law for damages for their failure to disclose material property conditions only in a few circumstances. Across the nation, however, this seems to be changing. Sellers of residential properties, and their brokerage agents, are increasingly held liable for their failure to disclose material defects that are not normally discoverable by

21. *Id.* at 257, 572 N.Y.S.2d at 675.
22. S.C. CODE ANN. § 48-39-10 *et. seq.* (Law Co-op. 1987).
23. 169 A.D.2d 254, 572 N.Y.S.2d 672 (1991).

the average buyer. In *Easton v. Strassburger*,[24] for example, the seller and broker were held liable for not disclosing certain soil conditions that indicated a mud slide was imminent. The purchaser of the single-family house on that lot was successful in a damage action against them, after the home was totally destroyed by a major soil movement that occurred soon after he purchased the property.[25]

Easton is a California case, followed recently by courts in several other jurisdictions. Some estimates coming from the brokerage insurance industry indicate that over two-thirds of buyer's claims against brokers involve non-disclosure; the average insurance award in such cases has more than doubled since 1984, when *Easton* was decided. Since 1984, six state legislatures have passed bills requiring sellers to disclose property defects.[26] By the end of 1993, such bills will be under consideration in twenty-one state legislatures.[27] Thirty-three states have some form of voluntary disclosure and four others are considering it.[28] The judicial, legislative and market perspective on this matter is that the seller and the brokerage agent are in a better position to discover and disclose latent defects than the buyers — particularly the normally unsophisticated purchaser of a single-family home.

The fear of liability for non-disclosure has led, even in states where the law does not require it, to the practice by brokers of requiring their listing sellers to complete a full disclosure statement which is then passed along to the prospective buyer. Recently, Caldwell Banker announced that sellers listing property with the national real estate brokerage company must fill out and sign property defect disclosure forms. The 800,000-member National Association of Realtors recently announced plans to lobby lawmakers in all states that do not have seller disclosure laws to pass them.[29] Interestingly, the local practice among brokers in the Isle of Palms

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24. 152 Cal. App. 3d 90, 199 Cal. Rptr. 383 (1st Dist. 1984).
25. *Id.* at 105, 199 Cal. Rptr. at 392.
26. James D. Lawlor, *Seller Beware*, A.B.A. J., Aug. 1992, at 90.
27. *Id.*
28. *Id.*
29. *Id.*

area is to require sellers to sign disclosure statements listing defective conditions in their properties.

This trend among brokers is due, in part, to a canonical duty that professional brokers have to discover and disclose property defects. Under Article 9 of the Code of Ethics of the National Association of Realtors, brokers are required to "avoid exaggeration, misrepresentation, or concealment of pertinent facts."[30] They are under an "affirmative obligation to discover adverse factors that a reasonably competent and diligent investigation would disclose."[31] Brokers have been disciplined by their Professional Standards Committee, for example, for failing to discover and disclose to the buyer that a home on a city block was not connected to the public sewer system.[32]

Mr. Lucas claimed at trial that his intention was to develop houses on the two lots. He had engaged an architect to draw plans and planned to sell at least one of the houses in the private market. In South Carolina, this sale is affected by a state statute that recognizes seller responsibility to disclose physical deficiencies. A bill which became effective in 1990 frees sellers and brokers from disclosing psychological defects of real property, while affirming their duty to disclose material defects: "This section does not relieve an owner or agent of an obligation to disclose the physical condition of the premises."[33]

Where there are recent movements in the soil, as in *Easton* and in *Lucas*, and given the seller's duty to disclose them to potential buyers, the property's marketability and market value are questionable. This is true, despite the fact that, in recent years, beachfront lots on the Isle of Palms have been selling. These sales are due primarily to the availability of government-sponsored property insurance programs, and there is some evidence, now discoverable by purchasers, that

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30. NATIONAL ASS'N OF REALTORS, CODE OF ETHICS (1982).

31. *Id.*

32. Easton v. Strassburger, 152 Cal. App. 3d 90, 101 n.6, 199 Cal. Rep. 383, 389 n.6 (1st Dist. 1984).

33. S.C. CODE ANN. § 40-57-270 (Law Co-op. 1990) (previously 1990 Act No. 481, §1, effective May 14, 1990).

these programs are being rethought, particularly insofar as they encourage construction in high-risk areas.

C. Availability of Insurance and Mortgage Financing

A bill that passed the House of Representatives in 1991, by a margin of 388 to 17, would eliminate flood insurance for new construction of homes in erosion hazard areas.[34] The House received testimony that severe coastal storms could cost the federal treasury billions of dollars because of its current obligations under this program.[35] Payments due to Hurricane Hugo, a single event, cost federal taxpayers over $300 million.[36] There was also testimony before the House that the existence of the insurance program was singularly responsible for much of the development of housing in coastal areas such as the Isle of Palms.[37]

Private market flood and storm-risk insurance in such areas, where it can be obtained, carries yearly premiums approaching 10% of a home's value — a prohibitive amount. Private market insurance companies in the Isle of Palms area do not provide insurance at all for homes built within 1000 feet of the high tide line. This area of disability includes the Lucas lots. It also includes the set back zone in which development was prevented by the 1988 Beachfront Management Act contested in the *Lucas* case.

The South Carolina legislature created the Windstorm and Hail Insurance Underwriting Association and mandated membership in it by insurance companies writing property insurance in the state. Members must participate in the Association's shared-risk pool, which is the only source, other than federal flood insurance, of storm-related casualty insurance in the 1000-foot zone of disability designated by the private

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34. National Flood Insurance Compliance Mitigation and Erosion Management Act, H.R. 1050, 102d Cong., 1st Sess. (1991).

35. Cornelia Dean, *Beachfront Owners Face Possible Cuts*, N.Y. TIMES, May 27, 1992, at A1.

36. National Underwriter Co. Property & Casualty/Risk & Benefits Management Edition, *Flood Plan Pays a Record $365M in S.C. Hugo Losses*, at 35 (Oct. 22, 1990).

37. Dean, *supra* note 35, at A1.

companies themselves. Presumably, the state legislature could act to limit its insurance requirements, leaving beachfront developers in high risk areas no method of obtaining casualty insurance. There is no evidence that the state legislature is inclined to do so, but it is noteworthy that the entire South Carolina congressional delegation voted in favor of H.R. 1236 that would have eliminated flood insurance coverage for new construction in high-risk areas. It is also interesting that some property rights groups, such as the Heritage Foundation and the Cato Institute, have joined the environmental lobby in opposing government-sponsored property insurance in areas deemed by the private market to be unduly risky.

If property insurance for storm-related risks is not obtainable by buyers, they cannot obtain private market construction or permanent loans for their properties. Conventional mortgage lenders in the Isle of Palms market area will not finance property purchase or development unless evidence of property insurance is provided as part of an application for such finance. Because of these customs and practices in the unregulated private market, most lots in this area of disability would not be developed but for the availability of government-sponsored insurance programs.

D. Legitimate Investment-Backed Expectation

The judgment of the unregulated private market in the Isle of Palms seems to be that beachfront construction is a doubtful, high risk business venture. Developers in the area would argue that development is encouraged and enabled by government-sponsored insurance programs that were available when they purchased beachfront lots and are available today.[38] Over time, however, buyers conducting due diligence investigations may conclude that these government programs are not reliable and that potential changes in them may impugn the ability of owners to develop or market their proper-

38. Between January, 1990 and August, 1992, for example, 54 beachfront lots were sold on the Isle of Palms. Thirty of them were vacant; they sold for an average price of just over $250,000. Twenty-four of them were developed as single-family lots; their average sales price was just over $500,000.

ties in the future.[39]

The judgment of the private market — the realtors, the insurance industry, and mortgage lenders — is that the type of permanent construction that is prevented by the Beachfront Management Act at issue in the *Lucas* case is a high-risk venture. In regulatory takings terms, Mr. Lucas, as a purchaser of beachfront lots, may not have "reasonable investment-backed expectations" that sustain the considerable price he paid.[40] If his expectations were reasonable, at the time of purchase, would a purchaser from him today have defensible investment-backed expectations? If not, should the taxpayers bear the burden of this change in society's view of the wisdom of developing on the beach? These transactional considerations are critical to the issue of the essential fairness of the regulation as well as to assessing how much of a loss Mr. Lucas suffered because of it.[41]

E. The Wisdom of Judicial Usurpation of Legislative Discretion

These facts raise an interesting question of whether the limitations on development imposed by the regulation chal-

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39. Additional evidence of the private market's adjustment to the new realities of beachfront development on barrier islands can be seen in the plans underway on Dewees Island immediately northeast of the Isle of Palms. One hundred and fifty homes are being sold on this 1200-acre island. The community, which will be deed-restricted to guarantee no further development, is being marketed as a "no negative impact development." Privately imposed setback restrictions on beachfront lots range from about 450 feet to 700 feet. The 150 homes are served by only three miles of road of natural sand base construction. Vehicles are limited to golf carts and small electric-powered cars.

40. Was Lucas's decision to buy these lots reasonable if it was based on the continuing availability of costly government-sponsored insurance programs? If the answer is yes, does this indirectly oblige government to continue programs that its taxpayers cannot afford?

41. In its order on remand, the Supreme Court of South Carolina found that there exists no common law basis to justify the prohibition of all development of the Lucas lots. In remanding the case to the circuit level, the Court held that Mr. Lucas's damages shall be limited to those actually "sustained as a result of his being temporarily deprived of the use of his property." Lucas v. South Carolina Coastal Council, 1992 WL 358097, at *2 (S.C. Nov. 20, 1992).

lenged in *Lucas* "inhere in the title [of the property] itself,"[42] as the majority decision required, not because of common-law nuisance limitations, but due to local industry practices, shaped by prevailing legal considerations in the unregulated private market.[43] A corollary question is whether the elimination of these government-sponsored insurance programs would constitute a "newly legislated" limitation on development of the type Justice Scalia says legislatures may not pass without compensation, if their effect is to deny all productive use of the land. Simply stating these queries raises obvious questions about the wisdom of judicial usurpation of legislative prerogatives in these complex and interrelated areas of society.

The federal and state legislatures collaborated in regulating development in coastal areas through the passage of complementary statutes: the Coastal Zone Management Act and the Beachfront Management Act. If they can collaborate in eliminating government-sponsored insurance programs that enable most of the development in high-risk areas along coastal beaches, should the court constrain their ability to regulate such development by the more direct means contested in the *Lucas* case?

VI. The Nuisance Law Limitation on Total Takings

The Court in *Lucas* held that the regulation, since it took all value, is a taking requiring compensation unless development of the lots could have been prevented under the common law nuisance doctrines of South Carolina. There is considerable irony in this reliance on the common law of nuisance in *Lucas*. We were instructed in 1970 by New York's highest state court that litigation under nuisance doctrines was not competent to resolve the broad geographical impacts of air pollution and similar matters.[44] The court wrote:

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42. 112 S. Ct. at 2900.

43. *Id.* at 2901.

44. Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 309 N.Y.S.2d 312, 257 N.E.2d 870 (1970).

> A court should not try to do this on its own as a by-product of private litigation and it seems manifest that the judicial establishment is neither equipped in the limited nature of any judgment it can pronounce nor prepared to lay down and implement an effective policy for the elimination of air pollution. This is an area beyond the circumference of one private lawsuit. It is a direct responsibility for government and should not thus be undertaken as an incident to solving a dispute between property owners and a single cement plant — one of many — in the Hudson Valley.[45]

This judicial sentiment is not limited to the courts in New York. A recent Florida decision reviewing the establishment of a coastal construction control line, affecting particularly the development of the barrier islands, contains this statement:

> Evaluation of the economic, environmental, and geophysical concerns underlying the wisdom and desirability of so regulating land use along the Florida beaches is, however a political matter for determination by the legislature, not this court. The setting of a truly desirable and effective coastal construction control line along almost any segment of the Florida coastline will inevitably involve mixed consideration of scientific knowledge and political concerns.[46]

The irony arises in comparing the above language to that of Justice Scalia in *Lucas*:

> Any limitation so severe [as a total taking] cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's *law of property* and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more

45. *Id.* at 223, 309 N.Y.S.2d at 314, 257 N.E.2d at 871.

46. Island Harbor Beach Club, Ltd. v. Department of Natural Resources, 495 So. 2d 209, 223-24 (Fla. Dist. Ct. App. 1986).

> than duplicate the result that could have been achieved *in the courts* — by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.[47]

By defining nuisance by reference to the case law, the Court has left the legislature little, if any, ability to regulate in its discretion. Under *Boomer*, New York's highest court declared its incompetence to handle matters involving broad geographical impacts such as air pollution and, one would suppose, coastal protection. There is a worrisome Catch-22 situation here, a gap in logic and strategy that protects the property owner from a total taking, leaving the communitarian interest in critical environmental protection in the breach.

An interesting question is whether the U.S. Supreme Court, under its *Lucas* test, would include within the State's "law of property" its seller disclosure doctrine and the customs and practices of the mortgage and insurance industries, which are shaped by prevailing legal considerations. If so, and if such practices discourage or prevent construction on the Lucas lots, there may be no "taking" under the rule articulated in *Lucas*, even when no productive use of the land is left to its owner.

In this context, the options available to the state in protecting its taxpayers and citizens from the growing expense and hazard of coastal erosion and violent winds amount to a sort of governmental Sophie's choice. South Carolina can prohibit development in close proximity to the beach, and risk having to compensate affected owners under *Lucas*. This risk is heightened because of the arrested development of the common law of nuisance as discussed above. Or, the state and federal governments can eliminate their insurance programs and transfer these costs to the affected property owners, a crushing burden for an important group of constituents. Alternatively, state and federal lawmakers can choose to continue

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47. 112 S. Ct. at 2900 (emphasis added).

these insurance programs, imposing the cost of compensation on the insurance companies required to participate in the state-mandated windstorm pool and on federal taxpayers under the federal flood insurance program.

The costs associated with property damage due to coastal erosion alone are staggering. Recent analysis of this country's coastlines indicates that 90% of the shoreline along the Gulf and Atlantic coasts is eroding. The predicted rise in sea level attributed to global warming is now one foot in the next century, which will cause a retreat in the coastline of South Carolina of 200 feet. Estimates in North Carolina indicate that up to 5,000 existing structures may be lost to coastal erosion over the next sixty years.[48] Add to this the billions of dollars lost in hurricanes Andrew and Hugo,[49] and the ramifications of this choice can be appreciated. In the face of such statistics, policies that discourage or prevent new construction of beachfront homes seems eminently wise. Not surprisingly, such policies coincide with emerging trends in the private real estate marketplace.

The complexity of all this bolsters the point of those who argue that the resolution of these issues ought to be left to the legislature, where all interest groups are heard, rather than to the courts, where only the interests of the litigants are articulated and resolved. This complexity also blunts the complaints of those who criticize the Court for failing to articulate a bright-line rule applicable to all takings cases. All of this calls on interests groups to collaborate to resolve these conflicts in the broader best interests of society rather than seek individual remedies in the highly adversarial context of cases brought before the bench.

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48. Dennis J. Hwang, *Shoreline Setback Regulations and the Takings Analysis*, 13 U. HAW. L. REV. 1, 2-3 (1991).

49. Peter Kerr, *Insurers Prepare to Seek Rate Raises After Disasters* , N.Y. TIMES, Oct. 25, 1992, at p.1. It is estimated that Hurricane Andrew caused $10.2 billion of damage in Florida and $500 million in Louisiana; Iniki caused $1.6 billion in damage in Hawaii. Prior to this year's storm, Hurricane Hugo, in 1989, was the nation's costliest storm, causing $4.2 billion in damage. *Id.*

VII. Applicability of *Lucas*

The wording of the decision of *Lucas* itself confines it to regulatory takings cases that are "relatively rare."[50] Other than creating an important nuisance and property law irony, I believe that the case does very little that is new and has limited applicability to the regulatory takings debate generally. The decision quite possibly doesn't even resolve the dispute between David Lucas and the South Carolina Coastal Council, as the above analysis illustrates.

My understanding of this field of law is that the Court tends to confine its holdings to similar types of fact situations. I call the types of disputes, like *Lucas*, in which regulations are rather summarily set aside by the Court, "undue burden" cases. In the Court's analysis, the regulation challenged in these cases goes beyond a reasonable police power limitation on property use and implicates the protection of property contained in the Fifth Amendment's Just Compensation Clause.

VIII. How Do Courts Decide Regulatory Takings Cases?

The frustration of regulators and property owners with the flexibility that judges have retained in the regulatory takings field is considerable. The jurisprudence of takings law has been described variously by respected commentators as "untidy and confused," "somewhat illogical," "a muddle," "a crazy-quilt pattern," "open-ended and standardless," "chaotic," and "mystifying and incoherent." Is the sum of this that regulators and property owners are subject to the whim of judges who simply decide cases according to their life experience? Karl Llewellyn argued that judges are guided by constraining principles and techniques, but that they also have leeway in deciding cases, particularly where social values are in flux.[51] He suggested that the facts lead judges to classify a dispute and that from that classification they search for the

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50. 112 S. Ct. at 2894.

51. KARL N. LLEWELLYN, THE CASE LAW SYSTEM IN AMERICA 99 (Paul Gewirtz ed. & Michael Ansald; trans., 1989).

applicable rules of law.

A. Categories of Takings

In the regulatory takings field there are four categories of fact patterns, which I classify as arbitration cases, undue burden cases, public values cases, and public injury cases. These categories can be illustrated by reviewing the opinions of the majority and dissent in the South Carolina State Supreme Court decision in *Lucas* and the majority decision of the U.S. Supreme Court written by Justice Scalia.

B. The Categories of Takings in *Lucas*

The majority of the South Carolina Supreme Court read the Beachfront Management Act, and its prohibition of development on the Lucas lots as intending to protect a critical natural resource and to prevent serious public injury.[52] The dissent, sympathetic to the complete destruction of market value, saw a legislature promoting tourism and preserving natural habitats for wildlife. In this, "the most perplexing area of American land use law," each side had at its disposal rules of law on which to rely to vindicate its sense of justice.[53]

This state court debate illustrates two categories of "fact situations" in the regulatory takings field. The majority sensed that the legislature was preventing a great public harm and placed the case in a group of cases where the primary objective of the regulation is the prevention of public injury: the Public Injury Category. The dissent believed that the legislature was regulating to secure laudable public benefits, short of preventing noxious or offensive uses of land: the Public Values Category.

The majority of the U.S. Supreme Court in *Lucas* placed these same facts in yet a third category. Since the regulation took all economically beneficial use, the "historical compact" contained in the takings clause may have been violated. Such

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52. Lucas v. South Carolina Coastal Council, 404 S.E.2d 895 (S.C. 1991).

53. *Id.* at 903 (quoting Settle, *Regulatory Taking Doctrine in Washington, Now You See It, Now You Don't*, 12 U. PUGET SOUND L. REV. 339 (1989)).

fact patterns constitute the "undue burden" category of cases, so labeled because the Court concludes that one or more individual owners of property have been singled out to bear a public burden that should be shouldered more broadly.

These three categories cover those controversies that our society debates the most: the "growth area of the law," to use Llewellyn's term, where societal values are in flux and great debate of the type generated by *Lucas* is occurring. The more settled category of disputes involves regulations that adjust the benefits and burdens of economic life in a manner that secures an average reciprocity of advantage to everyone concerned. The perception is that such regulations fairly arbitrate the obligations and rights of citizenship and ownership; they can be placed in a group of cases called the Arbitration Category, a class that represents the "stable core" (Llewellyn's term) of regulatory takings law, about which there is less social conflict and confusion in the law. Zoning ordinances are a classical example of such arbitration regulations.

In these categories of cases, there are some constraints on the judiciary and some leeways. Within each category, judges seem constrained. First, they are committed to search for fundamental fairness in the challenged regulation. Second, they make two demands of all regulations, following the *Agins*[54] prescription: the regulation must substantially advance a legitimate public interest and must not take all economically viable use of the property from the owner.[55] Third, judges will not question or lightly set aside a legislative finding that a particular objective is a legitimate subject justifying public regulation of private rights. Fourth, in determining whether the property owner is unfairly burdened, they will look for reciprocity of advantage and whether similar properties are treated in the same way. Finally, they will put the initial burden of proving the unconstitutionality of the regulation on the challenger. This burden is easily borne, in the undue burden category, where the owner can show that she has suffered an invasion of her possession or has no value left.

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54. Agins v. Tiburon, 447 U.S. 255 (1980).
55. *Id.* at 260.

In other ways, judges are provided leeways that they are more likely to use where they sense that relatively few owners have been singled out to bear a burden in the public interest. Since public benefit and public injury cases tend to involve particularized restrictions on properties with special characteristics, judges tend to proceed with greater care and to analyze, in more detail, whether these particular burdens are justified. The cases have not articulated precise levels of judicial scrutiny that are applied in certain categories of disputes. The Court may engage in an ad hoc, factual inquiry of sufficient intensity to satisfy itself that the regulation is essentially fair. In such cases, the relationship between the regulatory objective and the means chosen to accomplish it may be examined more carefully. If judges are satisfied that the regulation prevents uses of property that are injurious to the public, a finding of fairness is more likely than when the regulation is based on public values or sensibilities. In these latter cases, judges are more likely to engage in multi-factor balancing of the public and private interests affected by the regulation, though judges are not constrained to use any particular set of factors, nor are they required to balance or weigh them in any preordained way.

The sum of the U.S. Supreme Court regulatory takings case law is that the vast majority of regulations will be undisturbed by the courts, simply because judges are trained to defer to legislative determinations, absent a showing of essential unfairness which is lacking in most cases. The much touted ambiguity of the case law and the stricter standards applied to regulations arise in very unusual fact situations such as the total takings context, an invasion of possessory rights, or rather obvious, in the Court's view, trammeling of fundamental rights. With some exceptions, this ambiguity and these stricter rules will be limited to similar fact patterns.

IX. The Principle of Maximum Fairness in Analyzing Regulatory Takings Cases

When a court senses that it is dealing with a regulation that places an undue burden on the property owner, its opin-

ion focuses on the wrong to property; its sense of justice is offended. Predictably, the public policy pronouncements of the regulator enjoy less deference.

The majority opinion in the U.S. Supreme Court *Lucas* decision illustrates the categorically different method of proceeding once a case is placed in the undue burden category. It notes that in such a case "it is less realistic to indulge our usual assumption that the legislature is simply 'adjusting the benefits and burdens of economic life.' "[56] This is because such regulations "carry with them a heightened risk that private property is being pressed into some form of public service."[57] Even in these cases, where non-economic interests in property are regulated, these regulations "invite exceedingly close scrutiny under the Takings Clause."[58] The challenger enjoys stricter judicial scrutiny of the regulation upon a showing that the regulation has "denied him economically beneficial use of his land."[59]

The *Lucas* holding, therefore, should be confined to the facts of the case, which the Court itself states are "relatively rare."[60] There is ample precedent for takings analysis of the *Lucas* variety in cases like *Loretto v. Manhattan Teleprompter CATV Corp.*[61] Although these previous cases do not fall quite like the Scalia guillotine in *Lucas*, the basic holding of *Lucas* is not a dramatic departure, if confined to cases where the regulation truly takes all value.

The essential clue to a court that a regulation may be a taking requiring compensation under the just compensation clause is that the regulation has unfairly singled out a particular owner, or group of owners, to bear a public burden that the public as a whole ought to be responsible for. It is this clue from cases like *Lucas* that ought to be picked up by regulators and their attorneys if they wish to insulate their restric-

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56. 112 S. Ct. at 2894, (quoting Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978)).

57. *Id.* at 2895.

58. *Id.* at 2895 n.8.

59. *Id.* at 2893 n.6.

60. *Id.* at 2894.

61. 458 U.S. 419 (1982).

tions on property from attack as regulatory takings. Should they fail to do so, their ability to regulate property in the public interest may be limited by the legislature and their regulation may be found to violate the standards articulated in the undue burden category of regulatory takings cases.

The practical lesson that may be learned from this is that land use regulators should strive to achieve essential fairness rather than relax into an assumed presumption of validity. For a variety of reasons, those who draft regulations should be guided by a principle of maximum fairness and engage, themselves, in the exercises undertaken by the courts in close cases. Among these reasons are the following:

First, a regulatory regime that is generally fair might seem unduly burdensome as applied to a particular owner, triggering more careful judicial analysis, a takings finding and public cost and embarrassment.

Second, because judges do enjoy leeways in this field, and the rules in one category of case can bleed through to other categories, there is no guarantee that a given set of facts will be placed in a particular category.

Third, by proceeding fairly in regulating land uses, situations that lead courts and commentators to use phrases like "out-and-out plan of extortion" and "predatory practices" can be avoided along with the perception that land use regulation, in general, has gone too far. Unless this happens, victories in the courtroom can be negated in legislative chambers. The Private Property Rights Act of 1991 would constrain the issuance of needed and useful regulations. Such legislative proposals are less likely to succeed if the need for them is not felt by lawmakers.

Fourth, productive use of land is respected by the law. Regulations that intrude on such uses only as far as necessary to accomplish their environmental or other public objective are less vulnerable to invalidation in the courts by judges trained to respect private property rights as well as the discretion of legislatures.

A. Supporting Justification

If a land use regulation is not supported by findings that clearly demonstrate its public purpose and justify its private burdens, judges will be thrown back on their own sense of fairness. For this reason, regulations should always contain detailed findings of fact that support their adoption and impacts. As Justice Scalia counselled, this needs "to be more than an exercise in cleverness and imagination."[62] In justifying any regulation, or analyzing whether it is constitutional, there are several key questions that are helpful to ask.

First, is the public objective pursued by the regulatory scheme clearly stated and convincingly supported?

Second, is the close connection between the regulatory means and the burdens imposed obvious on the face of the regulation? Third, is it possible to characterize the regulatory scheme as an arbitration matter? Are the burdens of the regulation shared by a relatively large number of property owners including all similarly situated owners? Are there any special benefits from the regulation that run to those owners? If a relatively few owners are burdened, is there a convincing reason why this has to be so?

Fourth, does the regulation effect, directly or indirectly, an invasion of the owner's possessory rights? Is there any other alternative to accomplishing the regulatory end that does not involve an invasion? If the regulation effects a result that appears to constitute a traditional government enterprise, such as the preservation of open space, is there a convincing rationale for regulating rather than taking the property under eminent domain? Is there a possibility that the regulation will prevent all productive use of particular properties? If so, could the use have been prevented under the state's nuisance law or prevailing property law? Does the regulation have hardship exceptions to prevent total takings? If not, is their absence justified?

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62. Nollan v. California Coastal Comm'n, 483 U.S. 825, 841 (1987).

X. The Comprehensive Plan and the Principle of Maximum Fairness

Judges will have fewer occasions to second-guess regulators when it is obvious, in the structure of the regulatory program, that considerable and comprehensive planning was involved. This is illustrated by *Gardner v. New Jersey Pinelands Commission*.[63] In *Gardner*, a property owner was burdened by regulations that were drafted in response to federal and state legislation designed to protect the New Jersey Pine Barrens. The breadth of concern in the legislation is considerable, despite its primary focus on the preservation of the fragile ecosystem. The state authorized the designation of "protection areas" for the promotion of agriculture and "appropriate patterns of compatible residential, commercial and industrial development . . . ."[64] The Pinelands Commission adopted land use regulations, based on and consistent with a "comprehensive management plan," subject to the approval of the Secretary of the Interior of the United States. In this regime, the legislature and its regulatory agency arbitrated a full range of public concerns and private interests.

In *Gardner* the court quickly saw the analogy between this regulatory approach and zoning: "Because the Pinelands scheme is fundamentally a regime of zoning, takings doctrine dealing with zoning is particularly relevant."[65] The court noted that the regulation complained of had a particular impact on property with special characteristics, akin to the impacts of "complex, special-purpose regulations" where the demands of the judicial takings analysis "may become more elaborate."[66] The tone of the court's analysis, in this dual context, was respectful of the legislative determinations involved.

Under the Pine Barrens program, the large-scale reciprocity of advantage in the regulatory scheme is inherent in its concern for economic as well as ecological interests, paralleling the breadth of concerns of zoning itself. As Justice Stevens

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63. 593 A.2d 251 (N.J. 1991).
64. *Id.* at 254-55. *See* N.J. STAT. ANN. 13:18A-9b.
65. 593 A.2d at 257.
66. *Id.*

writes in his dissent in *Lucas*, "[P]erhaps the most familiar application of this principle of generality arises in zoning cases. A diminution of value caused by a zoning regulation is far less likely to constitute a taking if it is part of a general and comprehensive land use plan."[67]

Many land use regulations are adopted and enforced by public agencies that are either parochial or narrow in their focus. Local governments tend to be parochial, limited in their concern to property and affairs within their limited geographical boundaries. State and federal environmental regulations tend to focus narrowly on issues such as air quality, an estuary, an aquifer, specific wetlands, a scenic river, or a toxic waste site. When these regulations stray from public injury prevention, as the minority of the South Carolina Supreme Court felt the Beachfront Management Act did in *Lucas*, they risk invalidation under takings scrutiny. This risk is abated, if they are part of a more comprehensive approach such as that found in *Gardner*. Regulations that carry out objectives of a comprehensive plan are more easily seen as being in accord with the principle of generality, conferring reciprocal advantages, falling into the arbitration class and meriting the full deference that reviewing courts afford such regulatory programs.

With single-purpose regulations, emanating from state and federal agencies, and with parochial local regulations, it is less clear that the public interest is fully considered and that the regulatory scheme, in balance, bestows reciprocal benefits as broadly as possible. The lack of order in a system of uncoordinated regulations, some parochial, some narrow in focus, is itself burdensome; developers' proposals are often subject to multiple-agency reviews by different levels of government. It is obvious that a comprehensive and coordinated system of land use regulation furthers the essential fairness sought by courts in examining regulations.

The relatively recent appearance of comprehensive statewide land use legislation, coinciding with the quickening pace

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67. 112 S. Ct. at 2923.

of regulatory takings challenges is intriguing. Such initiatives, often called growth management statutes, generally require that state and local regulations be tied to comprehensive land use plans. Such plans consider, arbitrate, and represent a wide variety of interests including economic and residential development, infrastructure provision, the provision of open space and recreational facilities, and the protection of the environment, among others. This is the type of collaborative effort, representing both property and environmental interests, that is needed as an antidote to the rash of regulatory takings cases and the emerging trend toward property rights legislation.

In the typical growth management statute, state-wide land use objectives are articulated and local plans are urged or required to be consistent with those objectives. Emphasis is placed on need analysis and data gathering, and the integration of that information into comprehensive plans. Information is often assembled at the regional level, and regulations are tied to meeting those regional needs. The plans that result tend to be comprehensive in subject matter and geographical in focus, truly arbitrating a broad range of public and private interests in a uniform fashion. The publicity attending the consideration and adoption of such plans gives notice to property owners and purchasers of future allowable land cases. These plans are then used as the justification for specific land use regulations, such as zoning, at the local level. They also guide the issuance of single-purpose regulations by state agencies, as well as the expenditure of local, state and federal funds on capital infrastructure such as bridges, public transit, highways and water and sewer systems.

When a regulation, challenged as a taking, is carefully integrated into such a comprehensive system of land use regulation, the natural tendency of judges toward deference to law makers will be greatly reinforced. If there is a threat to the potency of legislatures from stricter judicial scrutiny of land use regulations, legislating comprehensively and intelligently in this fashion and adhering to the principle of maximum fairness will keep control where it historically has been. Absent a showing by a particular property owner of an egregious bur-

den in her case, justices are more likely to behave as they did in *Gardner*, deferring in tone and substance to the rule of law as competently expressed by the elected representatives of the people.