Pace University
DigitalCommons@Pace

Pace Law Faculty Publications | School of Law

1-1-1992

# Footprints in the Shifting Sands of the Isle of Palms: A Practical Analysis of Regulatory Takings Cases

John R. Nolon
*Elisabeth Haub School of Law at Pace University*

Follow this and additional works at: https://digitalcommons.pace.edu/lawfaculty

 Part of the Constitutional Law Commons, Environmental Law Commons, and the Property Law and Real Estate Commons

## Recommended Citation

John R. Nolon, Footprints in the Shifting Sands of the Isle of Palms: A Practical Analysis of Regulatory Takings Cases, 8 J. Land Use & Envtl. L. 1 (1992), http://digitalcommons.pace.edu/lawfaculty/199/.

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Law Faculty Publications by an authorized administrator of DigitalCommons@Pace. For more information, please contact dheller2@law.pace.edu.

JOURNAL OF LAND USE AND ENVIRONMENTAL LAW

VOLUME 8 FALL 1992 NUMBER 1

# FOOTPRINTS IN THE SHIFTING SANDS OF THE ISLE OF PALMS: A PRACTICAL ANALYSIS OF REGULATORY TAKINGS CASES

JOHN R. NOLON*

## I. INTRODUCTION

The U.S. Supreme Court granted certiorari during its 1991 term to review three decisions that riveted the attention of the land use bar.[1] Practitioners hoped that decisions in these cases would yield reliable definitions as to when a public regulation constitutes a taking of private property compensable under the Fifth Amendment of the U.S. Constitution. The stakes were high as evidenced by more than fifty amicus curiae briefs filed in the most closely watched of the three cases: *Lucas v. South Carolina Coastal Council*.[2] Groups as diverse as the National Cattlemen's Association, the Property Rights Preservation Association, and the Pacific Legal Foundation urged the Court to decide for the property owner.[3] Entities ranging from the Municipal

* B.A. University of Nebraska 1963; J.D. University of Michigan 1966. Mr. Nolon is the Charles A. Frueauff Research Professor at Pace Law School in White Plains, New York, where he teaches and writes in the areas of land use, property, environmental regulation, and real estate transactions and finance. He has co-authored with Duo Dickinson *Common Walls/Private Homes: Multiresidential Design* (1990), served on BNA's editorial board for the *Housing and Development Reporter*, and advises in rural and urban developments in Latin America.

1. *See* Lucas v. South Carolina Coastal Council, 112 S. Ct. 436 (1991) (granting certiorari), *and rev'd*, 112 S. Ct. 2886 (1992); PFZ Properties, Inc. v. Rodriguez, 112 S. Ct. 414 (1991) (granting certiorari), *and cert. dismissed*, 112 S. Ct. 1151 (1992); Yee v. City of Escondido, 112 S. Ct. 294 (1991) (granting certiorari), *and aff'd*, 112 S. Ct. 1522 (1992).

2. 112 S. Ct. 2886 (1992).

3. *See* Motion for Leave to File Brief Amici Curiae & Brief Amici Curiae of Mountain States Legal Found. & the Nat'l Cattlemen's Ass'n in Support of Petitioner at 6, Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992) (No. 91-453); Brief Amicus Curiae of Pacific Legal Found. in Support of Petitioner David H. Lucas at 4-6, *id.*; Washington Legal Found., Allied Educational Found., Property Rights Preservation, Inc., & Fairness to Land Owners Committee as Amici Curiae in Support of Petitioner at 6-7, *id.*



HeinOnline 8 J. Land Use & Envtl. L. 1 19921993

Art Society of New York, the Sierra Club, and the American Planning Association argued in favor of the State of South Carolina.[4]

The first case disposed of was *PFZ Properties v. Rodriguez*.[5] It presented a familiar set of facts: the developer was unable to obtain a construction permit for a proposed development after a long and torturous review process involving many delays. In March of 1992, the Court simply ruled that certiorari was granted improvidently,[6] slaking none of the thirst for definitive guidelines caused by a drought of clearly reasoned opinions in recent years.

The summary treatment of *PFZ Properties* heightened interest in *Yee v. City of Escondido*,[7] in which a property owner complained that a California mobile home rent control scheme constituted a regulatory taking. In a decision by Justice O'Connor rendered in April, 1992, the Court confined its opinion to the narrow question of whether the regulation authorized a "physical occupation" of the plaintiff's property.[8] The Court found no such invasion and upheld the state court's decision in favor of the rent control ordinance. The decision did not address broader regulatory takings issues because the Yees did not include such claims in their appeal.[9]

It was not until the last day of the term, June 29, 1992, that the Court decided *Lucas*. By that time, interest could not have been greater. At issue was the validity of a regulation that prohibited all permanent development of the plaintiff's two beachfront lots. The South Carolina Supreme Court upheld the regulation by a 3-2 margin because it prevented a "great public harm."[10] The U.S. Supreme Court reversed that determination and remanded the case to determine whether South Carolina's common law of nuisance could prohibit the construction of single-family housing on the lots.[11] The fractured

---

4. *See generally* Brief of the Municipal Art Society of New York, Inc., Amicus Curiae, in Support of Affirmance, *id.*; Brief Amici Curiae of Sierra Club, the Humane Society of the United States, and the American Institute of Biological Sciences in Support of Respondent, *id.*; Brief for American Planning Association and Tahoe Regional Planning Agency as Amici Curiae in Support of Respondent, *id.*

5. PFZ Properties, Inc. v. Rodriguez, 928 F.2d 28 (1st Cir.), *cert. granted*, 112 S. Ct. 414 (1991), *cert. dismissed*, 112 S. Ct. 1151 (1992). PFZ Properties claimed that the reviewing agency's delay and ultimate denial of their project approval constituted a violation of its equal protection and procedural and substantive due process rights. *Id.* at 30. Its action was not based on the Takings Clause of the Fifth Amendment. *Id.* at 30 n.2.

6. PFZ Properties, Inc. v. Rodriguez, 112 S. Ct. 1151 (1992) (dismissing certiorari).

7. 112 S. Ct. 1522 (1992), *aff'g* 274 Cal. Rptr. 551 (Ct. App. 1990).

8. *Id.* at 1528.

9. *Id.* at 1532-34.

10. *See* Lucas v. South Carolina Coastal Council, 404 S.E.2d 895, 898 (S.C. 1991), *rev'd*, 112 S. Ct. 2886 (1992).

11. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2901-02 (1992).

HeinOnline 8 J. Land Use & Envtl. L. 2 19921993

Court delivered an opinion in which five justices formed a majority,[12] one concurred,[13] another submitted a separate "statement,"[14] and two vigorously dissented.[15] A close examination of the divided opinion reveals a faint trail to follow in exploring regulatory takings jurisprudence; the decision left shallow footprints in the shifting coastal sands of South Carolina where the contested regulation prevented the development of the plaintiff's land.

### *A. The Takings Enigma*

The federal Constitution uses a semicolon to separate its Due Process and Takings Clauses: "nor shall any person be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation."[16] Both provisions protect property rights. The first guards against deprivations of property without due process. The second prohibits the taking of property by the sovereign for other than a public purpose and only if just compensation is paid.

Historically, the validity of land use regulations protecting the public health, safety, morals, or general welfare is reviewed under the separate Due Process Clause. Courts uphold such regulations if the regulatory objective is legitimate and properly promoted by the regulation. If the regulation violates due process requirements, courts will enjoin its enforcement, thereby relieving the property owner of its effect. Moreover, the owner may bring an action for consequential damages.[17]

The Fifth Amendment Takings Clause allows the government to single out individual properties or property interests and to appropriate them for a valid public purpose. The clause requires only that the owner receive just compensation: the full value of the interest appropriated. In general, the Takings Clause requires the courts to be vigilant that government actions and enterprises do not acquire such interests, directly or indirectly, without payment of just compensation.

---

12. *Id.* at 2887 (Scalia, J., writing for Court, joined by Rehnquist, C.J., and White, O'Connor, and Thomas, J.J.).

13. *Id.* at 2902 (Kennedy, J., concurring).

14. *Id.* at 2925 (statement of Souter, J.).

15. *Id.* at 2904 (Blackmun, J., dissenting), 2917 (Stevens, J., dissenting).

16. U.S. CONST. amend. V. These standards are equally applicable to the regulations of federal, state, and local agencies. *See* U.S. CONST. amend. XIV; Chicago, Burlington & Quincy R.R. v. City of Chicago, 166 U.S. 226, 241 (1897) (applying the Just Compensation Clause of the Fifth Amendment through the Fourteenth Amendment to the states and their instrumentalities).

17. *See* 42 U.S.C. § 1983 (1988) ("Every person who, under color of any statute . . . subjects . . . any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured.").

HeinOnline 8 J. Land Use & Envtl. L. 3 19921993

It is axiomatic that a land use regulation may not "take" property if it does not further a public purpose. A reviewing court may invalidate a regulation that does not advance a proper interest because it is repugnant to due process principles. To award just compensation for property interests taken by such a regulation would allow what the Fifth Amendment prohibits: the taking of property for other than a public purpose. So, the notion that a regulation may be a Fifth Amendment taking—a regulatory taking—is enigmatic.[18]

### *B. Uncertainty in the Case Law*

Seeds of confusion in distinguishing a proper regulation from a taking were first sown in 1922, when Justice Holmes stated "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[19] For a half century thereafter, the Court entertained no occasion to explain how one determines when a regulation goes too far. Beginning in 1978[20] and culminating in a 1987 trilogy of cases,[21] the Court struggled with this issue, piercing little of its enigmatic nature.[22] Indeed, some opinions created additional confusion by indicating that just compensation may be awarded when a regulation eliminates all land value, if only temporarily.[23] Some commentators suggested that the Court applied heightened scrutiny to certain types of regulatory takings cases, an uncharacteristic attitude.[24]

The cases decided by the 1991 term of the U.S. Supreme Court did little to eliminate the disarray of judicial tests for regulatory takings.[25]

---

18. *See* Jerold S. Kayden, *Judges As Planners: Limited or General Partners? in* ZONING AND THE AMERICAN DREAM: PROMISES STILL TO KEEP 235-37 (Charles M. Haar & Jerold S. Kayden eds., 1989). The issue of how enigmatic is the concept of a "regulatory taking," in practice, provides an interesting topic for additional research. As future cases are decided, it will be interesting to inquire whether just compensation awards are limited primarily to those instances where all, or nearly all, value of the land has been denied its owner. If so, the enigma will prove to be mostly theoretical.

19. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

20. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978).

21. Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987).

22. *See Nollan*, 483 U.S. at 866 (Stevens, J., dissenting) ("Even the wisest lawyers would have to acknowledge great uncertainty about the scope of this Court's takings jurisprudence.").

23. *First English*, 482 U.S. at 317-18; *cf.* First English Evangelical Lutheran Church v. County of Los Angeles, 258 Cal. Rptr. 893, 904-05 (Ct. App. 1989) (holding on remand that the regulation did not constitute a taking because it substantially advanced the state's interest in public safety).

24. *See, e.g.*, Craig A. Peterson, *Land Use Regulatory "Takings" Revisited: The New Supreme Court Approaches*, 39 HASTINGS L.J. 335, 352 (1988) (characterizing *Nollan* as applying "stricter judicial scrutiny in land use regulatory takings cases").

25. *See* Ruddick C. Lawrence, *Bright Lines in the Big City:* Seawall, *Tenant Succession*

HeinOnline 8 J. Land Use & Envtl. L. 4 19921993

The language of the cases appeared hopelessly mired in an unnatural mix of traditional due process rules and the unique takings considerations of the Just Compensation Clause. Judges and scholars have searched valiantly for unifying principles, formal guidelines, definitive allocations of burdens of proof, fixed standards of judicial deference, precise factors for balancing private and public interests, distinctions between regulations that prevent harm and those that promote public benefits, clear exceptions to the fixed rules being sought, and a hierarchy of interests to use in a balancing process that is yet undefined.[26]

Despite the energy devoted to these efforts, the collected decisions of our federal and state courts provide few fixed rules to guide the practitioner, judge, law professor, property owner, or regulator. These matters are litigated so vigorously today that the forces arrayed against land use regulations have been classified as a movement.[27]

### C. *Purpose of Article*

This article endeavors to provide a practical perspective on, and to derive some practical lessons from, the judicial decisions in the regulatory takings field. Part II examines and evaluates the *Lucas* case and its categorical test for reviewing regulations that constitute "total takings:" where no productive use of land is left by the regulation. The discussion contrasts *Lucas* to the standardless inquiry prescribed for the vast majority of cases where the regulation leaves the owner some value. Part III describes the operating technique of federal and state judges in deciding regulatory takings cases and concludes that the results in cases can be understood, if not predicted, through an analysis of the factual context of each case.

---

*Rights, and the Jurisprudence of Takings*, 91 COLUM. L. REV. 609, 609 (1991) ("The jurisprudence of takings has been variously described as 'untidy and confused,' 'somewhat illogical,' 'a muddle,' 'a crazy-quilt pattern,' 'open-ended and standardless,' 'chaotic,' 'mystifying,' and 'incoherent.'").

26. *See, e.g.*, Lynn Ackerman, *Searching for a Standard for Regulatory Takings Based on Investment-Backed Expectations: A Survey of State Court Decisions in the Vested Rights and Zoning Estoppel Areas*, 36 EMORY L.J. 1219 (1987); Jerry L. Anderson, *Takings and Expectations: Toward A "Broader Vision" of Property Rights*, 37 KAN. L. REV. 529 (1989); Raymond R. Coletta, *Reciprocity of Advantage and Regulatory Takings: Toward a New Theory of Takings Jurisprudence*, 40 AM. U. L. REV. 297 (1990); John J. Costonis, *Presumptive and Per Se Takings: A Decisional Model for the Taking Issue*, 58 N.Y.U. L. REV. 465 (1983); Douglas W. Kmiec, *The Original Understanding of the Taking Clause is Neither Weak Nor Obtuse*, 88 COLUM. L. REV. 1630 (1988); Susan J. Krueger, Keystone Bituminous Coal Ass'n v. DeBenedictis: *Toward Redefining Takings Law*, 64 N.Y.U. L. REV. 877 (1989); Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part II—Takings As Intentional Deprivations of Property Without Moral Justification*, 78 CAL. L. REV. 53 (1990).

27. Kirstin Downey, *A Conservative Supreme Court Addresses Property Rights*, WASH. POST, Feb. 16, 1992, at H1 (referring to "an increasingly militant property-rights movement").

HeinOnline 8 J. Land Use & Envtl. L. 5 19921993

Part IV argues that all regulatory taking controversies fit into one of four factual contexts. It discusses cases in each of these four categories and explains how and why courts tend to reach understandable results using predictable operating techniques in each category. Part V derives guidelines from these insights to help regulators draft regulations that will withstand judicial scrutiny and identify those that will not. The conclusion argues that most regulations will not be invalidated, but that regulators should infuse maximum fairness into their regulatory regimes for a variety of persuasive reasons.

## II. THE LEGAL BACKGROUND: *LUCAS V. SOUTH CAROLINA COASTAL COUNCIL*

The Supreme Court in *Lucas v. South Carolina Coastal Council*[28] applied a categorical test for reviewing "total takings." A discussion of the opinion provides an opportunity to examine the larger issue of judicial deference to the judgments of regulators and to pinpoint where a more exacting standard of review is used by the Court. The *Lucas* opinion should be of limited importance, if confined to similar fact patterns. It raises, however, a host of unresolved issues that merit a thorough examination of its facts and holding.

### *A. The* Lucas *Controversy*

David Lucas purchased two beachfront lots in 1986 for $975,000.[29] In 1988, the State of South Carolina passed the Beachfront Management Act[30] which, by virtue of a setback provision, prohibited the development of all permanent habitable structures on Lucas' property.[31] Lucas claimed that he had purchased the lots to build single-family housing, in accordance with applicable zoning, and that he had engaged an architect to draw plans for two houses: one for sale, the other for the use of his family.[32]

At first blush, this appeared to be a classic case of an unsuspecting purchaser having his entire investment destroyed by a subsequent regulation. Since 1979, however, Lucas had been a contractor and realtor in the development of the barrier island known as the Isle of Palms. He purchased two lots there with apparent knowledge of the fragile and changing state of affairs on the barrier island. Studies existed

28. 112 S. Ct. 2886 (1992).
29. *Id.* at 2889.
30. *See* S.C. CODE ANN. §§ 48-39-250 to -360 (Law. Co-op. Supp. 1991).
31. *Lucas*, 112 S. Ct. at 2889-90.
32. *Id.* at 2889.

HeinOnline 8 J. Land Use & Envtl. L. 6 19921993

showing vast fluctuations of the shoreline and considerable erosion of the area in the vicinity of the plaintiff's property. During half the time since 1949, all or part of the property was part of the beach or flooded daily by tide waters.[33] Lucas offered studies claiming that, over a 1500 year period, the Isle of Palms was accreting, moving seaward, except for a few episodes of erosion.[34]

The State of South Carolina argued 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.[35] As borne out by Hurricane Hugo, extreme winds break up structures on barrier island beaches and carry them like projectiles onto adjacent areas.[36] Severe storms can break septic tanks and sewer lines, leading to contamination of coastal waters. The cost to the public for cleanup and relief is considerable.[37]

The trial court found that the restrictions constituted a regulatory taking and awarded Lucas $1,232,387.50 as just compensation.[38] The South Carolina Supreme Court reversed this determination.[39] Lucas conceded at trial that the Beachfront Management Act was a proper and valid effort to preserve South Carolina's beaches, an extremely valuable resource. His position was simply that since the regulation denied him all economically viable use of his property, the state must compensate him. This, he claimed, was so even if the regulation prevented serious public harm.[40]

### *1. The Deferential Role of Reviewing Courts*

The South Carolina Supreme Court paid great deference to the determinations of the state legislature, noting that it was bound by the "uncontested legislative findings."[41] The court accepted the legislative determination that the prevention of new construction near the beach was necessary to prevent a "great public harm."[42] The acquiescence of

---

33. Record at 84, Lucas v. South Carolina Coastal Council, 404 S.E.2d 895 (S.C. 1991) (No. 23,342), *rev'd*, 112 S. Ct. 2886 (1992).

34. *Id.* at 26.

35. *Id.* at 77-87.

36. Natasha Zalkin, *Shifting Sands and Shifting Doctrines: The Supreme Court's [Changing] Takings Doctrine Through [sic] and South Carolina's Coastal Zone Statute*, 79 CAL. L. REV. 205, 207, 212-16 (1991).

37. *Id.*

38. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2890 (1992).

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

40. *Id.* at 898.

41. *Id.*

42. *Id.*

HeinOnline 8 J. Land Use & Envtl. L. 7 19921993

the South Carolina court is consistent with the historic role of the courts in the land use area.

Since the seminal case of *Village of Euclid v. Ambler Realty Co.*,[43] in which the U.S. Supreme Court first upheld zoning, the judiciary has been highly deferential to legislative determinations of the need to regulate land use in the public interest. The Court struck its deferential posture in *Euclid* with this sentence: "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control."[44]

Where the prevention of great public harm has been the aim of regulations in the past, the U.S. Supreme Court similarly has deferred to legislative judgments. As recently as 1987, in *Keystone Bituminous Coal Ass'n v. DeBenedictis*,[45] the Court wrote: "[T]he Commonwealth of Pennsylvania has acted to arrest what it perceives to be a significant threat to the common welfare."[46] On the strength of findings contained in the Pennsylvania act itself, the Court upheld a regulation that prevented the plaintiffs from mining a part of their subsurface estate, rejecting their claim that this deprivation of property amounted to a regulatory taking.[47] The South Carolina Supreme Court majority cited *Keystone* for the proposition that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community."[48] The state court stood in the mainstream of regulatory takings jurisprudence by deferring to a legislative determination of what uses of property are injurious.

### 2. *More Demanding Judicial Review In Rare Cases*

No U.S. Supreme Court decision has upheld a land use regulation that left the property owner with no productive use of the affected property. In theory, such a ruling is possible. If all productive uses of a property are sufficiently injurious to the community, the right of productive use arguably is not among the rights held by the property

---

43. 272 U.S. 365 (1926).

44. *Id.* at 388; *see also* Gorieb v. Fox, 274 U.S. 603, 608 (1927) ("City councils . . . are better qualified than the courts" to make these determinations); Zahn v. Board of Pub. Works, 274 U.S. 325 (1927) ("[I]t is impossible for us to say that [this zoning decision] was clearly arbitrary and unreasonable."); Nectow v. City of Cambridge, 277 U.S. 183 (1928) (holding that challenger overcame presumption of validity by proving affirmatively that the regulation bore no relation to advancing a public interest).

45. 480 U.S. 470 (1987).

46. *Id.* at 485.

47. *Id.* at 501-02.

48. Lucas v. South Carolina Coastal Council, 404 S.E.2d 895, 901 (S.C. 1991) (citing Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 491-92 (1987)), *rev'd*, 112 S. Ct. 2886 (1992). The phrase seems to have originated in Mugler v. Kansas, 123 U.S. 623, 665 (1887).

HeinOnline 8 J. Land Use & Envtl. L. 8 19921993

owner. In practice, however, most regulations leave some beneficial use and such a case seldom arises to test the theory. *Lucas* is the rare exception.

In *Lucas*, the trial court found that the plaintiff was denied all economic use of his land.[49] Resting on that conclusion, Justice Scalia, writing for the majority, noted that where all economic use is taken, the public interest advanced by the legislature in support of the regulation cannot, in itself, justify the regulation.[50] In other words, deference to the legislative finding does not conclude the inquiry. In these cases, where the plaintiff proves that there is no economic use of the property, Scalia held that "no matter how weighty the public purpose behind [the regulation], we have required compensation."[51]

In his dissent, Justice Blackmun argued that the majority's approach "alters the long-settled rules of [judicial] review" and places the "burden of showing the regulation is not a taking" on the state.[52] Scalia conceded that the Court never stated the justification for the rule he followed in *Lucas*.[53] He explained his approach in the following manner:

> 1. In the "extraordinary circumstance when *no* productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the legislature is simply 'adjusting the benefits and burdens of economic life.'"[54] Implicitly, the burden on the individual owner in such a case is simply too great, consequently violating historical standards of fairness.
>
> 2. In such cases, there is a "heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm."[55] Eminent domain law allows the acquisition of private lands of the type owned by Lucas for a variety of public purposes. Scalia seemed to "sense" that the regulation accomplished a public enterprise

---

49. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2908 (1992) (Blackmun, J., dissenting) ("The Court creates its new taking jurisprudence based on the trial court's finding that the property had lost all economic value. This finding is almost certainly erroneous.").

50. *See id.* at 2898 n.12. Scalia's conclusion echoes Chief Justice Rehnquist's dissent in *Keystone*: "[O]ur cases have never applied the nuisance exception to allow complete extinction of the value of a parcel of property." Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 513 (1987) (Rehnquist, C.J., dissenting).

51. *Lucas*, 112 S. Ct. at 2893.

52. *Id.* at 2909.

53. *Id.* at 2894.

54. *Id.* (quoting Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978)).

55. *Id.* at 2895.

HeinOnline 8 J. Land Use & Envtl. L. 9 19921993

outside the strictures of the eminent domain law, thus requiring compensation. One assumes this sense is stimulated only in those cases where the property owner is left with nothing.

3. The majority saw only one instance in which a regulation that takes "all economically beneficial use of land" could be upheld: where the limitation placed on the property by the regulation inheres in the title itself.[56] If, under the nuisance law of the state, the use restriction could be imposed by adjacent landowners as a private nuisance or by the state under its power to abate public nuisances, then the regulation will stand. Scalia borrowed from the *Restatement (Second) of Torts*[57] to illustrate the factors figuring into such an analysis. They include: the degree of harm involved in the unregulated use of the affected property, the alternative means available to avoid that harm, the social value of that use, and the suitability of that use in the locality. In Scalia's opinion, "[i]t seems unlikely that [such] common-law principles would have prevented the erection of any habitable or productive improvements" on Lucas' land.[58]

---

56. *Id.* at 2899.

57. RESTATEMENT (SECOND) OF TORTS §§ 826-827 (1979).

58. *Lucas*, 112 S. Ct. at 2901. It is interesting that, in the absence of federally subsidized flood insurance or a state requirement that insurance companies doing business in South Carolina participate in shared-risk insurance pools, very little development could occur on beachfront lots in high-erosion and high-risk areas. Private construction loans and permanent mortgages for development will not be issued by lenders in the Isle of Palms market area unless evidence of property insurance is provided as part of an application for such financing. John R. Nolon, Survey of Lending & Insurance Practices on the Isle of Palms (Sept. 11, 1992) (unpublished manuscript, on file with the *Journal of Land Use & Environmental Law*). Conventional property insurance coverage is not provided by private insurance companies for development on the Isle of Palms within 1000 feet of the beachfront. *Id.* This includes the setback area established by the Beachfront Management Act: the property restriction contested in *Lucas*. A proposal to eliminate federal flood insurance for new construction in high erosion areas passed the House of Representatives in May, 1991, by a vote of 388 to 16, with the unanimous approval of South Carolina's representatives. *See* 137 CONG. REC. H2633, H2653 (daily ed. May 1, 1991) (passing H.R. 1236, 102d Cong., 1st Sess. (1991)). A similar proposal is pending before the Senate. *See* S. 1650, 102d Cong., 1st Sess. (1991). Presumably, the state legislature could act to limit its insurance pooling requirements, *see* S.C. CODE ANN. § 38-35-370 (Law. Co-op. 1985), leaving beachfront developers in high-risk areas no method of obtaining casualty insurance, and therefore no ability to qualify for construction or mortgage financing.

These facts raise an interesting question of whether the limitations on development imposed by the challenged regulation in *Lucas* "inhere in the title [of the property] itself," *Lucas*, 112 S. Ct. at 2900, due to local industry practices, shaped by prevailing legal considerations in the unregulated private market. A corollary question is whether the elimination of these government-sponsored insurance programs would constitute a "newly legislated" limitation on development of the type Scalia says legislatures may not pass without compensation, if their effect is to deny all productive use of land. *Id.* Simply stating these queries raises obvious questions about the wisdom of judicial usurpation of legislative prerogatives in these complex and interrelated areas of society.

HeinOnline 8 J. Land Use & Envtl. L. 10 19921993

### B. *Summary of the Holding in* Lucas

The Court created an exception to the general rule[59] of takings law that requires deference to legislative determinations. That exception applies when all economically beneficial use of the land is prohibited. In such a case, courts owe little deference to legislative determinations. The only limitation to this exception occurs when, under common law principles, the use denied by the regulation can be abated as a nuisance. *Lucas* swings the balance heavily from the legislative chamber to the bench in total takings cases. By reversing the historical standard of deference and defining nuisances through reference to case law, the Court left the legislature little, if any, ability to regulate in its discretion where the regulation denies all use.[60]

---

59. Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926); *see also supra* notes 41-48 and accompanying text; United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938) ("[T]he existence of facts supporting the legislative judgment is to be presumed.").

60. *Lucas*, 112 S. Ct. at 2914 (Blackmun, J., dissenting). Troubled by "the Court's reliance on common-law principles of nuisance in its quest for a value-free taking jurisprudence," *id.*, Blackmun states: "In determining what is a nuisance at common law, state courts make exactly the decision that the Court finds so troubling when made by the South Carolina General Assembly today: they determine whether the use is harmful." *Id.*

There is considerable irony in this reliance on the common law of nuisance in *Lucas*. In 1970, New York's highest court held that litigation under nuisance doctrines was not competent to resolve the broad geographical impacts of air pollution and similar matters. It wrote:

> 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 River valley.

Boomer v. Atlantic Cement Co., 257 N.E.2d 870, 871 (N.Y. 1970). The irony arises in comparing this 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 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.

*Lucas*, 112 S. Ct. at 2900 (emphasis added).

Scalia defines nuisance exclusively by reference to the case law. Under *Boomer*, the highest New York court declared its incompetence, in the context of a private case, 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.

HeinOnline 8 J. Land Use & Envtl. L. 11 19921993

### 1. *Application of the* Lucas *Holding*

Justice Blackmun began his dissent by saying "[t]oday the Court launches a missile to kill a mouse."[61] Blackmun's metaphor addressed a portion of the opinion where the majority conceded that cases where the state prohibits all economic use of real estate will arise "relatively rarely" or only in "extraordinary circumstances."[62] Noting this, Blackmun "question[ed] the Court's wisdom in issuing sweeping new rules to decide such a narrow case."[63] Blackmun feared that "the Court's new policies will spread beyond the narrow confines of the present case."[64]

This fear is well founded.[65] When in *Nollan*, for example, Justice Scalia used new language to define the extent to which the means chosen to accomplish a public purpose must actually further that purpose, speculation flourished as to whether this implied a stricter standard of judicial review and whether such a standard adheres to the narrow facts of the case, or whether it generally should be applied to regulatory takings cases.[66] Since then, federal and state appellate cases have answered these questions in a variety of ways.[67] For example, in *Seawall Associates v. City of New York*,[68] New York's highest court invented three separate types of per se takings categories based on Scalia's new language.[69]

The U.S. Supreme Court has not identified discrete classes of regulatory takings cases in which clear rules of judicial review apply. As a result, tests and standards developed in one context can bleed through to other types of cases. Does *Lucas*, for example, reverse *Miller v. Schoene*,[70] where the Court sustained a regulation ordering the complete destruction of plaintiff's cedar trees to prevent the spread of infestation to valuable apple trees on neighboring properties? In *Miller*, the Court did not "weigh with nicety the question whether the infected cedars constitute a nuisance according to the common law; or whether

---

61. *Lucas*, 112 S. Ct. at 2904.

62. *See id.* at 2894, 2904.

63. *Id.* at 2904.

64. *Id.* The day after *Lucas* was decided, for example, five Massachusetts lawmakers filed a bill to repeal the State's Watershed Protection Act, citing *Lucas* as the reason. *Repeal Sought for Watershed Act*, BOSTON GLOBE, July 1, 1992, at 50.

65. *See infra* notes 173-80.

66. Nollan v. California Coastal Comm'n, 483 U.S. 825, 825 n.3 (1987); *see* Peterson, *supra* note 24.

67. *See generally* Jerold S. Kayden, *Land Use Regulations, Rationality, and Judicial Review: The RSVP in the* Nollan *Invitation (Part I)*, 23 URB. LAW. 301 (1991).

68. 542 N.E.2d 1059 (N.Y. 1989).

69. *See* discussion *infra* part IV.B.2.

70. 276 U.S. 272, 281 (1928).

they may be so declared by statute."[71] The *Miller* facts raise the specter of an imminent public peril, while *Lucas* involves an evolution of public understanding about the dangers of development on a barrier island.[72]

Further, it is by no means clear what Scalia meant when he referred to the denial of "all economically beneficial or productive use of land."[73] In fact, throughout the opinion he used other phraseology including "economically viable use of . . . land,"[74] "total deprivation of beneficial use,"[75] "no productive or economically beneficial use,"[76] and "without economically beneficial or productive options for . . . use."[77] What these various phrases mean depends as well on the property interest to which they are applied. Lucas lost the highest and best use of the property, but not his right of possession, right to exclude, right to alienate, or his right to enjoy his property in its undeveloped state. Do these rights have value? Are they part of the equation used to determine whether all "beneficial use" is taken?

Finally, Scalia's additional language regarding the property interest involved in the takings analysis is bound to result in additional confusion. He commented that "uncertainty regarding the composition of the denominator in our 'deprivation' fraction has produced inconsistent pronouncements by the Court."[78] In fact, there has been very little disagreement in the cases, since almost all of them have held that it is the diminution in the market value of the total estate that is reviewed to measure the burden on the private owner.

Scalia's comment will likely spur litigation in those highly unusual circumstances where state laws first create a discrete and unusual property estate, and then affect that estate through regulation. Affected owners may advance the argument that the value of that discrete estate

---

71. *Id.* at 280.

72. *See* Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2921 (1992) (Stevens, J., dissenting). Stevens noted that, at one time, the Court had endorsed this view:

> [T]he supervision of the public health and the public morals is a governmental power, "continuing in its nature," and "to be dealt with as the special exigencies of the moment may require;" . . . "for this purpose, the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself."

*Id.* (quoting Mugler v. Kansas, 123 U.S. 623, 669 (1887)).

73. *Id.* at 2893; *cf. id.* at 2908 (Blackmun, J., dissenting) ("The trial court appeared to believe that the [Lucas] property could be considered 'valueless' if it was not available for its most profitable use.").

74. *Id.* at 2983 n.6 (quoting Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 495 (1987)), 2984 (quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)).

75. *Id.* at 2894.

76. *Id.*

77. *Id.* at 2894-95.

78. *Id.* at 2894 n.7.

HeinOnline 8 J. Land Use & Envtl. L. 13 19921993

is the denominator used in measuring the degree of diminution effected by the regulation.[79] Similarly, where state law affects a possessory estate, such as an easement to traverse, courts assess the impact on that estate itself.[80] Although this "uncertainty" has arisen in narrow circumstances, landowners are being counselled generally to learn "[h]ow to fractionalize current property holdings to discourage regulation" and how to "define 'the parcel' or property unit to demonstrate deprivation of all economically-feasible use."[81]

Presumably, the *Lucas* Court meant to limit its holding to the facts of the case, which are narrow indeed. But Scalia's words can only encourage developers to challenge regulations that diminish the value of their lands. At the very least, the pace of litigation in this already litigious field will quicken as a result of the Supreme Court's decision. Moreover, the nondeferential test of *Lucas* may be nourished by the general confusion in this area and grow without great regard for the presumed intent of the Court that articulated it. In that respect, Blackmun's fears may be prophetic.

### 2. *Analysis of the* Lucas *Holding*

Despite these concerns, not much should happen as a result of *Lucas*.[82] The holding is properly confined to the facts of the case,

---

79. *Compare* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) *with* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497-502 (1987).

80. *See* Nollan v. California Coastal Comm'n, 483 U.S. 825, 831-37 (1987).

81. NATIONAL REAL ESTATE DEVELOPMENT CENTER, HOW TO SUCCESSFULLY RESOLVE LAND USE & REAL ESTATE ISSUES IN THE WAKE OF *Lucas* 2 (1992) (advertising "tactical workshop" on overcoming regulations) (on file with the *Journal of Land Use & Environmental Law*). The proposition is dubious that a regulatory taking will be found where an owner purchases property and intentionally subdivides it, segments its title, or otherwise manipulates it so that a portion of property is unusable under applicable land regulations. If the facts are known to a court, would it decide that the owner is "unduly singled out" by the regulation or that "essential fairness" is denied? That courts will seek such facts and question so-called "fractionalization" or "segmentation" of property is apparent in the tests adopted by the Eleventh Circuit to determine whether a regulation has taken all or substantially all value. These factors include "the history of development—what was built on the property and by whom? How was it subdivided and to whom was it sold? What plats were filed?"; and "what is the present nature and extent of the property?" Reahard v. Lee County, 968 F.2d 1131, 1136 (11th Cir. 1992).

82. *But see* Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2921-22 (1992) (Stevens, J., dissenting). In the area of statutory nuisance prevention, Stevens sees a considerable problem:

> Under the Court's opinion today, however, if a state should decide to prohibit the manufacture of asbestos, cigarettes, or concealable firearms, for example, it must be prepared to pay for the adverse economic consequences of its decision. One must wonder if Government will be able to "go on" effectively if it must risk compensation "for every such change in the general law."

*Id.* at 2921 (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922)).

HeinOnline 8 J. Land Use & Envtl. L. 14 19921993

which the Court itself characterized as "relatively rare."[83] In fact, there is already precedent for per se takings of this sort in cases like *Loretto v. Teleprompter Manhattan CATV Corp.*,[84] where a publicly imposed physical connection of a television cable was deemed a taking per se even though the space invaded was less than one and one half cubic feet.[85] Although such cases do not fall quite like Scalia's guillotine, the basic holding in *Lucas* does not represent a dramatic departure, if confined to similar facts.

Unfortunately, at the end of the term, the troubled field of regulatory takings remained unsettled by *PFZ Properties*, *Yee*, and *Lucas*. Scalia did provide in *Lucas* an interesting review of the takings field. He affirmed that regulations do not owe their validity to any claim that they prevent or eliminate noxious or harmful uses.[86] He set to rest the much-debated harm/benefit analysis as an unhelpful means of separating regulatory takings from "regulatory deprivations that do not require compensation."[87] Instead, Scalia tells us, regulations are valid simply because they are "reasonably related to the implementation of a policy—not unlike historic preservation—expected to produce a widespread public benefit and applicable to all similarly situated property."[88] A "land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests.'"[89]

Scalia's review of takings jurisprudence may tend to blunt challenges to the legitimacy of certain regulatory programs, such as historic preservation or viewshed protection. With that clarifying exception, *Lucas* does not settle this area of the law. One can expect more cases like *Seawall* that seek to expand on the per se takings category of cases.[90] Future areas of litigation include: the continuing debate over the meaning of Scalia's "essential nexus" test in *Nollan*; persistent confusion as to what constitutes the "property interest" affected by a regulation; attempts by land owners to stretch the meaning of "no productive or economically beneficial use" beyond the confines of the *Lucas* facts; experiments with property segmentation and property interest sever-

83. *Id.* at 2894.

84. 458 U.S. 419 (1982).

85. *Id.* at 421.

86. *Lucas*, 112 S. Ct. at 2897; *see also* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 134 (1978) (stating that valid exercises of the police power do not depend on "any supposed 'noxious' quality of the prohibited uses, but rather on the ground that the restrictions were reasonably related to the implementation of a policy . . . expected to produce a widespread public benefit").

87. *Lucas*, 112 S. Ct. at 2899.

88. *Id.* at 2897.

89. *Id.* (quoting Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 (1987)).

90. *See* Seawall Assocs. v. City of New York, 542 N.E.2d 1059, 1068 (N.Y. 1989).

HeinOnline 8 J. Land Use & Envtl. L. 15 19921993

ance; and exploration of the extent and scope of Scalia's policy of no deference in *Lucas*.

## III. SEARCHING FOR FOOTPRINTS IN AN UNMAPPED AREA OF LAW

The cumulative effect of the much-anticipated cases of the 1991 term, then, is the creation of additional questions for the courts and land use lawyers. The challenge of formulating practical strategies for proceeding through this judicial thicket is great indeed. This challenge is partially met through an examination of the operating techniques of judges facing regulatory taking claims.

### *A. Judges, Case Law and Social Norms*

In 1928, Karl Llewellyn faced a similar challenge when he undertook to explain the American case law system to German students at the Leipzig Faculty of Law. He noted that, in our system:

> Legal uncertainties arise far more when *non*legal norms in a society are in conflict . . . . [Conflicts among interest groups] are *fact situations* that arise because the margins of growth keep shifting in real life, and for that very reason they shift the law's margins of growth too . . . . The *critical* case always involves a fact situation not from the stable core but from the growth zone of life waiting to be regulated.[91]

Six decades removed, these words help to explain the unsettled nature of takings law. We as a society have not resolved the tension between property and environmental rights. Controversies abound and many law suits contest the effects of land use regulations.[92] In this respect, the dispute between Mr. Lucas and the State of South Carolina is a tremor running along a deep fault line in American society. Mr.

---

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

92. *See, e.g.*, Keith Schneider, *Environment Laws Face Stiff Test from Landowners*, N.Y. TIMES, Jan. 20, 1992, at 1 (referring to over 200 cases of this type pending before the U.S. Court of Claims and characterizing the growing resistance to environmental regulation as a "movement"); *see also* The Private Property Rights Act of 1991, S. 50, 102d Cong., 1st Sess. (1991). This proposed legislation is evidence of the rigorous efforts of property rights groups in the legislative arena. If enacted, the measure would require federal agencies to conduct a "Takings Impact Analysis," that is, an assessment of whether proposed regulations might result in a taking of private property, and to avoid such an effect, where possible. Parallel bills have been sponsored in the House as well. *See* Private Property Rights Act of 1991, H.R. 905, 102d Cong., 1st Sess. (1991); Private Property Rights Act of 1991, H.R. 1572, 102d Cong., 1st Sess. (1991); *see also infra* note 286 (listing similar pending state legislation). *See generally* Exec. Order No. 12,630, 53 Fed. Reg. 8859 (1988).

HeinOnline 8 J. Land Use & Envtl. L. 16 19921993

Lucas himself is celebrated by a growing property rights movement. Meanwhile, national environmental and preservation interests staunchly defended the regulation of Lucas' land before the U.S. Supreme Court.[93]

How far property rights can be regulated to protect the public interest is unsettled and so, Llewellyn explains, must be the law. In these growth areas of society and its law, Llewellyn urges us to anticipate sensible outcomes in cases and to trust that the rules of the cases will mesh well with the inherent reasons expressed in the opinions of courts deciding such controversies.[94] Outcomes in cases are "reasonably reckonable."[95]

### *1. Fact-Guided Decisions*

The key to such right reckoning, according to Llewellyn, is objective inquiry into the facts of the case at bar. The maxim *ex facto jus oritur* reminds us that the law arises out of facts. Llewellyn speaks of "[the] judges' insight into new fact situations and their meaning, being generally referred to as the 'sense of justice' in the individual case."[96] He refers to this intuition as "fact-guided decision making."[97]

Professor Frank Michelman similarly applied this perspective in analyzing the trilogy of 1987 U.S. Supreme Court cases, two of which seemed to break from the historical hands-off approach of the Court regarding such controversies. He explained that the vulnerability of these cases to rule of law analysis is a "sign [of] balancing—or, better, the judicial practice of situated judgment."[98] Llewellyn also explained the phenomenon of situated judgment. He referred to the lawyer's practice of "classifying facts for purposes of description and further

---

93. David Kaplan & Bob Cohn, *Pay Me, or Get Off My Land*, NEWSWEEK, Mar. 9, 1992, at 70. The conflict in social values was described as follows:

> Lucas's appeal is the flash point in a national clash pitting environmentalists and preservationists against a grass-roots coalition of ranchers, miners, loggers and developers. It is a war of both spiritual principles and economic principal [sic] that is being fought before local regulators, federal agencies, Congress and the courts. But what the justices do is paramount: a decision may effectively gut a generation of land regulation, as well as 50 years of judicial acquiescence to it.

*Id.*; *see also* Eugene Linden, *Demanding Payment for Good Behavior*, TIME, Feb. 3, 1992, at 52.

94. KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 36-37 (1960).

95. *See id.* at 17 (defining reckonability as "degrees of lessening uncertainty of outcome ranging from what . . . seems pure chance . . . [to what] is for human living 'safe'").

96. LLEWELLYN, *supra* note 91, at 79.

97. *Id.*

98. Frank Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600, 1629 (1987). *Compare id. with* LLEWELLYN, *supra* note 91, at 60. *But see* REGINALD WALTER MICHAEL DIAS, JURISPRUDENCE 459 (5th ed. 1985) (criticizing this notion as "too vague, being in every case the product of a shifting balance").

use."[99] Llewellyn found such classifying "a tacit precondition for handling any legal dispute."[100] In Llewellyn's view, once attorneys and judges agree on how the facts are classified, the rules of law they select and their views of the outcome of the case become more predictable and understandable.[101]

The discretion enjoyed by courts in making situated judgments brings with it the imperative that they adequately weigh facts and circumstances. If, as Llewellyn tell us, judges tend to classify the facts of a case in seeking the rule of law to apply, there is an implied condition that they fully consider the evidentiary record. A panel for the Eleventh Circuit recently addressed this issue in *Reahard v. Lee County*,[102] when it reversed a magistrate's terse declaration that a regulation worked a taking of private property. The appeals court stated that "the factfinder must analyze, at the very least," questions surrounding the economic impact of the regulation and the owner's investment-backed expectations.[103]

In the field of regulatory takings, the frequent reference by appellate courts to the fact intensive nature of their deliberations sharpens this perspective. Writing recently for a unanimous court, Justice O'Connor noted that "[s]uch forms of regulation are analyzed by engaging in the 'essentially ad hoc, factual inquiries' necessary to determine whether a regulatory taking has occurred."[104] It is the "particular circumstances" in each case that determine the outcome of such deliberations.[105]

---

99. LLEWELLYN, *supra* note 91, at 53 (emphasis omitted).

100. *Id.*

101. *Id.* at 53-54. Llewellyn admits that this process of selecting and classifying facts gives judges some leeway in determining which rules of law to use and, thereby, the outcome of cases at bar. "[E]ach way of construing the facts will contain a degree of violence to either the fact situation or the classifying category." *Id.* He hastens to observe that, despite this leeway, legal certainty is derived from the pressure of the facts, working through the tradition bound, common "sense of justice" of the judges, so that we observe a majority, "despite all their differences over the law, nonetheless reaching the same conclusion from the same fact situation." *Id.*

102. 968 F.2d 1131 (11th Cir. 1992).

103. *Id.* at 1136.

104. Yee v. City of Escondido, 112 S. Ct. 1522, 1529 (1992) (citing Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979)); *see also* Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2893 (1992) (noting that in all of these cases, the Court has "generally eschewed any 'set formula' for determining how far is too far, preferring to 'engag[e] in . . . essentially ad hoc, factual inquiries'") (citing Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978), quoting Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962)); Pennell v. City of San Jose, 485 U.S. 1, 10 (1988); Hodel v. Irving, 481 U.S. 704, 714 (1987); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 495 (1987); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982); San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 650 n.15 (1981); Reahard v. Lee County, 968 F.2d 1131 (11th Cir. 1992); Hendler v. United States, 952 F.2d 1364, 1373 (Fed. Cir. 1991); Azul Pacifico, Inc. v. City of Los Angeles, 948 F.2d 575, 579 (9th Cir. 1991), *withdrawn on other grounds*, Nos. 90-55853, 90-56066, 1992 WL 168953 (9th Cir.

HeinOnline 8 J. Land Use & Envtl. L. 18 19921993

### 2. *No Set Formula*

Despite the Supreme Court's plain statement that there is no "set formula"[106] for identifying a Fifth Amendment taking, the temptation to do so seems irresistible.[107] The U.S. Supreme Court has only gone as far as to indicate that there are several factors that have particular significance. Justice O'Connor briefly summarized these factors in the opening paragraph of her decision in *Yee*:

> Most of our [takings] cases . . . fall within two distinct classes. Where the government authorizes a physical occupation of property . . . , the Takings Clause generally requires compensation. . . . But where the government merely regulates the use of property, compensation is required only if considerations such as the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole. . . . [T]he second [category] necessarily entails complex factual assessments of the purposes and economic effects of government actions.[108]

## *B. Following the Trail of the* Lucas *Facts*

This faint trail in the regulatory case law jungle will be picked up in later sections of this article.[109] An analysis of the debate between the majority and minority judges in the South Carolina Supreme Court

---

July 23, 1992); McDougal v. County of Imperial, 942 F.2d 668, 676 (9th Cir. 1991); Samaad v. City of Dallas, 940 F.2d 925, 938 (5th Cir. 1991); Ciampitti v. United States, 18 Cl. Ct. 548, 557 (1989); Hall v. City of Santa Barbara, 797 F.2d 1493, 1497 (9th Cir. 1986), *amended*, 833 F.2d 1270 (9th Cir. 1987); Whitney Benefits, Inc. v. United States, 752 F.2d 1554, 1558 (Fed. Cir. 1985); MacLeod v. County of Santa Clara, 749 F.2d 541, 549 (9th Cir. 1984), *cert. denied*, 472 U.S. 1009 (1985); Gil v. Inland Wetlands & Watercourses Agency, 593 A.2d 1368, 1370 (Conn. 1991). This case-by-case approach seems to be guided by an understanding that the determination of whether a law effects a taking requires a "weighing of private and public interests," Agins v. City of Tiburon, 447 U.S. 255, 261 (1980), and is ultimately a matter of "fairness and justice." Armstrong v. United States, 364 U.S. 40, 49 (1960).

105. *See* United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958); United States v. Caltex (Philippines), Inc., 344 U.S. 149, 156 (1952).

106. *See, e.g.*, *Penn Central*, 438 U.S. at 124 (stating that "this Court, quite simply, has been unable to develop any set formula for determining when justice and fairness require that economic injuries caused by public action be compensated by the government"); *Kaiser Aetna*, 444 U.S. at 175; *see also* Florida Rock Indus. v. United States, 21 Cl. Ct. 161, 168 (1990) ("There is no fixed formula for determining when a regulation or its application denies an owner economically viable use of its land and thereby results in a taking.").

107. *See supra* note 26.

108. *Yee*, 112 S. Ct. at 1526 (citations omitted); *see also Penn Central*, 438 U.S. at 124-28.

109. *See* discussion *infra* part IV.

decision in *Lucas*[110] illustrates the operating technique used by judges confronted with complex regulatory taking challenges. The approaches taken by each side in that case illustrate how judges decide cases generally and demonstrate both the constraints under which they operate (the basis for expecting predictability in results) and the several leeways available to them (which options breed the much lamented murkiness).[111]

The majority in the South Carolina Supreme Court case spent little time discussing the facts. It analyzed the Beachfront Management Act and concluded that "discouraging new construction in close proximity to the beach/dune area is necessary to prevent a great public harm."[112] The memory of recent hurricane damage highlighted the importance of the legislative objective of providing "a barrier and buffer from high tides, storm surge, hurricanes, and normal erosion."[113] In this way, the court classified the facts of the case: the regulation merely prevents the landowners from using their property to cause public injury.

Next, the majority took several steps within this classification to find and apply the law. It cited the Latin maxim "*sic utere tuo ut alienum non laedas.*"[114] It referred to a recent U.S. Supreme Court opinion by Justice Stevens for the proposition that a regulation that prevents a nuisance-like use of one's property has taken nothing.[115] It cited several South Carolina cases for the proposition that no regulatory taking occurs when the regulation under attack prevents "a use seriously harming the public."[116] Finally, the prevailing justices established their standard for reviewing the regulation in question. They prescribed a highly deferential standard: "This [c]ourt is likewise bound by these uncontested legislative findings."[117]

On its face, the majority opinion is difficult to contest. The facts are straightforward and fit into a neat and understandable category. The

---

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

111. *See* LLEWELLYN, *supra* note 91, at 53-56, 76-78.

112. *Lucas*, 404 S.E.2d at 898.

113. *Id.*

114. *Id.* at 899. The phrase translates as: "Use your own property in such manner as not to injure that of another." *See infra* note 243.

115. Lucas v. South Carolina Coastal Council, 404 S.E.2d 895, 899 (S.C. 1991) (citing Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 491 n.20 (1987) ("[S]ince no individual has a right to use his property so as to create a nuisance or otherwise harm others, the State has not 'taken' anything when it asserts its power to enjoin the nuisance-like activity.")), *rev'd*, 112 S. Ct. 2886 (1992).

116. *Id.* (citing Carter v. South Carolina Coastal Council, 314 S.E.2d 327 (S.C. 1984); Richards v. City of Columbia, 88 S.E.2d 683 (S.C. 1955); Arnold v. City of Spartanburg, 23 S.E.2d 735 (S.C. 1943)).

117. *Lucas*, 404 S.E.2d at 898.

rules of law that apply to this category seem familiar and just. In a context of great potential harm to the public, a highly deferential standard of review rings true.

The dissent followed a similar track, yet arrived at an altogether different destination. It too spent little time on the facts, claiming that the regulation reduced the lot values to zero.[118] It cited a fundamental proposition violated by the regulation: an individual should not "bear a burden which in fairness should be borne by all."[119] When the regulation shifts the burden from the public to a private owner, a court may conclude that the Takings Clause is implicated.

Based on this inherent sense of justice, it seems, the dissent placed the facts in an entirely different category. Justice Harwell stated that, in his opinion, the Beachfront Management Act did not have as its primary purpose the prevention of a nuisance.[120] He opined that the activities the Act sought to prohibit "do not rise to such a level as to be fairly considered 'noxious.'"[121] The dissent saw the Act as an attempt to promote tourism, create needed natural habitats, and protect a place that harbors natural beauty. The fury of the hurricane was not paramount in its reckoning.

The dissent concluded that the regulation intended to accomplish a laudable public benefit, the burdens of which should be borne by all. From this point of reference, the dissent searched for its dispositive rule of law. It discussed several U.S. Supreme Court cases and concluded that, in the non-nuisance prevention category of cases, the Court employs a two-pronged test: "We have held that land use regulation can effect a taking if it 'does not substantially advance legitimate state interests, . . . or denies an owner economically viable use of his land.'"[122] The minority easily found that the regulation violated the second prong.

On its face, the dissenting opinion is also hard to contest. The facts are straightforward, and fit into a neat and understandable category. The rules of law applied to this category are familiar and just. Precedents are cited. In the context of a burdensome regulation that seeks laudable public benefits, the dissent would subject the regulation to a

---

118. *Id.* at 907-08 (Harwell, J., dissenting) (noting, however, that Lucas might be able to build on the lots under an amendment to the Act that allowed construction subject to the issuance of a special permit that had not been applied for).

119. *Id.* at 906.

120. *Id.*

121. *Id.*

122. *Id.* at 905 (quoting Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 485 (1987)).

HeinOnline 8 J. Land Use & Envtl. L. 21 19921993

review of whether it goes too far and thereby becomes a taking for which an owner must be compensated.

## IV. FOUR CATEGORIES OF TAKINGS CASES: SITUATED JUDGMENTS

The debate between the majority and dissent in the South Carolina Supreme Court highlighted the lack of congruent social norms in takings cases.[123] The majority read the act as an attempt to protect a critical natural resource and prevent serious public injury. The dissent, sympathetic to the complete destruction of the land's market value, saw instead a legislature promoting tourism and preserving natural habitats for wildlife. In this, "the most perplexing area of American land use law,"[124] each side had at its disposal rules of law on which to rely in order to vindicate its sense of justice.[125]

This debate illustrates two categories of "fact situations" available to judges in the regulatory takings field. The majority sensed that the legislature merely acted to prevent a great public harm and placed the case in a group of cases where the primary objective of the regulation was 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 another category. Since the regulation took all economically beneficial use, the "historical compact"[126] contained in the Takings Clause may have been violated. Such fact patterns fit into an 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 burden that should be shouldered by the public.

These three categories cover those controversies that our society debates the most: the "growth area of the law," to use Llewellyn's term.[127] A 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."[128] The perception is that such regulations fairly arbitrate the

---

123. *Compare id.* at 895-902 *with id.* at 902-08.

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

125. *See infra* part V.

126. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2900 (1992). Undertaking a lengthy review of the history of the Takings Clause, Justice Blackmun noted that "[i]t is not clear from the Court's opinion where our 'historical compact' . . . comes from, but it does not appear to be history." *Id.* at 2914 (Blackmun, J., dissenting).

127. *See* LLEWELLYN, *supra* note 91, at 99.

128. *Lucas*, 112 S. Ct. at 2894 (quoting Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)).

HeinOnline 8 J. Land Use & Envtl. L. 22 19921993

obligations and rights of citizenship and ownership. They can be placed in a fourth group of cases called the Arbitration category, a class that represents the "stable core"[129] of regulatory takings law, about which there is less social conflict and confusion in the law.

In *Yee*, Justice O'Connor identified two, not four, categories of regulatory takings cases and described the Court's operating technique with respect to both.[130] The first category involves government actions that invade the physical possession of property, denying the owner the historic and essential right to exclude others.[131] When government usurps such fundamental property rights, Justice O'Connor indicated that "the Takings Clause generally requires compensation."[132] This language implies that when a fundamental right is abrogated and the Takings Clause is implicated, the Court will scrutinize the regulation carefully. In such a case, the Court will attempt to protect the rights guaranteed by the constitution where it senses a heightened risk of their violation.

It is in the second category, "where the government merely regulates the use of property,"[133] that the rules become murky. Since such cases constitute the vast majority of regulatory takings disputes,[134] discerning the judicial approach in this area becomes critical. Here, we are advised, the inquiry is guided by fairness and the result depends on the character of the regulation and the extent to which the owner has been deprived the economic use of the affected property.

### *A. Arbitration Cases*

Zoning, which limits uses of land and prescribes dimensional limitations on development in discrete districts, constitutes much of the Ar-

---

129. *See* LLEWELLYN, *supra* note 94, at 99.

130. Yee v. City of Escondido, 112 S. Ct. 1522, 1526 (1992); *see also Penn Central*, 438 U.S. at 124-28.

131. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982) (noting that the right to exclude others "has traditionally been considered one of the most treasured strands in an owner's bundle of property rights"). "[P]roperty law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property." *Id.* at 436. Relying on this language, New York's highest court found a New York City regulation facially invalid because it substantially impaired three basic property rights: the right to possess, use, and dispose. Seawall Assocs. v. City of New York, 542 N.E.2d 1059 (N.Y. 1989).

132. *Yee*, 112 S. Ct. at 1526. For an example of a physical invasion of this sort that is not compensable under the Takings Clause, see Nollan v. California Coastal Comm'n, 483 U.S. 825, 836 (1987).

133. *Yee*, 112 S. Ct. at 1526.

134. *Cf.* Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2894 (1992) ("[T]he *functional* basis for permitting the government, by regulation, to affect property values without compensation . . . does not apply to the relatively rare situations where the government has deprived a landowner of all economically beneficial uses.") (emphasis in original) (footnote omitted).

HeinOnline 8 J. Land Use & Envtl. L. 23 19921993

bitration category of cases, where property uses are regulated for the reciprocal advantage of everyone in the zoning district. All property owners are burdened and benefitted in roughly proportionate ways. Potential conflicts of property use and enjoyment are arbitrated by the regulation. A certain "reciprocity of advantage" inheres in such regulations; the burdened owner measurably benefits from similar burdens placed on others.

Since the U.S. Supreme Court decided *Village of Euclid v. Ambler Realty Co.*[135] in 1926, it has reviewed challenges to regulations that arbitrate burdens and benefits among property owners giving great deference to the regulator, striking down regulations rarely and only when the challenger can prove conclusively that the regulation in question bears "no substantial relation to the public health, safety, morals, or general welfare."[136]

It was in the context of an arbitration case that the Supreme Court articulated the test to determine whether regulations are takings.[137] In *Agins*, which involved a landowner's challenge to the city's zoning ordinance, the Court framed a two-pronged test, drawing from two of its earlier cases. Zoning "effects a taking if the ordinance 'does not substantially advance [a] legitimate state interest[]'[138] or [if it] 'denies an owner economically viable use of his land.'"[139]

The Supreme Court in *Agins* and *Euclid* articulated a standard set of considerations for courts reviewing takings challenges in the arbitration context:

> 1. On its face, is the "'justice and fairness' guaranteed by the Fifth and Fourteenth Amendments" respected by the regulation?[140]
>
> 2. The principal indicator of fairness is "in essence a determination that the public at large, rather than a single owner, must bear the burden."[141]

---

135. 272 U.S. 365 (1926).

136. *Id.* at 395; *see id* at 388 ("If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control."); *see also supra* notes 43-44.

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

138. This first prong derives from Nectow v. City of Cambridge, 277 U.S. 183, 188 (1928).

139. *Agins*, 447 U.S. at 260. The second prong derives from Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 138 n.36 (1978).

140. *Agins*, 447 U.S. at 263 (citing *Penn Central*, 438 U.S. at 124).

141. *Id.* at 260; *see also* Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2923 (1992) (Stevens, J., dissenting). Justice Stevens characterizes this notion as follows: "Perhaps 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." *Id.*

HeinOnline 8 J. Land Use & Envtl. L. 24 19921993

3. An additional indicator of fairness appears where the regulation involves reciprocal benefits to the landowner and the public.[142]

4. Since "no precise rule determines when property has been taken, the question necessarily requires a weighing of private and public interests,"[143] particularly in close cases.

5. The public "benefits must be considered along with any diminution in market value" of the affected property.[144]

6. Determinations of the legislature regarding the legitimacy of the public interest will be "clothed with a strong presumption of constitutionality."[145]

7. Implicit in this presumption is the allocation of the burden of proof on the challenger to prove its invalidity. This is particularly difficult with respect to the first prong due to the presumption.

These rules, derived from seminal cases, demonstrate the operating methods adopted by a court working within the "stable core" of regulatory takings law. The rules encourage deference to a legislature pursuing a comprehensive plan for the municipality, meting out burdens on land owners generally for the overall benefit of the community. A court's sense of justice is not offended by a demonstrated diminution in value, the methods used, or the objectives pursued by the regulators.

There is greater social conflict and therefore greater divergence among the decisions in the other groups of cases, where society's views are less settled. A review of illustrative cases in each of these groupings further demonstrates the judicial operating technique in the takings field and provides a practical basis for answering the questions faced by public regulators and property owners.

---

142. *Agins*, 447 U.S. at 262.

143. *Id.* at 260-61 (citations omitted).

144. *Id.* at 262.

145. *See* Curtiss-Wright v. East Hampton, 82 A.2d 551, 553 (N.Y. 1981) (citing five other New York cases). Early on, the U.S. Supreme Court held a similar view:

> If these reasons . . . do not demonstrate the wisdom . . . of those restrictions . . . at least, the reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.

Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926); *see also Agins*, 447 U.S. at 261 ("The State of California has determined that . . . [open-space plans discourage unnecessary growth]. Such governmental purposes have long been recognized as legitimate.").

### B. *Undue Burden Cases*

The first category of takings cases referenced by Justice O'Connor in *Yee*[146] arises "[w]here the government authorizes a physical occupation of property (or actually takes title)" by the regulation.[147] In *Lucas*, Scalia expanded the first class somewhat, noting that "[w]e have . . . described at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced" by the regulation.[148] The first of these includes "regulations that compel the property owner to suffer a physical 'invasion' of his property."[149] The second involves a regulation that "denies all economically beneficial or productive use of land."[150]

To judges, regulations from this first category appear to take the "fundamental" property rights of an individual, or unduly burden a particular owner or group of owners in order to accomplish a government enterprise. The Takings Clause protects private property from such public intrusions unless just compensation is awarded.[151] A regulation that imposes an undue burden is more likely a violation of the intent of the framers of the Fifth Amendment. It was their objective to

---

146. Yee v. City of Escondido, 112 S. Ct. 1522 (1992).

147. *Id.* at 1526.

148. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2893 (1992).

149. *Id.*

150. *Id.* Scalia's confirmation of this is worded as follows: "[R]egulations that leave the owner of land without economically beneficial or productive options for its use . . . carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm." *Id.* at 2894-95. Scalia also found this expectation rooted in his view of history: "[W]e think the notion . . . that title is somehow held subject to the 'implied limitation' that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture." *Id.* at 2900. Blackmun's dissent cautioned against such an expansive reading of history:

> But the conclusion that a regulation is not on its face a taking because it allows the landowner some economic use of property is a far cry from the proposition that *denial* of such use is sufficient to establish a taking claim regardless of any other consideration. The Court never has accepted the latter proposition.

*Id.* at 2911 n.11 (Blackmun, J., dissenting) (emphasis in original); *see also id.* at 2914 (noting that Court's "historical compact" is not based on history).

151. *E.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982). In *Loretto*, the Court stated the limits of this first category:

> Our holding today is very narrow. We affirm the traditional rule that a permanent physical occupation of property is a taking. In such a case, the property owner entertains a historically rooted expectation of compensation, and the character of the invasion is qualitatively more intrusive than perhaps any other category of property regulation. We do not, however, question the equally substantial authority upholding a State's broad power to impose appropriate restrictions upon an owner's use of his property.

*Id.*

prevent government from singling out, or placing undue burdens on, individual property owners in the public interest.[152]

When a court senses that it is dealing with an undue burden case, its opinion focuses on the wrong to the property. Its sense of justice is offended. Predictably, the public policy pronouncements of the regulator enjoy less deference. The majority opinion in *Lucas* illustrated the categorically different method of proceeding, once a case is placed in the Undue Burden category. 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.'"[153] This follows because such regulations "carry with them a heightened risk that private property is being pressed into some form of public service."[154] In these cases, the regulations "invite exceedingly close scrutiny under the Takings Clause."[155] The challenger enjoys this stricter judicial scrutiny of the regulation upon a showing that the regulation has "denie[d] him economically beneficial or productive use of land."[156] Cases of this sort tend to fall into one of two sub-categories: invasion cases and fundamental rights cases.

### *1. Invasion Cases*

In 1871, in the case of *Pumpelly v. Green Bay & Mississippi Canal Co.*,[157] the Supreme Court entertained a petitioner's claim that a government action effected a taking indirectly, through the invasion of his possessory interest, without a formal action in eminent domain. The State of Wisconsin authorized the construction of a dam that raised the level of an adjacent lake, flooded petitioner's property, and

---

152. *See Lucas*, 112 S. Ct. at 2894 (citing Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)). This concept is a mirror-image reflection of the "reciprocity of advantage" principle found in the Arbitration category of cases. Recall that such regulations adjust "'the benefits and burdens of economic life' . . . in a manner that secures an 'average reciprocity of advantage' to everyone concerned." *Id.* Regulations that fit in the Undue Burden category often violate the principle of generality that Justice Stevens says is "well-rooted in our broader understandings of the Constitution as designed in part to control the 'mischiefs of faction.'" *Id.* at 2923 (citing THE FEDERALIST No. 10, at 43 (James Madison) (G. Wills ed., 1982)).

153. *Id.* at 2894.

154. *Id.* at 2895.

155. *Id.* at 2895 n.8; *see also id.* at 2893 ("In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation."). Where such use is denied, "the legislature's recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated." *Id.* at 2899.

156. *Id.* at 2893.

157. 80 U.S. 166 (1871).

HeinOnline 8 J. Land Use & Envtl. L. 27 19921993

"worked an almost complete destruction of the value of the land."[158] The Court held that "[i]t would be a very curious and unsatisfactory result, if . . . it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely . . . without making any compensation, because . . . it is not *taken* for the public use."[159]

In 1945, the Court found that the dramatic impact on property enjoyment of lowflying government airplanes was "as much an appropriation of the use of the land as a more conventional entry upon it," and therefore constituted a Fifth Amendment taking.[160] The Court noted that such flights were a "direct invasion" of the owner's domain and that "it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking."[161] Similarly, the Court found that a regulation imposing a public access requirement on a water channel owned by the developer of a marina community constituted a taking.[162] By 1982, this area of case law had developed so far that a regulation allowing a third-party cable television company to affix a cable connection to a privately owned apartment building, occupying only one and one-half cubic feet of private property, likewise constituted an invasive taking.[163]

In 1987, regulatory takings jurisprudence became confused by language in an opinion by Justice Scalia that seemed to heighten the degree of scrutiny afforded land use regulations. In *Nollan v. California Coastal Commission*,[164] as a condition for granting a permit to build

---

158. *Id.* at 177.

159. *Id.* at 177-78 (emphasis added).

160. United States v. Causby, 328 U.S. 256, 264 (1945).

161. *Id.* at 266 (quoting United States v. Cress, 243 U.S. 316, 328 (1917)). There are at least two attributes of this invasion that define its "character" as a taking. First, the government's action was in the nature of a trespass on the possessory rights of the owner. The effect on the property owner was so great that the flights amounted to the imposition of a servitude on the property, greatly affecting "[t]he owner's right to possess and exploit the land—that is to say, his beneficial ownership of it." *Id.* at 262. Second, the government action complained of was a governmental enterprise: the operation of a military airport. The Takings Clause is implicated particularly through the imposition of servitudes on private land incident to the operation of a public enterprise. The Just Compensation Clause of the Fifth Amendment was added to the Constitution to enable the government to appropriate private property interests for such enterprises.

162. Kaiser Aetna v. United States, 444 U.S. 164, 179-80 (1979) ("In this case, we hold that the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation.") (footnote omitted).

163. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 438 (1982). In *Lucas*, Justice Scalia noted this line of reasoning when he wrote: "no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation." Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2893 (1992).

164. 483 U.S. 825 (1987).

HeinOnline 8 J. Land Use & Envtl. L. 28 19921993

on beachfront property, the jurisdiction mandated that the property owner grant the public a lateral easement, running from the mean high tide line to an existing seawall on the property.[165] The Nollans had applied for a permit that would allow them to build a house larger than permitted.[166] They contested the permit condition as a violation of their right to exclude others from their property.

The *Nollan* decision, written by Justice Scalia, placed these facts squarely in the Undue Burden category: an invasion case. "Indeed, one of the principal uses of the eminent domain power is to assure that the government be able to require conveyance of just such interests, so long as it pays for them."[167] In the Court's opinion, this was a classic eminent domain, or takings, issue.[168]

Scalia referenced the *Agins* two-pronged test.[169] Without discussing whether the condition denied the owners economical use of their land, he proceeded directly to an examination of whether it substantially advanced legitimate state interests. The majority assumed, without deciding, the legitimacy of encouraging public beach access.[170] It denied, however, that the condition substantially advanced that objective.[171]

Much has been written about the confusion in the *Nollan* decision. Before examining its ambiguity, it is important to emphasize what is understandable about the decision. The Court simply did not disturb the judicial attitude regarding the legitimacy of public regulation across a broad range of interests. This was explicit in Scalia's language in *Lucas*: "Our cases . . . have made clear however that a broad range of governmental purposes and regulations satisfy these requirements [as to what constitutes a legitimate state interest]."[172]

---

165. *Id.* at 828.

166. *Id.*

167. *Id.* at 831.

168. *See* Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2923 (1992) (Stevens, J., dissenting). Stevens explained the Court's orientation in cases like *Nollan* differently: "[I]n the case of so-called 'development exactions,' we have paid special attention to the risk that particular landowners might 'b[e] singled out to bear the burden' of a broader problem not of his own making." *Id.* (quoting Nollan v. California Coastal Comm'n, 483 U.S. 825, 835 n.4 (1987)).

169. *See* Agins v. City of Tiburon, 447 U.S. 255, 260 (1980). The *Agins* test states that a regulation is constitutionally impermissible if it does not substantially advance legitimate state interests or denies an owner economically viable use of his land. *See supra* notes 137-39 and accompanying text.

170. *Nollan*, 483 U.S. at 835-36.

171. *Id.* at 836-37.

172. *Lucas*, 112 S. Ct. at 2897. This assumption becomes a powerful and direct endorsement of the "full scope of the State's police power." *Id.* The majority in *Lucas* reminds us that "where [the] State 'reasonably conclude[s] that "the health, safety, morals, or general welfare" would be promoted by prohibiting particular contemplated uses of land,' compensation need not accompany prohibition," confirming the Court's approach in *Penn Central*. *Id.* (quoting Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 125 (1978)).

HeinOnline 8 J. Land Use & Envtl. L. 29 19921993

In focusing on the connection between the easement imposed and the public interest served, the *Nollan* majority is said by some to have adopted a stricter standard of judicial review of takings cases.[173] Such a conclusion, however, is not altogether clear from the opinion. The *Nollan* opinion contrasts wording used in *Agins* to that used in *Euclid*, even though both belong to the Arbitration category of cases. In *Euclid*, the Court examined whether the regulation had a "substantial relation to the public health, safety, morals, or general welfare."[174] The *Agins* Court required a regulation to "substantially advance [a] legitimate state interest[]."[175] Scalia, writing for the majority, used the different wording in *Agins* to craft an "essential nexus" test.[176]

Only anecdotal evidence suggests that *Nollan* adopted a stricter scrutiny standard of review, applicable to regulatory takings cases outside the Undue Burden category. At most, Scalia used pointed and nondeferential language[177] to review the California Coastal Commission's findings in *Nollan*.[178] One can only infer a desire to use the essential nexus more broadly by resorting to Scalia's subsequent opinions.[179] The ambiguity surrounding this issue is unfortunate. It may be seen by some lower courts as leave to review with stricter scrutiny the extent to

---

173. *See* Nathaniel S. Lawrence, *Means, Motives, and Takings: The Nexus Test of* Nollan v. California Coastal Commission, 12 HARV. ENVTL. L. REV. 231, 242 (1988).

174. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926).

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

176. Nollan v. California Coastal Comm'n, 483 U.S. 825, 837 (1987). Compare the language in *Agins* and *Euclid* with that written over 100 years ago in *Mugler v. Kansas*:

> If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the [C]onstitution.

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

177. *Nollan*, 483 U.S. at 837 ("[T]he lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was.").

178. *Id.* at 838. Scalia refuted the Commission's arguments:

> Rewriting the [Commission's] argument to eliminate the play on words makes clear that there is nothing to it. It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house.

*Id.*

179. *See* Pennell v. City of San Jose, 485 U.S. 1, 18-19 (1988) (Scalia, J., concurring in part and dissenting in part). In *Pennell*, Justice Scalia would have entertained, as the majority did not, the plaintiff's contention that the regulation did not properly advance a legitimate state interest. In both *Pennell* and Yee v. City of Escondido, 112 S. Ct. 1522, 1533-34 (1992), the majority of the Court shows no inclination to engage in a substantive review of regulatory actions that have been challenged as takings. This was reinforced again during the 1991 term in Arkansas v. Oklahoma, 112 S. Ct. 1046, 1059-60 (1992). *See generally* Stan Millan, *Is Clean Water Only for Those at the Top?*, 8 J. LAND USE & ENVTL. LAW 235 (1992).

HeinOnline 8 J. Land Use & Envtl. L. 30 19921993

which a regulation furthers a legitimate state interest outside the undue burden class of cases.[180]

It is noteworthy, however, that Scalia's opinion never used the words "heightened scrutiny" or "stricter scrutiny" to characterize the formulation of his standard. Indeed, the only reference in the opinion to the Takings Clause appeared obliquely in the footnotes.[181] Further, Scalia seemed to confuse due process and equal protection cases, and the tests adopted in those contexts, with takings cases and their standards.[182] Finally, there was no indication in his opinion that the Court overruled cases like *Euclid* and *Agins*, or the deferential standards they employ.

In articulating his test, Scalia used wording that belied its characterization as a new standard of judicial review, the so-called heightened scrutiny standard.[183] He wrote, quite unremarkably, that: "The evident constitutional propriety disappears, however, if the condition substituted for the prohibition *utterly fails* to further the end advanced as the justification for the prohibition. When *that essential nexus* is eliminated . . . [the regulation falls]."[184] In the Court's opinion, there was no relation at all between the condition imposed in *Nollan* and the public purpose to be achieved.[185] In the end, it is the utter failure of the regulation to achieve its objective that doomed the permit condition in *Nollan*, not the Court's stricter scrutiny of the regulatory scheme.[186]

---

180. *See, e.g.*, Kayden, *supra* note 67, at 301. Kayden interprets Parranto Bros., Inc. v. City of New Brighton, 425 N.W.2d 585, 591 (Minn. Ct. App. 1988), as applying stricter scrutiny to a rezoning matter because of *Nollan*.

181. *Nollan*, 483 U.S. at 834-35, nn.3, 4.

182. *See* Kayden, *supra* note 67, at 314-15. Kayden explored this confusion:

> *Agins* itself is a product of due process and equal protection cases. *Agins* cited *Nectow*—a due process, not a just compensation, case—as the exclusive source of its first prong, thereby mixing due process apples with just compensation oranges. . . . The connection is complete: As much as it may desire to construct an alternate genealogy, *Nollan* is a direct descendant of *Euclid* and its due process-equal protection standard, via *Agins* and *Nectow*.

*Id.*

183. *See, e.g.*, Lawrence W. Andrea, *Trespass at High Tide: The Supreme Court Gives Heightened Scrutiny to a State Imposed Easement Requirement*, 54 BROOK. L. REV. 991, 1011-20 (1988).

184. *Nollan*, 483 U.S. at 837 (emphasis added).

185. *Id.* at 838 ("[W]e find that this case does not meet even the most untailored standards.").

186. *See* Nectow v. City of Cambridge, 277 U.S. 183, 187-88 (1928). The *Nectow* Court uses a standard and method of review similar to that applied by the *Nollan* Court:

> We quite agree . . . that a court should not set aside the determination of public officers . . . unless it is clear that their action "has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense."

*Id.* (quoting Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926)). Applying this standard, the

HeinOnline 8 J. Land Use & Envtl. L. 31 19921993

The best way to understand what Scalia did in *Nollan* in articulating the essential nexus test is to look for his "situation sense."[187] Scalia characterized the California permit condition as "an out-and-out plan of extortion."[188] It imposed on the private owner the obligation to allow third parties to invade his possession.[189] The majority feared that the Nollans were singled out to bear an undue public burden.[190] In this context, the strong language and a longer look at the regulation becomes understandable. The argument that the opinion created a new standard of judicial review applicable to all categories of regulatory takings cases, however, finds no support in the opinion. More importantly, such a view ignores the Court's repeated statement that there is "no set formula" for deciding regulatory takings cases, but that it relies on ad hoc, factual inquiries into the circumstances of each case.[191]

### 2. *Fundamental Rights Cases*

It would be hard to conjure a set of facts further removed from those of an arbitration case, such as *Agins*, than those brought to the bench in *Seawall Associates v. City of New York*.[192] In *Agins*, provisions contained in a comprehensive zoning ordinance reduced the number of houses that could be built on the owner's parcel. In *Seawall*, under a local law applicable only to certain properties, the owners were required to maintain their single room occupancy buildings in habitable condition, to rehabilitate them when necessary, and to offer them for rent to bona fide tenants, as defined by the regulation. The pur-

---

*Nectow* Court overturned the regulation in much the same manner as the majority overturned the permit condition in *Nollan*.

187. *See supra* notes 96-101 and accompanying text. Scalia makes it clear that the unilateral imposition of a public easement on private property would constitute a compensable taking, per se, under the Fifth and Fourteenth Amendments. *Nollan*, 483 U.S. at 831-33. When such an easement is imposed in the context of an application for a discretionary permit, however, there is no per se need for compensation. The "essential nexus" between the condition and the objective to be secured by it is understandable and reasonable.

188. *Nollan*, 483 U.S. at 837 (quoting J.E.D. Assocs. v. Atkinson, 432 A.2d 12, 14-15 (N.H. 1981)). It is this phrase, which questions and recharacterizes the regulators' motive, perhaps more than any other language in the opinion, that suggests that a higher level of judicial scrutiny is being used to review the condition.

189. *Nollan*, 483 U.S. at 831 ("We have repeatedly held that, as to property reserved by its owner for private use, 'the right to exclude [others is] "one of the most essential sticks in the bundle of rights that are commonly characterized as property."'") (quoting Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433 (1982)).

190. *Id.* at 836 n.4 ("One of the principal purposes of the Takings Clause is 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'") (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

191. *See supra* note 104.

192. 542 N.E.2d 1059 (N.Y. 1989).

HeinOnline 8 J. Land Use & Envtl. L. 32 19921993

pose of the law was to preserve the stock of housing suitable to homeless individuals. Its effect was to prevent these owners from demolishing their buildings and constructing more valuable structures in their place.

In the court's words, the regulation took away the owners' "quintessential rights to possess and exclude;"[193] took their right to "use their properties as they see fit;"[194] and "negatively affect[ed] the owners' right to dispose of their properties"[195] for "any sums approaching their investments."[196] In the court's opinion, the facts fell outside the ambit of arbitration cases. The regulation so severely trammelled fundamental rights of property owners that a different judicial attitude could be anticipated. Llewellyn's notions help anticipate the outcome in *Seawall* once the facts are classified in this way.

The court wasted little effort discussing deferential standards of review. The court did discuss, however, the rights to use, possess, and dispose of one's property, variously calling them the "traditional,"[197] "essential,"[198] and "classical"[199] rights of property. The court quickly concluded that, "[w]here, as here, owners are forced to accept the occupation of their properties by persons not already in residence, the resulting deprivation of rights in those properties is sufficient to constitute a physical taking for which compensation is required."[200]

The majority in *Seawall* sustained its conclusion by selecting rules of law from invasion cases, where private third parties were permitted access to a plaintiff's property. Most notably, the Court cited to *Loretto*,[201] *Pumpelly*,[202] *United States v. Causby*,[203] and *Kaiser*.[204] Quoting *Loretto*, the New York court noted that, "[t]his right to exclude 'has traditionally been considered one of the most treasured strands in an owner's bundle of property rights.'"[205]

---

193. *Id.* at 1065 n.5.
194. *Id.* at 1066.
195. *Id.*
196. *Id.*
197. *Id.* at 1063.
198. *Id.* at 1062.
199. *Id.* at 1063.
200. *Id.* at 1063. As if to demonstrate the elasticity of the subcategories of undue burden cases, the court characterized the facts as constituting an "enterprise" case, a "fundamental rights" case, and an "invasion" case. *Id.* at 1065, 1070; *see also supra* note 161.
201. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).
202. Pumpelly v. Green Bay & Miss. Canal Co., 80 U.S. 166 (1871).
203. 328 U.S. 256 (1946); *see also* United States v. Dickinson, 331 U.S. 745, 750-51 (1947) (unintentional flooding).
204. Kaiser Aetna v. United States, 444 U.S. 164 (1979).
205. Seawall Assocs. v. City of New York, 542 N.E.2d 1059, 1063 (N.Y. 1989) (quoting *Loretto*, 458 U.S. at 435).

HeinOnline 8 J. Land Use & Envtl. L. 33 19921993

Having disposed of the local law as a deprivation of fundamental property rights, a "per se taking," the court also considered whether it was a "regulatory taking." For this purpose, it used the traditional *Agins* two-pronged test. In applying the test, however, the court used language unfamiliar to those accustomed to reading arbitration case decisions. First, the court took the case out of the arbitration class:

> [T]he constitutional guarantee against uncompensated takings is violated when the adjustment of rights for the public good becomes so disproportionate that it can be said that the governmental action is "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[206]

As a regulatory takings case, this analysis ventured into the Undue Burden category, where the reciprocity of advantage present in arbitration cases is absent.

Second, the court held that the taking of a "discrete twig out of (the owner's) fee simple bundle of rights"[207] can effectively deny an owner economical use of his property. This, in itself, fails the second prong of the *Agins* test.[208] The *Seawall* opinion therefore dramatically contrasts with the proof required of challengers in arbitration cases where land owners must show conclusively that the property has no reasonable use. The *Seawall* court did not discuss the economic impact of the regulation. Instead, it grafted its fundamental rights violation arguments into the second prong of the *Agins* test and concluded that it "is inescapable that the effect of the provisions is unconstitutionally to deprive owners of economically viable use of their properties."[209]

Third, the court adopted "close nexus" and "heightened judicial scrutiny"[210] standards, attributing them to *Nollan*. The court applied these strict standards to the first prong of the test: whether the regulation substantially advances a legitimate state interest. The court never questioned the appropriateness of the public objective of housing the homeless. Instead, it doubted that the law advanced the objective, noting that the city's own study acknowledged that the preservation of such units "would do little to resolve the homeless crisis."[211]

Fourth, it appears that the majority reversed the burden of proof employed in arbitration cases and the "fairly debatable" standard of

---

206. *Id.* at 1065 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

207. *Id.* at 1067 (quoting Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1233 (1967)).

208. *See supra* notes 137-39 and accompanying text.

209. *Seawall*, 542 N.E.2d at 1068.

210. *Id.*

211. *Id.*

HeinOnline 8 J. Land Use & Envtl. L. 34 19921993

deference articulated by *Euclid*. The court noted that "[t]he heavy exactions imposed by [the law] must 'substantially advance' its putative purpose of relieving homelessness."[212] The court did not find that the law met this "close nexus" requirement.

The result of this New York decision is understandable as an undue burden case. Like the *Lucas* bench, the New York Court of Appeals sensed that it faced a case belonging to a "categor[y] of regulatory action" where compensation may be awarded "without case-specific inquiry into the public interest advanced in support of the restraint."[213] This view echoes Scalia's suggestion in *Lucas* that "there are plainly a number of noneconomic interests in land whose impairment will invite exceedingly close scrutiny under the Takings Clause."[214] Primary among these noneconomic interests is the fundamental right to exclude others. As the court in *Loretto* noted, "[past] cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner."[215]

Does the *Seawall* decision make sense, however, if applied to other classes of takings cases? The state court referenced the owner's right to "use their properties as they see fit"[216] as a fundamental right of property ownership. If *Seawall* is applied literally outside the undue burden context, zoning setback requirements, which clearly and substantially limit private property use, would become takings without regard to their economic impact or the public benefit achieved. The *Seawall* court clearly did not envision this result. This difficultly illustrates the importance of confining regulatory takings holdings to the factual situation out of which they arise. Moreover, it suggests that the historic, deferential standards of review still apply outside the Undue Burdens category.[217]

---

212. *Id.* at 1069.

213. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2893 (1992).

214. *Id.* at 2895 n.3 (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 436 (1982), an invasion case).

215. *Loretto*, 458 U.S. at 434-35. *Compare id. with* Yee v. City of Escondido, 112 S. Ct. 1522, 1530 (1992) (noting that a governmentally compelled physical occupation "may be relevant to a regulatory taking argument, as it may be one factor a reviewing court would wish to consider in determining whether the ordinance unjustly imposes a burden on the petitioners").

216. *Seawall*, 542 N.E.2d at 1066.

217. *See* Birnbaum v. New York, 541 N.E.2d 23 (N.Y. 1989). This case was decided by the New York Court of Appeals one month prior to *Seawall*. In *Birnbaum*, the private property owner was prevented from closing her nursing home by state regulation, during which time she incurred operating losses. The regulation prevented the owner from using her property as she saw fit; it arguably prevented her from disposing of it and compelled the continuation of the business. That this impact on fundamental property rights does not compel the court to find a compensable

HeinOnline 8 J. Land Use & Envtl. L. 35 19921993

### C. *Public Values Cases*

In *Yee v. City of Escondido*, after discussing undue burden cases, Justice O'Connor defined a broad second class of regulatory takings cases "where the government merely regulates the use of property."[218] In this second category, which certainly includes the Arbitration category discussed above, further classification may be merited.[219] It is in this second category that a takings determination "entails complex factual assessments of the purposes and economic effects of government actions."[220]

Some commentators attempt to divide this second group of cases into discrete categories by suggesting that courts weigh the importance of the public objective to gauge the fundamental fairness of the regulatory scheme.[221] Although debatable, this assertion does find support in some cases. In *Agins*, for example, the question of whether a regulation constituted a taking "requires a weighing of private and public interests."[222] Further, the California Supreme Court upheld on remand a regulation in *First English* based on its measure of the importance of the public objective achieved compared with the degree of private burden.[223] The court alluded to a hierarchy of interests served by the police power with preservation of life at the top and the pursuit of aesthetic values near the bottom.[224]

Scalia's opinions also reflect interestingly on the issue of whether there is a hierarchy of public interests in regulatory takings cases. In

---

taking is apparent in Chief Justice Wachtler's opinion, which found that no taking occurred. In the context of a heavily regulated industry, the facts suggested to the court that the owner was not unfairly treated; indeed, she reasonably could have expected such a prohibition. The state regulatory scheme was designed to provide and maintain a system of health care for the people of the area. This, added to her reasonable expectations, took the case out of the Undue Burden category. In this context, the same court that decided *Seawall* was deferential to the state regulatory scheme, did not scrutinize heavily the reasoning advanced by the state in favor of the regulation, and affirmed that a takings analysis generally requires an ad hoc, factual inquiry, citing Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

218. Yee v. City of Escondido, 112 S. Ct. 1522, 1526 (1992); *see supra* notes 130-34 and accompanying text.

219. *Yee*, 112 S. Ct. at 1526 (citing *Penn Central*, 438 U.S. at 123-25). Justice O'Connor writes that in this second category, "compensation is required only if considerations such as the purpose of the regulation or the extent to which it deprives the owner of the economic use suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole." *Id.*

220. *Id.*

221. *See* Charles L. Siemon, *Who Owns Cross Creek?*, 5 J. LAND USE & ENVTL. L. 323, 362 (1990) ("It appears . . . that the willingness of the courts to find that a regulation has gone 'too far' declines as the importance of the purpose increases.").

222. Agins v. City of Tiburon, 447 U.S. 255, 261 (1980).

223. First English Evangelical Lutheran Church v. County of Los Angeles, 258 Cal. Rptr. 893 (Ct. App. 1989), *cert. denied*, 493 U.S. 1056 (1990).

224. *Id.* at 904.

HeinOnline 8 J. Land Use & Envtl. L. 36 19921993

*Lucas*, Scalia confirmed that "a broad range of governmental purposes and regulations," encompassing the "full scope of the State's police power," including objectives such as "historic preservation," constitute legitimate state interests.[225] Yet, in *Nollan*, Scalia assumed without deciding that the Commission's interest in preserving the public's ability to see the beach constituted a legitimate state interest.[226] If the visual, aesthetic and recreational interests promoted by the Commission's regulations were legitimate interests, equal in importance to all other public interests, why did Scalia take this approach? His reticence implies that some public interests may be different from others when they are weighed under *Agins*.

On examination, a more comfortable[227] rationale explaining why courts use more caution in the Public Values category is found in the central focus of regulatory takings cases on whether an owner has been singled out unfairly.[228] Determining when an owner has been singled out requires an examination of whether regulatory impacts are distributed broadly or narrowly. Regulations that restrict the use of property for aesthetic or historic purposes tend to fall on a few owners and yet benefit the public in general.[229] For this reason, regulations burdening relatively few owners may receive more extensive analysis.[230]

When regulations burden a few in the interest of many, judges may engage in a lengthier analysis and consider a variety of additional fac-

---

225. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2897 (1992) (citing Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 125, 133-34 n.30 (1978); Nollan v. California Coastal Comm'n, 483 U.S. 825, 834-35 (1987)).

226. *Nollan*, 483 U.S. at 835.

227. The proposition that courts use varying levels of scrutiny to review the regulation's purpose is at odds with the deference uniformly paid by courts to legislative determinations. It suggests that judges second guess the legitimacy of state interests, as determined by elected legislators. The cases suggest only that courts will review with particular care the means chosen to accomplish such interests, not the legitimacy of the interest itself. This "stricter scrutiny" is limited, almost exclusively, to cases where an undue burden on a particular owner is effected by the regulation.

228. *Lucas*, 112 S. Ct. at 2923 (Stevens, J., dissenting).

229. Local governments, historically, have developed three types of aesthetic regulations: architectural review regulation, controls on billboards and signs, and regulation of junkyards. By definition, a relatively few properties owners are burdened by such provisions in the interests of benefiting the public at large.

230. *See, e.g.*, Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 147 (1978) (Rehnquist, J., dissenting) ("[New York City] imposed a substantial cost on less than one-tenth of one percent of the buildings in New York City for the general benefit of all its people. It is exactly this imposition of general costs on a few individuals at which the 'taking' protection is directed."). Any doubt about the validity of such regulations should be resolved by Scalia's majority opinion in *Lucas*. Justice Scalia noted that the Supreme Court has regularly upheld regulations "on the ground that the restrictions were reasonably related to the implementation of a policy—not unlike historic preservation—expected to produce a widespread public benefit and applicable to all similarly situated property." *Lucas*, 112 S. Ct. at 2897 (quoting *Penn Central*, 438 U.S. at 133-34 n.30).

HeinOnline 8 J. Land Use & Envtl. L. 37 19921993

tors. In *Penn Central Transportation Co. v. City of New York*,[231] for example, the Court looked to several matters to determine whether a taking occurred, including the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations. The owner in *Penn Central* contested a historic district regulation that imposed a limitation on the owner's ability to build in its air rights.[232] Effectively, the owner was denied a permit to construct a fifty-five story office tower over Grand Central Station in New York City. The Court adopted a multifactor balancing approach in affirming the regulation.[233] In the process, it:

> 1. exhibited sensitivity to the laws in "all 50 States and over 500 municipalities"[234] that require or encourage historic preservation;
> 2. noted the comprehensiveness of the New York City ordinance;
> 3. found no onerous requirements in the regulation;
> 4. concentrated on a transfer of development rights feature designed to provide some compensation for the limitation on development rights; and
> 5. referenced "special mechanisms . . . to ensure that designation does not cause economic hardship."[235]

Citing familiar case law,[236] the U.S. Supreme Court found that the law embodied the requisite reciprocity of advantage because of the comprehensive nature of of the New York City historic preservation program. Justice Brennan's decision is replete with deference to the New York State Legislature, the New York City Council, the Landmarks Preservation Commission, and the decisions of the New York trial and appellate courts. Although the lengthy analysis considered several factors, the Court, in the end, sensed that the principle of generality was not violated and the results were fundamentally fair.[237]

---

231. 438 U.S. 104 (1978).
232. *Id.* at 109.
233. *Id.* at 124.
234. *Id.* at 106.
235. *Id.* at 112.
236. *Id.* at 123 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).
237. *Compare Penn Central*, 438 U.S. at 104 *with* Department of Natural Resources v. Indiana Coal Council, 542 N.E.2d 1000, 1002 (Ind. 1989). In *Indiana Coal Council*, the court deferred to a regulation designed to prevent "damage to important historic, cultural, scientific, and esthetic values and natural systems." *Id.* at 1002. It declined to find that the prohibition of strip mining, to prevent damage to such values, was a taking. *Indiana Coal Council*, 542 N.E.2d at 1004. The court imposed a heavy burden of proof on the challenger. *Id.* at 1003. The court de-

HeinOnline 8 J. Land Use & Envtl. L. 38 19921993

Contrast this to *United Artists Theater Circuit, Inc. v. City of Philadelphia*,[238] where the Pennsylvania Supreme Court found that the City of Philadelphia's Historic Preservation law violated the state constitution's analogue to the Takings Clause. The Court saw in the regulation the degree of private burden that the *Seawall* majority found in the New York City's scheme to preserve residential buildings for the homeless. The Pennsylvania law gave the Historic Commission

> almost absolute control over the property, including the physical details and the uses to which it could be put. Further, the historic designation imposed upon the owner an affirmative duty to preserve the building, at the exclusive expense of the owner, in the . . . style and appearance mandated by the Commission.[239]

The tone of the decision made it clear that the Court sensed that it faced a regulation that simply had gone too far. This decision was influenced by:

> 1. the numerous procedural steps, some of them costly to the owner, required for a permit to alter or demolish a designated building;
> 2. the minimal repairs that an owner could make without a permit;
> 3. the duty to preserve the building in its historic state;
> 4. the imposition of criminal penalties for noncompliance; and
> 5. the extensive controls over interior space.

The exasperation of the Pennsylvania Supreme Court is palpable in its reference to a comment by counsel for the plaintiff, undisputed by the Commission, that "the owner would be legally obligated to obtain permission from the Commission to move a mirror from one wall to another."[240] In these observations, one senses a court classifying facts that will place the case beyond the reach of the Arbitration category. It should be no surprise, therefore, that the court found an absence of

---

clined to use heightened scrutiny, doubting that the *Nollan* court articulated such a standard and confining its use, if it exists, to cases where the government requires an "actual conveyance of property [as] a condition of the lifting of a land use restriction." *Id.* at 1005. The court found that no intrusion amounting to an actual conveyance was involved and that the regulation survived the "substantial relationship" test. *See generally id.* at 1005 (citing Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)).

238. 595 A.2d 6, 13-14 (Pa. 1991), *reh'g granted, id.*

239. *Id.* at 11.

240. *Id.*

reciprocity of advantage in the Philadelphia law: "Here, Philadelphia . . . is forcing the owner of that property to bear a public burden, ostensibly to enhance the quality of life of the public as a whole. . . . This is a burden that, in fairness and justice, should be borne by all."[241]

In this context, where the private burden becomes too great, the Court used a less deferential standard: "If after investigating there is doubt as to whether the statute is enacted for a recognized police object, or if, conceding its purpose, its exercise goes too far, it then becomes the judicial duty [to] . . . declare the given exercise of the police power invalid."[242] The court thus held the law unconstitutional insofar as it authorized the historic designation of private property without the consent of the owner.

The different outcomes in these two cases, both involving historic preservation ordinances, demonstrate the importance of the facts of each controversy. Both Courts engaged in relatively lengthy analyses of the regulations and the burdens they impose. In *Penn Central*, the facts led the U.S. Supreme Court to conclude that the burdens were not unreasonable. Its treatment of the regulation, albeit extensive, was ultimately deferential. In *United Artist*, the Pennsylvania court sensed a fundamental unfairness imposed by the Philadelphia ordinance. The Pennsylvania statute appeared more detailed and directive than its New York counterpart. With its sense of fairness offended, the court found a taking under Pennsylvania state law.

### *D. Public Injury Prevention Cases*

When the purpose of land use regulations is to protect the public health or safety, they often impose burdens on a limited number of properties that exhibit the undesirable or offensive effect. In this respect, such regulations often resemble those enacted to protect public values, such as aesthetics, history or heritage. Regulations that prevent uses injurious to the public, however, are significantly different. When the intent to prevent public harm is clear and the potential for public injury inheres in the proscribed use of the regulated properties, courts are less likely to question the regulators. The essential fairness is more apparent because the common law historically prevented uses of private property that injure the public.[243]

---

241. *Id.* at 11-12.

242. *Id.* at 12 (quoting White's Appeal, 134 A. 409, 411 (1926)).

243. *Sic utere tuo ut alienum non laedas*, "[u]se your own property in such a manner as not to injure that of another." BLACK'S LAW DICTIONARY 1380 (6th ed. 1990); *see also* Munn v. Illinois,

HeinOnline 8 J. Land Use & Envtl. L. 40 19921993

There is no dispute that there is a "nuisance exception" to the application of the Just Compensation Clause of the Fifth Amendment. As recently as 1987, a majority of the U.S. Supreme Court upheld this principal in *Keystone*,[244] where the exception was described as extending to the prohibition of harmful uses of land that are "akin to a public nuisance,"[245] "similar to [a] public nuisance[],"[246] or "nuisance-like."[247] In dissent, Chief Justice Rehnquist acknowledged the government's "unquestioned authority" to forbid uses that injure others, but disagreed over how broadly the exception applied to exempt regulations from application of the Takings Clause.[248]

The debate over the breadth of the nuisance exception defies easy resolution simply because the task of defining a nuisance is so difficult. Henry of Bracton, the first codifier and commentator on the Common Law of England, wrote that "nuisances are truly infinite."[249] Blackstone agreed. He defined public nuisance as "a species of offenses against the public order and economical regimen of the state; being either the doing of a thing to the annoyance of all the king's subjects, or the neglecting to do a thing which the common good requires."[250]

In *Lucas*,[251] the Court noted that the legitimacy of land use regulations does not rest on whether they prevent "harmful or noxious uses."[252] Instead, the Court found that the power to regulate land is coterminous with the "full scope of the State's police power."[253] Having eliminated any doubt about the breadth of legitimate state interests for regulating land use, the majority provided a new setting for the use of the nuisance exception.

---

94 U.S. 113, 124 (1877) (stating that government may require "each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another"); Mugler v. Kansas, 123 U.S. 623, 665 (1887) (stating that long ago it was recognized that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community").

244. *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987). The majority interpreted a Pennsylvania statute that prevented surface subsidence by limiting the mining of coal in the support estate, below the surface, as a nuisance prevention statute. *Id.* at 474. The Court stated: "[T]he Commonwealth of Pennsylvania has acted to arrest what it perceives to be a significant threat to the common welfare." *Id.* at 485.

245. *Id.* at 488.

246. *Id.* at 492.

247. *Id.* at 491 n.20.

248. *Id.* at 512. Rehnquist argued that the doctrine "is a narrow exception allowing the government to prevent 'a misuse or illegal use.'" *Id.* (quoting Curtin v. Benson, 222 U.S. 78, 86 (1911)).

249. HENRY DE BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND (Samuel E. Thorne trans., 1968).

250. 4 WILLIAM BLACKSTONE, COMMENTARIES *166-67 (spelling modernized).

251. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992).

252. *Id.* at 2897.

253. *Id.*

Recall that in *Lucas* the majority agreed that a regulation can take "all economically beneficial use of land," if the proscribed use could have been prohibited under "the State's law of . . . nuisance."[254] On remand, the South Carolina courts must determine whether the "background principles of [the State's] nuisance and property law"[255] prevent Lucas from building permanent structures on his two beachfront lots. In most states, determining what constitutes a nuisance depends as much on ad hoc, factual inquiries as regulatory takings analysis. Both look to the circumstances of the case, the location of the property, and the insights of an evolving society. By adding this state law nuisance inquiry to the standards applicable to this narrow category of regulatory takings cases, *Lucas* gave courts a factor to interpret that is as vague and hard to apply as the "essential nexus" test in *Nollan*.[256]

In future regulatory takings cases, the inquiry as to whether a regulated use could have been enjoined under state nuisance law should be limited to "total takings"[257] cases, where the regulation prohibits all economic or productive use of land. Since these cases constitute a tiny fraction of such disputes, one must question the relevance of the nuisance exception to the resolution of the vast remainder of cases where some use of the challenger's property remains.

A regulatory takings analysis essentially invites an inquiry into the fairness of the regulatory scheme. Upon proof that particular properties are singled out for regulation because of the potentially injurious nature of the prohibited use, the fairness of the regulation becomes more obvious. In this context, as opposed to the total takings setting, courts are not likely to "weigh with nicety"[258] whether the regulation prevents a common law nuisance, nor are they required to do so by the *Lucas* decision. The more the regulator shows that the regulation operates to prevent a public injury, the more judges will sense its essential fairness and not classify the regulation as a compensable taking. In such situations, a court will be more likely to sense that a regulation imposes burdens fairly if it concludes that the primary purpose of the regulation is to eliminate an injurious use. Injurious uses could include nuisances, nuisance-like activities, or conduct akin to a nuisance.

The New Jersey Supreme Court recently decided a case relevant to this analysis. In *Gardner v. New Jersey Pinelands Commission*,[259] a farm owner, relying on *Nollan*, challenged a commission regulation

254. *Id.* at 2900.
255. *Id.* at 2901-02.
256. *See supra* notes 173-91 and accompanying text.
257. *See Lucas*, 112 S. Ct. at 2901.
258. Miller v. Schoene, 276 U.S. 272, 280 (1928).
259. 593 A.2d 251 (N.J. 1991).

HeinOnline 8 J. Land Use & Envtl. L. 42 19921993

limiting development of his 217 acre farm to five homes, restricting the rest of the land to agricultural uses, and requiring a perpetual deed restriction on the property's use to that effect.[260] The farm was located in the New Jersey Pine Barrens, an area of unique ecological features.[261]

The clash of interests in this case, placing it in the growth area of the law,[262] was as dramatic as the conflict in *Lucas*. The plaintiff's land was located in one of the most rapidly developing areas in the country, situated near "the midpoint of the emerging megalopolis that extends from Boston to Richmond."[263] The Pine Barrens contained numerous endangered plant and animal species. The lands also overlaid an aquifer constituting one of the largest unused sources of pure water in the world. The fragile ecology of the area also made it the first natural resource area protected by the Natural Reserve Program created by the U.S. Congress.[264] Federal and state legislation created a planning commission for the Pinelands. Using its zoning powers, the commission adopted a comprehensive management plan and land use regulations, including those which restricted the plaintiff's parcel.

The operating technique of the court in reviewing the plaintiff's taking challenge is instructive. First, it referenced the Arbitration category of cases, calling the commission's regulatory scheme "fundamentally a regime of zoning."[265] The court noted that regulations from the Arbitration category must meet the demands of the two-pronged *Agins* test.[266] The court stated, however, that when the impacts of a regulation amount to "particularized restrictions on property with special characteristics,"[267] the judicial demands of the legislation "become more elaborate"[268] and require an analysis of several factors.[269]

---

260. *Id.* at 253, 256, 258-59.

261. *Id.* at 253.

262. *See* LLEWELLYN, *supra* note 91.

263. *Gardner*, 593 A.2d at 254.

264. National Parks and Recreation Act of 1978, Pub. L. No. 95-625, 92 Stat. 3492 (codified as amended at 16 U.S.C. § 471i (1988)).

265. *Gardner*, 593 A.2d at 257.

266. Agins v. City of Tiburon, 447 U.S. 255, 260 (1980). A zoning scheme "must substantially advance legitimate state interests, and it cannot deny an owner all economically viable use of the land." *Gardner*, 593 A.2d at 257.

267. *Gardner*, 593 A.2d at 256.

268. *Id.* at 257; *see also* Nollan v. California Coastal Comm'n, 483 U.S. 825, 841 (1987) ("We are inclined to be *particularly careful* about the [term 'substantial'] where the actual conveyance of property is [required], . . . since *in that context* there is heightened risk that the purpose is avoidance of the compensation requirement.") (emphasis added).

269. *Gardner*, 593 A.2d at 257 (citing Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124-28 (1978)).

HeinOnline 8 J. Land Use & Envtl. L. 43 19921993

Because the challenged regulatory regime involved particularized restrictions on property with special characteristics, the court engaged in a lengthy analysis of whether it furthered legitimate state interests or denied the plaintiff all economically viable use of his land. In undertaking this analysis, the court began with its observation that the legislation "advances a valid public purpose by preventing or reducing harm to the public."[270] The court reached this conclusion without reference to common law nuisance principles.

The court cited a New Jersey precedent for the proposition that "[a] property owner 'has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others.'"[271] Without referencing the "essential nexus" test, the court disposed of the plaintiff's *Nollan* challenge by finding that the regulation "does not constitute a burden that is unrelated to the essential purposes of the regulatory scheme."[272] Finally, the court concluded that, by allowing the existing agricultural uses to continue and permitting the development of five houses, the owner could enjoy gainful use of the property and that there was "no showing that the economic impact of the regulations interfere[d] with distinct investment-backed expectations."[273]

The decision, though lengthy and careful in its analysis, deferred to the regulator and imposed a burden on the challenger to prove that the regulation violated the *Agins* test. In the public injury or arbitration context — both referenced in *Gardner* — this is the classic and time-honored approach of the judiciary.

## V. CONCLUSION—DRAFTING AND DETECTING REGULATIONS THAT MEET THE JUDGE'S SEARCH FOR ESSENTIAL FAIRNESS

Recognizing the different categories of takings claims helps one understand how judges use their discretion to resolve disputes. Understanding the operating techniques may assist regulators in designing legislation that will resist judicial scrutiny. This section suggests methods by which regulators may apply the foregoing discussion of the var-

---

270. *Id.* at 258.

271. *Id.* (quoting Usdin v. Environmental Protection Dep't, 414 A.2d 280, 288 (Law Div. 1980), *aff'd*, 430 A.2d 949 (N.J. Super. Ct. App. Div. 1981)).

272. *Id.* at 259. The court noted that the Pine Barrens deed restriction requirement imposed a use restriction, similar to a zoning restriction, not a physical access easement or invasion as found in *Nollan*. In this context, it applied the standard test of whether the "development limitations substantially advanced legitimate state interests." *Id.* (citing Glisson v. Alachua County, 558 So. 2d 1030 (Fla. 1st DCA 1990)).

273. *Id.* at 261.

HeinOnline 8 J. Land Use & Envtl. L. 44 19921993

ious takings categories and create fair, equitable, and above all constitutional regulations.

### *A. Judicial Leeways and Constraints*

The flexibility retained by judges in this field leads to considerable frustration on the part of regulators and property owners alike. In *Lucas*, the majority of the state supreme court sustained the regulation as preventing public injury, conferring special status on "this kind of regulation" using common law terms: "no individual has a right to use his property so as to create a nuisance or otherwise harm others."[274] The dissent characterized the same regulation as a public values case, one that merely promoted tourism and therefore should not withstand Fifth Amendment analysis.[275] The U.S. Supreme Court majority opinion flatly labeled the facts as falling in the Undue Burden category where compensation must be awarded "without case-specific inquiry into the public interest advanced."[276]

Does *Lucas* teach us that regulators and property owners are subject to the whim of judges who simply decide cases according to their life experience?[277] Llewellyn argued that judges are guided by constraining principles and techniques and have leeway in deciding cases, particularly where social values are in flux.[278] He suggested that the facts lead judges to classify a dispute and that from such classifications they search for the applicable rules of law. In the regulatory taking field there are four types of fact patterns, classified as: Arbitration category cases,[279] Undue Burden category cases,[280] Public Values category cases,[281] and Public Injury category cases.[282] In these categories, there are some constraints on the judiciary and some leeways.

---

274. Lucas v. South Carolina Coastal Council, 404 S.E.2d 895, 898-99 (S.C. 1991) (citing Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 491 (1987)), *rev'd*, 112 S. Ct. 2886 (1992).

275. *Id.* at 906.

276. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2893 (1992).

277. There is validity to the observation that reviewing courts have great discretion to define the issues and thereby predetermine the result. *See supra* note 101. This happened in *Nollan* where the U.S. Supreme Court focused on the weakest of several Coastal Commission justifications for the lateral easement—viewshed protection—and then proceeded to find no "essential nexus" between the easement and that objective. The material that follows discusses both these leeways and the influences that constrain judicial discretion. These factors also help explain how discretion and constraints influence the way judges behave. Would, for example, the majority in *Nollan* have used its discretion to define the issues as it did if it had not been dealing with an undue burden case involving an invasion of the owner's possession?

278. *See supra* notes 91-101 and accompanying text.

279. *See supra* part IV.A.

280. *See supra* part IV.B.

281. *See supra* part IV.C.

282. *See supra* part IV.D.

HeinOnline 8 J. Land Use & Envtl. L. 45 19921993

In certain ways, judges seem constrained. First, they are committed, in all four categories of cases, to search for fundamental fairness in the challenged regulation. Second, they make two demands of all regulations, following the *Agins* prescription: the regulation must substantially advance a legitimate public interest and must not take all economically viable use of the property from the owner.[283] Third, judges very seldom question 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 search 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. In the Undue Burden category this burden requires only that the owner show an invasion of the possession or that there has been a total taking.

In other ways, judges enjoy 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 the precise levels of judicial scrutiny applied in these cases. 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 find that the regulation prevents uses of property that are injurious to the public, the fairness of the regulation is more evident than when the regulation merely promotes 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. Nonetheless, 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 absent in most cases. The much touted ambiguity of the case law and the use of stricter standards arise in very unusual fact situations such as the total takings con-

283. Agins v. City of Tiburon, 447 U.S. 255, 260-61 (1980).

HeinOnline 8 J. Land Use & Envtl. L. 46 19921993

text, an invasion of possessory rights, or a rather obvious trammelling of fundamental rights. Generally, this ambiguity and these stricter rules apply only to similar fact patterns.

### *B. Principle of Maximum Fairness*

The practical lesson to be learned from the foregoing analysis is that land use regulators should strive to achieve essential fairness rather than relax with the assumption that their regulations are presumed valid. For a variety of reasons, those who draft regulations should follow a principle of maximum fairness and engage themselves in the exercises undertaken by the courts in close cases. The following principles should guide their inquiry:

1. 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.
2. Because judges do enjoy leeways in this field, and the rules in one category of cases can bleed through to other categories, there is no guarantee that a given set of facts will be placed in a particular category.
3. By proceeding fairly in regulating land uses, situations that lead courts and commentators to use phrases like "out-and-out plan of extortion"[284] and "predatory regulatory practices"[285] 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, pending in the Senate and supported by the Bush administration, would subject all federal regulations to a "takings impact analysis" that would constrain the issuance of needed and useful regulations.[286] Such legislative proposals are

---

284. Nollan v. California Coastal Comm'n, 483 U.S. 825, 837 (1987).

285. Bruce W. Burton, *Predatory Municipal Zoning Practices: Changing the Presumption of Constitutionality in the Wake of the "Takings Trilogy"*, 44 ARK. L. REV. 65, 92 (1991).

286. The Private Property Rights Act of 1991, S. 50, 102d. Cong., 1st Sess. (1991); *see supra* note 92. Bills requiring state agencies to conduct a takings impact analyses prior to the issuance of new regulations have been introduced in state legislatures in at least the following states: Alabama, *see* S. 84, Reg. Sess., 1992 Ala. Acts; Arizona, *see* H.R. 2236, S. 1005, 40th Leg., 2d Sess., 1992 Ariz. Sess. Laws; California, *see* A. 1557, Reg. Sess., 1991 Cal. Stat. (applicable to Fish and Game Commission; died in committee); Delaware, *see* S. 130, 136th Leg., Reg. Sess., 1991 Del. Laws; Kentucky, *see* H.R. 768, Reg. Sess., 1992 Ky. Acts; Maine, *see* S. 664, 115th Leg., 2d Sess., 1992 Me. Laws; Missouri, *see* H.R. 1721, 86th Leg., 2d Sess., 1992 Mo. Laws; New Hamp-

HeinOnline 8 J. Land Use & Envtl. L. 47 19921993

less likely to succeed if there is no perceived need for their protections.

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

If regulators ignore this call for maximum fairness they run the risk of offending the sensibility of the court and having their determinations scrutinized more rigorously. Regulations designed to be fair are less likely to offend the court's "sense of justice." If a reviewing court senses a balanced regulation, it is less likely to conclude that the Takings Clause is implicated, and will tend to adopt a deferential posture.

### *1. Supporting Justification*

Land use regulations not based on adequate findings to justify their private burdens will tend to throw judges 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, however, this needs "to be more than an exercise in cleverness and imagination."[287] In justifying any regulation, or analyzing whether it is constitutional, there are several key questions:

1. *Legitimate Objective.* Is the public objective pursued by the regulatory scheme clearly stated and convincingly supported?

2. *Nexus.* Is the close connection between the regulatory means and the burdens imposed obvious on the face of the regulation?

3. *Reciprocity of Advantage.* 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

---

shire, *see* H.R. 681, 152d Leg., Reg. Sess., 1991 N.H. Laws; New York, *see* A. 9110, 214th Leg., 2d Sess., 1992 N.Y. Laws; Oklahoma, *see* H.R. 1495, 43d Leg., 2d Sess., 1991 Okla. Sess. Laws; South Carolina, *see* S. 188, 1230 & 1254, 1991 S.C. Acts; Vermont, *see* P. 14, 61st Leg., 1st Sess., 1992 Vt. Laws; Washington, *see* S. 5122, 5539 & 6201, 52d Leg., Reg. Sess., 1991 Wash. Laws.

287. *Nollan*, 483 U.S. at 841 ("We view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination."); *see also* Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2898 n.12 (1992). Note that this precaution was articulated in *Nollan*, an undue burden case.

HeinOnline 8 J. Land Use & Envtl. L. 48 19921993

owners? If the regulation burdens a relatively few owners, is there a convincing justification?

4. *Undue Burden.* 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,[288] 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 such use be prevented under the state's nuisance law? Does the regulation have hardship exceptions to prevent total takings? If not, is their absence justified?

### C. *Regulatory Takings and the Comprehensive Plan*

Judges will have fewer occasions to second guess regulators when it is obvious that considerable and comprehensive planning went into the structure of the regulatory program. This is illustrated in *Gardner v. New Jersey Pinelands Commission*,[289] where federal[290] and state[291] legislation designed to protect the New Jersey Pine Barrens led to the creation of a comprehensive scheme of regulation. The legislation addressed a considerable number of factors, despite its primary focus on the preservation of the fragile ecosystem. For example, the state authorized the designation of "protection areas" for the promotion of agriculture and "appropriate patterns of compatible residential, commercial, and industrial development."[292] 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 arbitrate a full range of public concerns and private interests.[293]

In *Gardner*, the court quickly saw the analogy between this regulatory approach and zoning: "Because the Pinelands scheme is funda-

288. *See supra* note 161.
289. 593 A.2d 251, 257 (N.J. 1991).
290. National Parks and Recreation Act of 1978, 16 U.S.C. § 471i (1988).
291. The New Jersey Pinelands Protection Act, N.J. STAT. ANN. §§ 13:18A-1 to -29 (West 1991).
292. *Gardner*, 593 A.2d at 254-55.
293. *Id.* at 255.

HeinOnline 8 J. Land Use & Envtl. L. 49 19921993

mentally a regime of zoning, takings doctrine dealing with zoning is particularly relevant."[294] The court noted, as well, that the regulation had a particular impact on property with special characteristics. This placed the Pine Barren legislation in a category of "complex, special-purpose regulations"[295] where the demands of the judicial takings analysis may become more elaborate. The tone of the court's analysis in this dual context, however, remained respectful of the legislative determinations.

Under the Pine Barrens program, the large-scale reciprocity of advantage in the regulatory scheme inheres in the concern for economic as well as ecological interests, paralleling the breadth of concern of zoning itself. As Justice Stevens wrote in his dissent in *Lucas*, "[p]erhaps the most familiar application of this principle of generality arises in zoning cases. A diminution in 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."[296]

Public agencies adopt and enforce many land use regulations 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 geographical boundaries.[297] 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 found in *Lucas*, they risk invalidation under takings scrutiny. This risk is abated, however, if they are part of a more comprehensive approach such as that found in *Gardner*. Judges more easily find that regulations carrying out the objectives of a comprehensive plan accord with the principle of generality, confer reciprocal advantages, fall into the arbitration class, and merit the full deference of the reviewing court.

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

---

294. *Id.* at 257.

295. *Id.*

296. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2923 (1992) (Stevens, J., dissenting); *see supra* note 141. *Lucas* is properly distinguished from *Gardner* by the fact that the Pine Barrens regulations left the owner some discrete and valuable uses, while the Beachfront Management Act in *Lucas* did not. This difference can be perceived in the structure of the legislative scheme: the Beachfront Management Act is more narrowly focused on preserving the fragile ecosystem, while the Pine Barrens regulations, although preservation-minded, focused more broadly on allowing economic uses, while still preserving the ecosystem.

297. *See* Golden v. Ramapo, 285 N.E.2d 291, 299 (N.Y. 1972) ("[C]ommunity autonomy in land use controls has come under increasing attack . . . because of its pronounced insularism.").

HeinOnline 8 J. Land Use & Envtl. L. 50 19921993

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 often face multiple-agency reviews by different levels of government. Obviously, 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 state-wide land use legislation, coinciding with the quickening pace of regulatory takings challenges, is intriguing.[298] Such initiatives, often called growth management statutes, generally require that state and local regulations be tied to comprehensive land use plans. The plans articulate state-wide land use objectives and local plans must relate to or be consistent with those objectives. The plans place emphasis on need analysis, data gathering, and the integration of that information. Information is often assembled at the regional level and regulations are tied to meeting regional needs. The plans that result tend to be comprehensive in subject matter and geographical focus, truly arbitrating a broad range of public and private interests in a uniform fashion. These plans in turn justify specific land use regulations at the local level and guide the issuance of single-purpose regulations by state agencies. Ultimately, they coordinate 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 to defer to law makers will be reinforced greatly. If stricter scrutiny poses a threat to the potency of land use regulations, then comprehensive and intelligent legislation that adheres 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 burden, judges and 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.

---

298. *See* Symposium, *Growth Management and the Environment in the 1990s*, 24 LOY. L.A. L. REV. 905 (1991). At least the following states have adopted growth management statutes: Florida, *see* FLA. STAT. ANN. §§ 163.3161-.3243 (West 1990 & Supp. 1992); Georgia, *see* GA. CODE ANN. ch. 36-70 (Michie Supp. 1992); Hawaii, *see* HAW. REV. STAT. ch. 13-205 (1985 & Supp. 1991); Kentucky, *see* KY. REV. STAT. ANN. §§ 100.111-.197 (Michie/Bobbs-Merrill 1982 & Supp. 1990); Maine, *see* ME. REV. STAT. ANN. tit. 30-A, §§ 4311-44 (West 1991); New Jersey, *see* N.J. STAT. ANN. §§ 40:55D-1 to -112 (West Supp. 1990); Oregon, *see* OR. REV. STAT. ch. 197 (1991); Rhode Island, *see* R.I. GEN. LAWS ch. 45-22 (1991); Vermont, *see* VT. STAT. ANN. tit. 24, §§ 4301-87 (1975 & Supp. 1991); Washington, *see* WASH. REV. CODE ANN. ch. 36.70A (West 1991 & Supp. 1992).

HeinOnline 8 J. Land Use & Envtl. L. 51 19921993