

NLWJC- Kagan

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Takings (95) [3]

olation of their rights under § 1981 remains the same and will go at least partially unremedied when the person with whom the ultimate employment contract must be made is immunized from even injunctive relief. I cannot impute to the Congress which enacted § 1981 the intention to reach such an inequitable and nonsensical result. Accordingly, I must dissent.

tioner associations liable for discrimination practiced by the JATC. Specifically, they may be held liable because the trustees administering the JATC are appointed by the petitioner associations, the JATC is funded by employer contributions, and the associations exercise control over the JATC's actions. I also agree with JUSTICE O'CONNOR that the Court's opinion does not prevent the District Court from requiring petitioners to comply with incidental or ancillary provisions contained in its injunctive order.

LORETTO *v.* TELEPROMPTER MANHATTAN CATV
CORP. ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK

No. 81-244. Argued March 30, 1982—Decided June 30, 1982

A New York statute provides that a landlord must permit a cable television (CATV) company to install its CATV facilities upon his property and may not demand payment from the company in excess of the amount determined by a State Commission to be reasonable. Pursuant to the statute, the Commission ruled that a one-time \$1 payment was a reasonable fee. After purchasing a five-story apartment building in New York City, appellant landlord discovered that appellee CATV companies had installed cables on the building, both "crossovers" for serving other buildings and "noncrossovers" for serving appellant's tenants. Appellant then brought a class action for damages and injunctive relief in a New York state court, alleging, *inter alia*, that installation of the cables insofar as appellee companies relied on the New York statute constituted a taking without just compensation. Appellee New York City, which had granted the companies an exclusive franchise to provide CATV within certain areas of the city, intervened. Upholding the New York statute, the trial court granted summary judgment to appellees. The Appellate Division of the New York Supreme Court affirmed, and on further appeal the New York Court of Appeals also upheld the statute, holding that it serves the legitimate police power purpose of eliminating landlord fees and conditions that inhibit the development of CATV, which has important educational and community benefits. Rejecting appellant's argument that a physical occupation authorized by government is necessarily a taking, the court further held that the statute did not have an excessive economic impact upon appellant when measured against her aggregate property rights, did not interfere with any reasonable investment-backed expectations, and accordingly did not work a taking of appellant's property.

Held: The New York statute works a taking of a portion of appellant's property for which she is entitled to just compensation under the Fifth Amendment, as made applicable to the States by the Fourteenth Amendment. Pp. 425-441.

(a) When the "character of the governmental action," *Penn Central Transportation Co. v. New York City*, 438 U. S. 104, 124, is a permanent physical occupation of real property, there is 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. Pp. 426-435.

(b) To the extent that the government permanently occupies physical property, it effectively destroys the owner's rights to possess, use, and dispose of the property. Moreover, the owner suffers a special kind of injury when a *stranger* invades and occupies the owner's property. Such an invasion is qualitatively more severe than a regulation of the *use* of property, since the owner may have no control over the timing, extent, or nature of the invasion. And constitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied. Pp. 435-438.

(c) Here, the cable installation on appellant's building constituted a taking under the traditional physical occupation test, since it involved a direct physical attachment of plates, boxes, wires, bolts, and screws to the building, completely occupying space immediately above and upon the roof and along the building's exterior wall. There is no constitutional difference between a crossover and noncrossover installation, since portions of the installation necessary for both types of installation permanently appropriated appellant's property. The fact that the New York statute applies only to buildings used as rental property does not make it simply a regulation of the use of real property. Physical occupation of one type of property but not another is no less a physical occupation. The New York statute does not purport to give the *tenant* any enforceable property rights with respect to CATV installation, and thus cannot be construed as merely granting a tenant a property right as an appurtenance to his leasehold. Application of the physical occupation rule in this case will not have dire consequences for the government's power to adjust landlord-tenant relationships, since it in no way alters the usual analysis governing a State's power to require landlords to comply with building codes. Pp. 438-440.

53 N. Y. 2d 124, 423 N. E. 2d 320, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and POWELL, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN and WHITE, JJ., joined, *post*, p. 442.

Michael S. Gruen argued the cause and filed briefs for appellant.

Erwin N. Griswold argued the cause for appellees. With him on the brief for appellees Teleprompter Manhattan

CATV Corp. et al. was *Michael Lesch*. *Frederick A. O. Schwarz, Jr.*, and *Leonard Koerner* filed a brief for appellee City of New York.*

JUSTICE MARSHALL delivered the opinion of the Court.

This case presents the question whether a minor but permanent physical occupation of an owner's property authorized by government constitutes a "taking" of property for which just compensation is due under the Fifth and Fourteenth Amendments of the Constitution. New York law provides that a landlord must permit a cable television company to install its cable facilities upon his property. N. Y. Exec. Law § 828(1) (McKinney Supp. 1981-1982). In this case, the cable installation occupied portions of appellant's roof and the side of her building. The New York Court of Appeals ruled that this appropriation does not amount to a taking. 53 N. Y. 2d 124, 423 N. E. 2d 320 (1981). Because we conclude that such a physical occupation of property is a taking, we reverse.

I

Appellant Jean Loretto purchased a five-story apartment building located at 303 West 105th Street, New York City, in 1971. The previous owner had granted appellees Teleprompter Corp. and Teleprompter Manhattan CATV (collectively Teleprompter)¹ permission to install a cable on the building and the exclusive privilege of furnishing cable

**Michael D. Botwin* and *James J. Bierbower* filed a brief for the National Satellite Cable Association et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *Robert Abrams*, Attorney General, *pro se*, *Shirley Adelson Siegel*, Solicitor General, and *Lawrence J. Logan*, Assistant Attorney General, for the Attorney General of New York; by *Brenda L. Fox*, *James H. Ewalt*, and *Robert St. John Roper* for the National Cable Television Association, Inc.; and by *Stuart Robinowitz* and *Richard A. Rosen* for the New York State Cable Television Association.

¹Teleprompter Manhattan CATV was formerly a subsidiary, and is now a division, of Teleprompter Corp.

television (CATV) services to the tenants. The New York Court of Appeals described the installation as follows:

"On June 1, 1970 TelePrompter installed a cable slightly less than one-half inch in diameter and of approximately 30 feet in length along the length of the building about 18 inches above the roof top, and directional taps, approximately 4 inches by 4 inches by 4 inches, on the front and rear of the roof. By June 8, 1970 the cable had been extended another 4 to 6 feet and cable had been run from the directional taps to the adjoining building at 305 West 105th Street." *Id.*, at 135, 423 N. E. 2d, at 324.

Teleprompter also installed two large silver boxes along the roof cables. The cables are attached by screws or nails penetrating the masonry at approximately two-foot intervals, and other equipment is installed by bolts.

Initially, Teleprompter's roof cables did not service appellant's building. They were part of what could be described as a cable "highway" circumnavigating the city block, with service cables periodically dropped over the front or back of a building in which a tenant desired service. Crucial to such a network is the use of so-called "crossovers"—cable lines extending from one building to another in order to reach a new group of tenants.² Two years after appellant purchased the building, Teleprompter connected a "noncrossover" line—*i. e.*, one that provided CATV service to appellant's own tenants—by dropping a line to the first floor down the front of appellant's building.

²The Court of Appeals defined a "crossover" more comprehensively as occurring:

"[W]hen (1) the line servicing the tenants in a particular building is extended to adjacent or adjoining buildings, (2) an amplifier which is placed on a building is used to amplify signals to tenants in that building and in a neighboring building or buildings, and (3) a line is placed on a building, none of the tenants of which are provided CATV service, for the purpose of providing service to an adjoining or adjacent building." 53 N. Y. 2d, at 133, n. 6, 423 N. E. 2d, at 323, n. 6.

Prior to 1973, Teleprompter routinely obtained authorization for its installations from property owners along the cable's route, compensating the owners at the standard rate of 5% of the gross revenues that Teleprompter realized from the particular property. To facilitate tenant access to CATV, the State of New York enacted § 828 of the Executive Law, effective January 1, 1973. Section 828 provides that a landlord may not "interfere with the installation of cable television facilities upon his property or premises," and may not demand payment from any tenant for permitting CATV, or demand payment from any CATV company "in excess of any amount which the [State Commission on Cable Television] shall, by regulation, determine to be reasonable."³ The landlord may, however, require the CATV company or the tenant to bear the cost of installation and to indemnify for any damage caused by the installation. Pursuant to § 828(1)(b), the State Commission has ruled that a one-time \$1 payment

³New York Exec. Law § 828 (McKinney Supp. 1981-1982) provides in part:

"1. No landlord shall

"a. interfere with the installation of cable television facilities upon his property or premises, except that a landlord may require:

"i. that the installation of cable television facilities conform to such reasonable conditions as are necessary to protect the safety, functioning and appearance of the premises, and the convenience and well-being of other tenants;

"ii. that the cable television company or the tenant or a combination thereof bear the entire cost of the installation, operation or removal of such facilities; and

"iii. that the cable television company agree to indemnify the landlord for any damage caused by the installation, operation or removal of such facilities.

"b. demand or accept payment from any tenant, in any form, in exchange for permitting cable television service on or within his property or premises, or from any cable television company in exchange therefor in excess of any amount which the commission shall, by regulation, determine to be reasonable; or

"c. discriminate in rental charges, or otherwise, between tenants who receive cable television service and those who do not."

is the normal fee to which a landlord is entitled. *In the Matter of Implementation of Section 828 of the Executive Law*, No. 90004, Statement of General Policy (New York State Commission on Cable Television, Jan. 15, 1976) (Statement of General Policy), App. 51–52; Clarification of General Policy (Aug. 27, 1976), App. 68–69. The Commission ruled that this nominal fee, which the Commission concluded was equivalent to what the landlord would receive if the property were condemned pursuant to New York's Transportation Corporations Law, satisfied constitutional requirements "in the absence of a special showing of greater damages attributable to the taking." Statement of General Policy, App. 52.

Appellant did not discover the existence of the cable until after she had purchased the building. She brought a class action against Teleprompter in 1976 on behalf of all owners of real property in the State on which Teleprompter has placed CATV components, alleging that Teleprompter's installation was a trespass and, insofar as it relied on § 828, a taking without just compensation. She requested damages and injunctive relief.⁴ Appellee City of New York, which has granted Teleprompter an exclusive franchise to provide CATV within certain areas of Manhattan, intervened. The Supreme Court, Special Term, granted summary judgment to Teleprompter and the city, upholding the constitutionality of § 828 in both crossover and noncrossover situations. 98 Misc. 2d 944, 415 N. Y. S. 2d 180 (1979). The Appellate Division affirmed without opinion. 73 App. Div. 2d 849, 422 N. Y. S. 2d 550 (1979).

On appeal, the Court of Appeals, over dissent, upheld the statute. 53 N. Y. 2d 124, 423 N. E. 2d 320 (1981). The court concluded that the law requires the landlord to allow both crossover and noncrossover installations but permits him to

⁴Class-action status was granted in accordance with appellant's request, except that owners of single-family dwellings on which a CATV component had been placed were excluded. Notice to the class has been postponed, however, by stipulation.

request payment from the CATV company under § 828(1)(b), at a level determined by the State Cable Commission, only for noncrossovers. The court then ruled that the law serves a legitimate police power purpose—eliminating landlord fees and conditions that inhibit the development of CATV, which has important educational and community benefits. Rejecting the argument that a physical occupation authorized by government is necessarily a taking, the court stated that the regulation does not have an excessive economic impact upon appellant when measured against her aggregate property rights, and that it does not interfere with any reasonable investment-backed expectations. Accordingly, the court held that § 828 does not work a taking of appellant's property. Chief Judge Cooke dissented, reasoning that the physical appropriation of a portion of appellant's property is a taking without regard to the balancing analysis courts ordinarily employ in evaluating whether a regulation is a taking.

In light of its holding, the Court of Appeals had no occasion to determine whether the \$1 fee ordinarily awarded for a noncrossover installation was adequate compensation for the taking. Judge Gabrielli, concurring, agreed with the dissent that the law works a taking but concluded that the \$1 presumptive award, together with the procedures permitting a landlord to demonstrate a greater entitlement, affords just compensation. We noted probable jurisdiction. 454 U. S. 938 (1981).

II

The Court of Appeals determined that § 828 serves the legitimate public purpose of "rapid development of and maximum penetration by a means of communication which has important educational and community aspects," 53 N. Y. 2d, at 143–144, 423 N. E. 2d, at 329, and thus is within the State's police power. We have no reason to question that determination. It is a separate question, however, whether an otherwise valid regulation so frustrates property rights that compensation must be paid. See *Penn Central Transporta-*

tion Co. v. New York City, 438 U. S. 104, 127–128 (1978); *Delaware, L. & W. R. Co. v. Morristown*, 276 U. S. 182, 193 (1928). We conclude that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve. Our constitutional history confirms the rule, recent cases do not question it, and the purposes of the Takings Clause compel its retention.

A

In *Penn Central Transportation Co. v. New York City*, *supra*, the Court surveyed some of the general principles governing the Takings Clause. The Court noted that no “set formula” existed to determine, in all cases, whether compensation is constitutionally due for a government restriction of property. Ordinarily, the Court must engage in “essentially ad hoc, factual inquiries.” *Id.*, at 124. But the inquiry is not standardless. The economic impact of the regulation, especially the degree of interference with investment-backed expectations, is of particular significance. “So, too, is the character of the governmental action. A ‘taking’ may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.” *Ibid.* (citation omitted).

As *Penn Central* affirms, the Court has often upheld substantial regulation of an owner’s use of his own property where deemed necessary to promote the public interest. At the same time, we have long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause. Our cases further establish that when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred. In such a case, “the character of the government action” not only is an important factor in resolving whether the action works a taking but also is determinative.

When faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking.⁵ As early as 1872, in *Pumpelly v. Green Bay Co.*, 13 Wall. 166, this Court held that the defendant’s construction, pursuant to state authority, of a dam which permanently flooded plaintiff’s property constituted a taking. A unanimous Court stated, without qualification, that “where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution.” *Id.*, at 181. Seven years later, the Court re-emphasized the importance of a physical occupation by distinguishing a regulation that merely restricted the use of private property. In *Northern Transportation Co. v. Chicago*, 99 U. S. 635 (1879), the Court held that the city’s construc-

⁵ Professor Michelman has accurately summarized the case law concerning the role of the concept of physical invasions in the development of takings jurisprudence:

“At one time it was commonly held that, in the absence of explicit expropriation, a compensable ‘taking’ could occur *only* through physical encroachment and occupation. The modern significance of physical occupation is that courts, while they sometimes do hold nontrespassory injuries compensable, *never* deny compensation for a physical takeover. The one incontestable case for compensation (short of formal expropriation) seems to occur when the government deliberately brings it about that its agents, or the public at large, ‘regularly’ use, or ‘permanently’ occupy, space or a thing which theretofore was understood to be under private ownership.” Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law, 80 Harv. L. Rev. 1165, 1184 (1967) (emphasis in original; footnotes omitted).

See also 2 J. Sackman, *Nichols’ Law of Eminent Domain* 6–50, 6–51 (rev. 3d ed. 1980); L. Tribe, *American Constitutional Law* 460 (1978).

For historical discussions, see 53 N. Y. 2d, at 157–158, 423 N. E. 2d, at 337–338 (Cooke, C. J., dissenting); F. Bosselman, D. Callies, & J. Banta, *The Taking Issue* 51 (1973); Stoebuck, *A General Theory of Eminent Domain*, 47 Wash. L. Rev. 553, 600–601 (1972); Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 S. Ct. Rev. 63, 82; Cormack, *Legal Concepts in Cases of Eminent Domain*, 41 Yale L. J. 221, 225 (1931).

tion of a temporary dam in a river to permit construction of a tunnel was not a taking, even though the plaintiffs were thereby denied access to their premises, because the obstruction only impaired the use of plaintiffs' property. The Court distinguished earlier cases in which permanent flooding of private property was regarded as a taking, *e. g.*, *Pumpelly*, *supra*, as involving "a physical invasion of the real estate of the private owner, and a practical ouster of his possession." In this case, by contrast, "[n]o entry was made upon the plaintiffs' lot." 99 U. S., at 642.

Since these early cases, this Court has consistently distinguished between flooding cases involving a permanent physical occupation, on the one hand, and cases involving a more temporary invasion, or government action outside the owner's property that causes consequential damages within, on the other. A taking has always been found only in the former situation. See *United States v. Lynah*, 188 U. S. 445, 468-470 (1903); *Bedford v. United States*, 192 U. S. 217, 225 (1904); *United States v. Cress*, 243 U. S. 316, 327-328 (1917); *Sanguinetti v. United States*, 264 U. S. 146, 149 (1924) (to be a taking, flooding must "constitute an actual, permanent invasion of the land, amounting to an appropriation of, and not merely an injury to, the property"); *United States v. Kansas City Life Ins. Co.*, 339 U. S. 799, 809-810 (1950).

In *St. Louis v. Western Union Telegraph Co.*, 148 U. S. 92 (1893), the Court applied the principles enunciated in *Pumpelly* to a situation closely analogous to the one presented today. In that case, the Court held that the city of St. Louis could exact reasonable compensation for a telegraph company's placement of telegraph poles on the city's public streets. The Court reasoned:

"The use which the [company] makes of the streets is an exclusive and permanent one, and not one temporary, shifting and in common with the general public. The ordinary traveler, whether on foot or in a vehicle, passes to and fro along the streets, and his use and occupation

thereof are temporary and shifting. The space he occupies one moment he abandons the next to be occupied by any other traveller. . . . *But the use made by the telegraph company is, in respect to so much of the space as it occupies with its poles, permanent and exclusive.* It as effectually and permanently dispossesses the general public as if it had destroyed that amount of ground. Whatever benefit the public may receive in the way of transportation of messages, that space is, so far as respects its actual use for purposes of highway and personal travel, wholly lost to the public. . . .

" . . . It matters not for what that exclusive appropriation is taken, whether for steam railroads or street railroads, telegraphs or telephones, the state may if it chooses exact from the party or corporation given such exclusive use pecuniary compensation to the general public for being deprived of the common use of the portion thus appropriated." *Id.*, at 98-99, 101-102 (emphasis added).⁶

Similarly, in *Western Union Telegraph Co. v. Pennsylvania R. Co.*, 195 U. S. 540 (1904), a telegraph company constructed and operated telegraph lines over a railroad's right of way. In holding that federal law did not grant the company the right of eminent domain or the right to operate the lines absent the railroad's consent, the Court assumed that

⁶The City of New York objects that this case only involved a city's right to charge for use of its streets, and not the power of eminent domain; the city could have excluded the company from any use of its streets. But the physical occupation principle upon which the right to compensation was based has often been cited as authority in eminent domain cases. See, *e. g.*, *Western Union Telegraph Co. v. Pennsylvania R. Co.*, 195 U. S. 540, 566-567 (1904); *California v. United States*, 395 F. 2d 261, 263, n. 4 (CA9 1968). Also, the Court squarely held that insofar as the company relied on a federal statute authorizing its use of post roads, an appropriation of state property would require compensation. *St. Louis v. Western Union Telegraph Co.*, 148 U. S., at 101.

the invasion of the telephone lines would be a compensable taking. *Id.*, at 570 (the right-of-way “cannot be appropriated in whole or in part except upon the payment of compensation”). Later cases, relying on the character of a physical occupation, clearly establish that permanent occupations of land by such installations as telegraph and telephone lines, rails, and underground pipes or wires are takings even if they occupy only relatively insubstantial amounts of space and do not seriously interfere with the landowner’s use of the rest of his land. See, e. g., *Lovett v. West Va. Central Gas Co.*, 65 W. Va. 739, 65 S. E. 196 (1909); *Southwestern Bell Telephone Co. v. Webb*, 393 S. W. 2d 117, 121 (Mo. App. 1965). Cf. *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U. S. 327 (1922). See generally 2 J. Sackman, *Nichols’ Law of Eminent Domain* § 6.21 (rev. 3d ed. 1980).⁷

More recent cases confirm the distinction between a permanent physical occupation, a physical invasion short of an occupation, and a regulation that merely restricts the use of property. In *United States v. Causby*, 328 U. S. 256 (1946), the Court ruled that frequent flights immediately above a landowner’s property constituted a taking, comparing such overflights to the quintessential form of a taking:

“If, by reason of the frequency and altitude of the flights, respondents could not use this land for any purpose, their loss would be complete. It would be as complete as if the United States had entered upon the surface of the land and taken exclusive possession of it.” *Id.*, at 261 (footnote omitted).

⁷ Early commentators viewed a physical occupation of real property as the quintessential deprivation of property. See, e. g., 1 W. Blackstone, *Commentaries* *139; J. Lewis, *Law of Eminent Domain in the United States* 197 (1888) (“Any invasion of property, except in case of necessity . . . , either upon, above or below the surface, and whether temporary or permanent, is a *taking*: as by constructing a ditch through it, passing under it by a tunnel, laying gas, water or sewer pipes in the soil, or extending structures over it, as a bridge or telephone wire” (footnote omitted; emphasis in original)); 1 P. Nichols, *Law of Eminent Domain* 282 (2d ed. 1917).

As the Court further explained,

“We would not doubt that, if the United States erected an elevated railway over respondents’ land at the precise altitude where its planes now fly, there would be a partial taking, even though none of the supports of the structure rested on the land. The reason is that there would be an intrusion so immediate and direct as to subtract from the owner’s full enjoyment of the property and to limit his exploitation of it.” *Id.*, at 264–265.

The Court concluded that the damages to the respondents “were not merely consequential. They were the product of a direct invasion of respondents’ domain.” *Id.*, at 265–266. See also *Griggs v. Allegheny County*, 369 U. S. 84 (1962).

Two wartime takings cases are also instructive. In *United States v. Pewee Coal Co.*, 341 U. S. 114 (1951), the Court unanimously held that the Government’s seizure and direction of operation of a coal mine to prevent a national strike of coal miners constituted a taking, though members of the Court differed over which losses suffered during the period of Government control were compensable. The plurality had little difficulty concluding that because there had been an “actual taking of possession and control,” the taking was as clear as if the Government held full title and ownership. *Id.*, at 116 (plurality opinion of Black, J., with whom Frankfurter, Douglas, and Jackson, JJ., joined; no other Justice challenged this portion of the opinion). In *United States v. Central Eureka Mining Co.*, 357 U. S. 155 (1958), by contrast, the Court found no taking where the Government had issued a wartime order requiring nonessential gold mines to cease operations for the purpose of conserving equipment and manpower for use in mines more essential to the war effort. Over dissenting Justice Harlan’s complaint that “as a practical matter the Order led to consequences no different from those that would have followed the temporary acquisition of physical possession of these mines by the United States,” *id.*, at 181, the Court reasoned that “the Government did not oc-

copy, use, or in any manner take physical possession of the gold mines or of the equipment connected with them." *Id.*, at 165–166. The Court concluded that the temporary though severe restriction on *use* of the mines was justified by the exigency of war.⁸ Cf. *YMCA v. United States*, 395 U. S. 85, 92 (1969) ("Ordinarily, of course, government occupation of private property deprives the private owner of his use of the property, and it is this deprivation for which the Constitution requires compensation").

Although this Court's most recent cases have not addressed the precise issue before us, they have emphasized that physical *invasion* cases are special and have not repudiated the rule that any permanent physical *occupation* is a taking. The cases state or imply that a physical invasion is subject to a balancing process, but they do not suggest that a permanent physical occupation would ever be exempt from the Takings Clause.

Penn Central Transportation Co. v. New York City, as noted above, contains one of the most complete discussions of the Takings Clause. The Court explained that resolving whether public action works a taking is ordinarily an ad hoc inquiry in which several factors are particularly significant—the economic impact of the regulation, the extent to which it interferes with investment-backed expectations, and the character of the governmental action. 438 U. S., at 124. The opinion does not repudiate the rule that a permanent physical occupation is a government action of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine.⁹

⁸ Indeed, although dissenting Justice Harlan would have treated the restriction as if it were a physical occupation, it is significant that he relied on physical appropriation as the paradigm of a taking. See *United States v. Central Eureka Mining Co.*, 357 U. S., at 181, 183–184.

⁹ The City of New York and the opinion of the Court of Appeals place great emphasis on *Penn Central's* reference to a physical invasion "by government," 438 U. S., at 124, and argue that a similar invasion by a private

In *Kaiser Aetna v. United States*, 444 U. S. 164 (1979), the Court held that the Government's imposition of a navigational servitude requiring public access to a pond was a taking where the landowner had reasonably relied on Government consent in connecting the pond to navigable water. The Court emphasized that the servitude took the landowner's right to exclude, "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Id.*, at 176. The Court explained:

"This is not a case in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioner's private property; rather, the imposition of the navigational servitude in this context will result in an *actual physical invasion* of the privately owned marina. . . . And even if the Government physically invades only an easement in property, it must nonetheless pay compensation. See *United States v. Causby*, 328 U. S. 256, 265 (1946); *Portsmouth Co. v. United States*, 260 U. S. 327 (1922)." *Id.*, at 180 (emphasis added).

Although the easement of passage, not being a permanent occupation of land, was not considered a taking *per se*, *Kaiser Aetna* reemphasizes that a physical invasion is a government intrusion of an unusually serious character.¹⁰

party should be treated differently. We disagree. A permanent physical occupation authorized by state law is a taking without regard to whether the State, or instead a party authorized by the State, is the occupant. See, e. g., *Pumpelly v. Green Bay Co.*, 13 Wall. 166 (1872). *Penn Central* simply holds that in cases of physical invasion short of permanent appropriation, the fact that the government itself commits an invasion from which it directly benefits is one relevant factor in determining whether a taking has occurred. 438 U. S., at 124, 128.

¹⁰ See also *Andrus v. Allard*, 444 U. S. 51 (1979). That case held that the prohibition of the sale of eagle feathers was not a taking as applied to traders of bird artifacts. "The regulations challenged here do not compel the surrender of the artifacts, and there is no physical invasion or restraint upon them. . . . In this case, it is crucial that appellees retain the rights

Another recent case underscores the constitutional distinction between a permanent occupation and a temporary physical invasion. In *PruneYard Shopping Center v. Robins*, 447 U. S. 74 (1980), the Court upheld a state constitutional requirement that shopping center owners permit individuals to exercise free speech and petition rights on their property, to which they had already invited the general public. The Court emphasized that the State Constitution does not prevent the owner from restricting expressive activities by imposing reasonable time, place, and manner restrictions to minimize interference with the owner's commercial functions. Since the invasion was temporary and limited in nature, and since the owner had not exhibited an interest in excluding all persons from his property, "the fact that [the solicitors] may have 'physically invaded' [the owners'] property cannot be viewed as determinative." *Id.*, at 84.¹¹

In short, when the "character of the governmental action," *Penn Central*, 438 U. S., at 124, is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to

to possess and transport their property, and to donate or devise the protected birds. . . . [L]oss of future profits—unaccompanied by any physical property restriction—provides a slender reed upon which to rest a takings claim." *Id.*, at 65–66.

¹¹Teleprompter's reliance on labor cases requiring companies to permit access to union organizers, see, e. g., *Hudgens v. NLRB*, 424 U. S. 507 (1976); *Central Hardware Co. v. NLRB*, 407 U. S. 539 (1972); *NLRB v. Babcock & Wilcox Co.*, 351 U. S. 105 (1956), is similarly misplaced. As we recently explained:

"[T]he allowed intrusion on property rights is limited to that necessary to facilitate the exercise of employees' § 7 rights [to organize under the National Labor Relations Act]. After the requisite need for access to the employer's property has been shown, the access is limited to (i) union organizers; (ii) prescribed non-working areas of the employer's premises; and (iii) the duration of the organization activity. In short, the principle of accommodation announced in *Babcock* is limited to labor organization campaigns, and the 'yielding' of property rights it may require is both temporary and limited." *Central Hardware Co.*, *supra*, at 545.

whether the action achieves an important public benefit or has only minimal economic impact on the owner.

B

The historical rule that a permanent physical occupation of another's property is a taking has more than tradition to commend it. Such an appropriation is perhaps the most serious form of invasion of an owner's property interests. To borrow a metaphor, cf. *Andrus v. Allard*, 444 U. S. 51, 65–66 (1979), the government does not simply take a single "strand" from the "bundle" of property rights: it chops through the bundle, taking a slice of every strand.

Property rights in a physical thing have been described as the rights "to possess, use and dispose of it." *United States v. General Motors Corp.*, 323 U. S. 373, 378 (1945). To the extent that the government permanently occupies physical property, it effectively destroys *each* of these rights. First, the owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space. The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights.¹² See *Kaiser Aetna*,

¹²The permanence and absolute exclusivity of a physical occupation distinguish it from temporary limitations on the right to exclude. Not every physical invasion is a taking. As *PruneYard Shopping Center v. Robins*, 447 U. S. 74 (1980), *Kaiser Aetna v. United States*, 444 U. S. 164 (1979), and the intermittent flooding cases reveal, such temporary limitations are subject to a more complex balancing process to determine whether they are a taking. The rationale is evident: they do not absolutely dispossess the owner of his rights to use, and exclude others from, his property.

The dissent objects that the distinction between a permanent physical occupation and a temporary invasion will not always be clear. *Post*, at 448. This objection is overstated, and in any event is irrelevant to the critical point that a permanent physical occupation is unquestionably a taking. In the antitrust area, similarly, this Court has not declined to apply a *per se* rule simply because a court must, at the boundary of the rule, apply the rule of reason and engage in a more complex balancing analysis.

444 U. S., at 179–180; see also Restatement of Property § 7 (1936). Second, the permanent physical occupation of property forever denies the owner any power to control the use of the property; he not only cannot exclude others, but can make no nonpossessory use of the property. Although deprivation of the right to use and obtain a profit from property is not, in every case, independently sufficient to establish a taking, see *Andrus v. Allard*, *supra*, at 66, it is clearly relevant. Finally, even though the owner may retain the bare legal right to dispose of the occupied space by transfer or sale, the permanent occupation of that space by a stranger will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property.

Moreover, an owner suffers a special kind of injury when a *stranger* directly invades and occupies the owner's property. As Part II–A, *supra*, indicates, property law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property. To require, as well, that the owner permit another to exercise complete dominion literally adds insult to injury. See Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1228, and n. 110 (1967). Furthermore, such an occupation is qualitatively more severe than a regulation of the *use* of property, even a regulation that imposes affirmative duties on the owner, since the owner may have no control over the timing, extent, or nature of the invasion. See n. 19, *infra*.

The traditional rule also avoids otherwise difficult line-drawing problems. Few would disagree that if the State required landlords to permit third parties to install swimming pools on the landlords' rooftops for the convenience of the tenants, the requirement would be a taking. If the cable installation here occupied as much space, again, few would disagree that the occupation would be a taking. But constitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occu-

ped.¹³ Indeed, it is possible that in the future, additional cable installations that more significantly restrict a landlord's use of the roof of his building will be made. Section 828 requires a landlord to permit such multiple installations.¹⁴

Finally, whether a permanent physical occupation has occurred presents relatively few problems of proof. The placement of a fixed structure on land or real property is an obvious fact that will rarely be subject to dispute. Once the fact of occupation is shown, of course, a court should consider the *extent* of the occupation as one relevant factor in determining the compensation due.¹⁵ For that reason, moreover, there is

¹³ In *United States v. Causby*, 328 U. S. 256 (1946), the Court approvingly cited *Butler v. Frontier Telephone Co.*, 186 N. Y. 486, 79 N. E. 716 (1906), holding that ejection would lie where a telephone wire was strung across the plaintiff's property without touching the soil. The Court quoted the following language:

"[A]n owner is entitled to the absolute and undisturbed possession of every part of his premises, including the space above, as much as a mine beneath. If the wire had been a huge cable, several inches thick and but a foot above the ground, there would have been a difference in degree, but not in principle. Expand the wire into a beam supported by posts standing upon abutting lots without touching the surface of plaintiff's land, and the difference would still be one of degree only. Enlarge the beam into a bridge, and yet space only would be occupied. Erect a house upon the bridge, and the air above the surface of the land would alone be disturbed." 328 U. S., at 265, n. 10, quoting *Butler v. Frontier Telephone Co.*, *supra*, at 491–492, 79 N. E. 718.

¹⁴ Although the City of New York has granted an exclusive franchise to Teleprompter, it is not required to do so under state law, see N. Y. Exec. Law § 811 *et seq.* (McKinney Supp. 1981–1982), and future changes in technology may cause the city to reconsider its decision. Indeed, at present some communities apparently grant nonexclusive franchises. Brief for National Satellite Cable Association et al. as *Amici Curiae* 21.

¹⁵ In this case, the Court of Appeals noted testimony preceding the enactment of § 828 that the landlord's interest in excluding cable installation "consists entirely of insisting that some negligible unoccupied space remain unoccupied." 53 N. Y. 2d, at 141, 423 N. E. 2d, at 328 (emphasis omitted). The State Cable Commission referred to the same testimony in establishing a \$1 presumptive award. Statement of General Policy, App. 48.

A number of the dissent's arguments—that § 828 "likely increases both the building's resale value and its attractiveness on the rental market,"

less need to consider the extent of the occupation in determining whether there is a taking in the first instance.

C

Teleprompter's cable installation on appellant's building constitutes a taking under the traditional test. The installation involved a direct physical attachment of plates, boxes, wires, bolts, and screws to the building, completely occupying space immediately above and upon the roof and along the building's exterior wall.¹⁶

In light of our analysis, we find no constitutional difference between a crossover and a noncrossover installation. The portions of the installation necessary for both crossovers and noncrossovers permanently appropriate appellant's property. Accordingly, each type of installation is a taking.

Appellees raise a series of objections to application of the traditional rule here. Teleprompter notes that the law applies only to buildings used as rental property, and draws the

post, at 452, and that appellant might have no alternative use for the cable-occupied space, *post*, at 453-454—may also be relevant to the amount of compensation due. It should be noted, however, that the first argument is speculative and is contradicted by appellant's testimony that she and "the whole block" would be able to sell their buildings for a higher price absent the installation. App. 100.

¹⁶ It is constitutionally irrelevant whether appellant (or her predecessor in title) had previously occupied this space, since a "landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land." *United States v. Causby, supra*, at 264.

The dissent asserts that a taking of about one-eighth of a cubic foot of space is not of constitutional significance. *Post*, at 443. The assertion appears to be factually incorrect, since it ignores the two large silver boxes that appellant identified as part of the installation. App. 90; Loretto Affidavit in Support of Motion for Summary Judgment (Apr. 21, 1978), Appellants' Appendix in No. 8300/76 (N. Y. App.), p. 77. Although the record does not reveal their size, appellant states that they are approximately 18" x 12" x 6", Brief for Appellant 6 n.*, and appellees do not dispute this statement. The displaced volume, then, is in excess of 1½ cubic feet. In any event, these facts are not critical: whether the installation is a taking does not depend on whether the volume of space it occupies is bigger than a breadbox.

conclusion that the law is simply a permissible regulation of the use of real property. We fail to see, however, why a physical occupation of one type of property but not another type is any less a physical occupation. Insofar as Teleprompter means to suggest that this is not a permanent physical invasion, we must differ. So long as the property remains residential and a CATV company wishes to retain the installation, the landlord must permit it.¹⁷

Teleprompter also asserts the related argument that the State has effectively granted a tenant the property right to have a CATV installation placed on the roof of his building, as an appurtenance to the tenant's leasehold. The short answer is that §828(1)(a) does not purport to give the *tenant* any enforceable property rights with respect to CATV installation, and the lower courts did not rest their decisions on this ground.¹⁸ Of course, Teleprompter, not appellant's tenants, actually owns the installation. Moreover, the government does not have unlimited power to redefine property rights. See *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U. S. 155, 164 (1980) ("a State, by *ipse dixit*, may not transform private property into public property without compensation").

¹⁷ It is true that the landlord could avoid the requirements of §828 by ceasing to rent the building to tenants. But a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation. Teleprompter's broad "use-dependency" argument proves too much. For example, it would allow the government to require a landlord to devote a substantial portion of his building to vending and washing machines, with all profits to be retained by the owners of these services and with no compensation for the deprivation of space. It would even allow the government to requisition a certain number of apartments as permanent government offices. The right of a property owner to exclude a stranger's physical occupation of his land cannot be so easily manipulated.

¹⁸ We also decline to hazard an opinion as to the respective rights of the landlord and tenant under state law *prior* to enactment of §828 to use the space occupied by the cable installation, an issue over which the parties sharply disagree.

Finally, we do not agree with appellees that application of the physical occupation rule will have dire consequences for the government's power to adjust landlord-tenant relationships. This Court has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails. See, e. g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U. S. 241 (1964) (discrimination in places of public accommodation); *Queenside Hills Realty Co. v. Saxl*, 328 U. S. 80 (1946) (fire regulation); *Bowles v. Willingham*, 321 U. S. 503 (1944) (rent control); *Home Building & Loan Assn. v. Blaisdell*, 290 U. S. 398 (1934) (mortgage moratorium); *Edgar A. Levy Leasing Co. v. Siegel*, 258 U. S. 242 (1922) (emergency housing law); *Block v. Hirsh*, 256 U. S. 135 (1921) (rent control). In none of these cases, however, did the government authorize the permanent occupation of the landlord's property by a third party. Consequently, our holding today in no way alters the analysis governing the State's power to require landlords to comply with building codes and provide utility connections, mailboxes, smoke detectors, fire extinguishers, and the like in the common area of a building. So long as these regulations do not require the landlord to suffer the physical occupation of a portion of his building by a third party, they will be analyzed under the multifactor inquiry generally applicable to nonpossessory governmental activity. See *Penn Central Transportation Co. v. New York City*, 438 U. S. 104 (1978).¹⁹

¹⁹ If § 828 required landlords to provide cable installation if a tenant so desires, the statute might present a different question from the question before us, since the landlord would own the installation. Ownership would give the landlord rights to the placement, manner, use, and possibly the disposition of the installation. The fact of ownership is, contrary to the dissent, not simply "incidental," *post*, at 450; it would give a landlord (rather than a CATV company) full authority over the installation except only as government specifically limited that authority. The *landlord* would de-

III

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.

Furthermore, our conclusion that § 828 works a taking of a portion of appellant's property does not presuppose that the fee which many landlords had obtained from Teleprompter prior to the law's enactment is a proper measure of the value of the property taken. The issue of the amount of compensation that is due, on which we express no opinion, is a matter for the state courts to consider on remand.²⁰

side how to comply with applicable government regulations concerning CATV and therefore could minimize the physical, esthetic, and other effects of the installation. Moreover, if the landlord wished to repair, demolish, or construct in the area of the building where the installation is located, he need not incur the burden of obtaining the CATV company's cooperation in moving the cable.

In this case, by contrast, appellant suffered injury that might have been obviated if she had owned the cable and could exercise control over its installation. The drilling and stapling that accompanied installation apparently caused physical damage to appellant's building. App. 83, 95-96, 104. Appellant, who resides in her building, further testified that the cable installation is "ugly." *Id.*, at 99. Although § 828 provides that a landlord may require "reasonable" conditions that are "necessary" to protect the appearance of the premises and may seek indemnity for damage, these provisions are somewhat limited. Even if the provisions are effective, the inconvenience to the landlord of initiating the repairs remains a cognizable burden.

²⁰ In light of our disposition of appellant's takings claim, we do not address her contention that § 828 deprives her of property without due process of law.

The judgment of the New York Court of Appeals is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE WHITE join, dissenting.

If the Court's decisions construing the Takings Clause state anything clearly, it is that "[t]here is no set formula to determine where regulation ends and taking begins." *Goldblatt v. Town of Hempstead*, 369 U. S. 590, 594 (1962).¹

In a curiously anachronistic decision, the Court today acknowledges its historical disavowal of set formulae in almost the same breath as it constructs a rigid *per se* takings rule: "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." *Ante*, at 426. To sustain its rule against our recent precedents, the Court erects a strained and untenable distinction between "temporary physical invasions," whose constitutionality concededly "is subject to a balancing process," and "permanent physical occupations," which are "taking[s] without regard to other factors that a court might ordinarily examine." *Ante*, at 432.

In my view, the Court's approach "reduces the constitutional issue to a formalistic quibble" over whether property has been "permanently occupied" or "temporarily invaded." *Sax, Takings and the Police Power*, 74 *Yale L. J.* 36, 37

¹ See *Kaiser Aetna v. United States*, 444 U. S. 164, 175 (1979); *Andrus v. Allard*, 444 U. S. 51, 65 (1979) ("There is no abstract or fixed point at which judicial intervention under the Takings Clause becomes appropriate"); *Penn Central Transportation Co. v. New York City*, 438 U. S. 104, 124 (1978); *United States v. Caltex, Inc.*, 344 U. S. 149, 156 (1952) ("No rigid rules can be laid down to distinguish compensable losses from noncompensable losses"); *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393, 416 (1922) (a takings question "is a question of degree—and therefore cannot be disposed of by general propositions").

(1964). The Court's application of its formula to the facts of this case vividly illustrates that its approach is potentially dangerous as well as misguided. Despite its concession that "States have broad power to regulate . . . the landlord-tenant relationship . . . without paying compensation for all economic injuries that such regulation entails," *ante*, at 440, the Court uses its rule to undercut a carefully considered legislative judgment concerning landlord-tenant relationships. I therefore respectfully dissent.

I

Before examining the Court's new takings rule, it is worth reviewing what was "taken" in this case. At issue are about 36 feet of cable one-half inch in diameter and two 4" x 4" x 4" metal boxes. Jointly, the cable and boxes occupy only about one-eighth of a cubic foot of space on the roof of appellant's Manhattan apartment building. When appellant purchased that building in 1971, the "physical invasion" she now challenges had already occurred.² Appellant did not bring this action until about five years later, demanding 5% of appellee Teleprompter's gross revenues from her building, and claiming that the operation of N. Y. Exec. Law § 828 (McKinney

² In January 1968, appellee Teleprompter signed a 5-year installation agreement with the building's previous owner in exchange for a flat fee of \$50. Appellee installed both the 30-foot main cable and its 4- to 6-foot "crossover" extension in June 1970. For two years after taking possession of the building and the appurtenant equipment, appellant did not object to the cable's presence. Indeed, despite numerous inspections, appellant had never even noticed the equipment until Teleprompter first began to provide cable television service to one of her tenants. 53 N. Y. 2d 124, 134-135, 423 N. E. 2d 320, 324 (1981). Nor did appellant thereafter ever specifically ask Teleprompter to remove the components from her building. App. 107, 108, 110.

Although the Court alludes to the presence of "two large silver boxes" on appellant's roof, *ante*, at 438, n. 16, the New York Court of Appeals' opinion nowhere mentions them, nor are their dimensions stated anywhere in the record.

Supp. 1981-1982) "took" her property. The New York Supreme Court, the Appellate Division, and the New York Court of Appeals all rejected that claim, upholding § 828 as a valid exercise of the State's police power.

The Court of Appeals held that

"the State may proscribe a trespass action by landlords generally against a cable TV company which places a cable and other fixtures on the roof of any landlord's building, in order to protect the right of the tenants of rental property, who will ultimately have to pay any charge a landlord is permitted to collect from the cable TV company, to obtain TV service in their respective apartments." 53 N. Y. 2d 124, 153, 423 N. E. 2d 320, 335 (1981).

In so ruling, the court applied the multifactor balancing test prescribed by this Court's recent Takings Clause decisions. Those decisions teach that takings questions should be resolved through "essentially ad hoc, factual inquiries," *Kaiser Aetna v. United States*, 444 U. S. 164, 175 (1979), into "such factors as the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations." *PruneYard Shopping Center v. Robins*, 447 U. S. 74, 83 (1980). See 53 N. Y. 2d, at 144-151, 423 N. E. 2d, at 330-334.

The Court of Appeals found, first, that § 828 represented a reasoned legislative effort to arbitrate between the interests of tenants and landlords and to encourage development of an important educational and communications medium.³ *Id.*, at

³The court found that the state legislature had enacted § 828 to "prohibit gouging and arbitrary action" by "landlords [who] in many instances have imposed extremely onerous fees and conditions on cable access to their buildings." 53 N. Y. 2d, at 141, 423 N. E. 2d, at 328, citing testimony of Joseph C. Swidler, Chairman of the Public Service Commission, before the Joint Legislative Committee considering the CATV bill.

Given the growing importance of cable television, the legislature decided that urban tenants' need for access to that medium justified a minor intrusion upon the landlord's interest, which "consists entirely of insisting that

143-145, 423 N. E. 2d, at 329-330. Moreover, under *PruneYard Shopping Center v. Robins*, 447 U. S., at 83-84, the fact that § 828 authorized Teleprompter to make a minor physical intrusion upon appellant's property was in no way determinative of the takings question. 53 N. Y. 2d, at 146-147, 423 N. E. 2d, at 331.⁴

Second, the court concluded that the statute's economic impact on appellant was *de minimis* because § 828 did not affect the fair return on her property. 53 N. Y. 2d, at 148-150, 423 N. E. 2d, at 332-333. Third, the statute did not interfere with appellant's reasonable investment-backed expectations. *Id.*, at 150-151, 423 N. E. 2d, at 333-334. When appellant purchased the building, she was unaware of the existence of the cable. See n. 2, *supra*. Thus, she could not have invested in the building with any reasonable expectation that the one-eighth cubic foot of space occupied by the cable television installment would become income-productive. 53 N. Y. 2d, at 155, 423 N. E. 2d, at 336.

some negligible unoccupied space remain unoccupied. The tenant's interest clearly is more substantial, consisting of a right to receive (and perhaps send) communications from and to the outside world. In the electronic age, the landlord should not be able to preclude a tenant from obtaining CATV service (or to exact a surcharge for allowing the service) any more than he could preclude a tenant from receiving mail or telegrams directed to him." *Ibid.*, citing Regulation of Cable Television by the State of New York, Report to the New York Public Service Commission by Commissioner William K. Jones 207 (1970).

⁴Section 828 carefully regulates the cable television company's physical intrusion onto the landlord's property. If the landlord requests, the company must conform its installations "to such reasonable conditions as are necessary to protect the safety, functioning and appearance of the premises, and the convenience and well-being of other tenants." N. Y. Exec. Law § 828(1)(a)(i) (McKinney Supp. 1981-1982). Furthermore, the company must "agree to indemnify the landlord for any damage caused by the installation, operation or removal of such facilities." § 828(1)(a)(iii). Finally, the statute authorizes the landlord to require either "the cable television company or the tenant or a combination thereof [to] bear the entire cost of the installation, operation or removal" of any equipment. § 828(1)(a)(ii).

II

Given that the New York Court of Appeals' straightforward application of this Court's balancing test yielded a finding of no taking, it becomes clear why the Court now constructs a *per se* rule to reverse. The Court can escape the result dictated by our recent takings cases only by resorting to bygone precedents and arguing that "permanent physical occupations" somehow differ qualitatively from all other forms of government regulation.

The Court argues that a *per se* rule based on "permanent physical occupation" is both historically rooted, see *ante*, at 426-435, and jurisprudentially sound, see *ante*, at 435-438. I disagree in both respects. The 19th-century precedents relied on by the Court lack any vitality outside the agrarian context in which they were decided.⁵ But if, by chance, they

⁵The Court properly acknowledges that none of our recent takings decisions have adopted a *per se* test for either temporary physical invasions or permanent physical occupations. See *ante*, at 432-435, and 435, n. 12. While the Court relies on historical dicta to support its *per se* rule, the only holdings it cites fall into two categories: a number of cases involving flooding, *ante*, at 427-428, and *St. Louis v. Western Union Telegraph Co.*, 148 U. S. 92 (1893), cited *ante*, at 428.

In 1950, the Court noted that the first line of cases stands for "the principle that the destruction of privately owned land by flooding is 'a taking' to the extent of the destruction caused," and that those rulings had already "been limited by later decisions in some respects." *United States v. Kansas City Life Ins. Co.*, 339 U. S. 799, 809-810. Even at the time of its decision, *St. Louis v. Western Union Telegraph Co.* addressed only the question "[w]hether the city has power to collect rental for the use of streets and public places" when a private company seeks exclusive use of land whose "use is common to all members of the public, and . . . [is] open equally to citizens of other States with those of the State in which the street is situate." 148 U. S., at 98-99. On its face, that issue is distinct from the question here: whether appellant may extract from Teleprompter a fee for the continuing use of her roof space above and beyond the fee set by statute, namely, "any amount which the commission shall, by regulation, determine to be reasonable." N. Y. Exec. Law § 828(1)(b) (McKinney Supp. 1982).

have any lingering vitality, then, in my view, those cases stand for a constitutional rule that is uniquely unsuited to the modern urban age. Furthermore, I find logically untenable the Court's assertion that § 828 must be analyzed under a *per se* rule because it "effectively destroys" three of "the most treasured strands in an owner's bundle of property rights," *ante*, at 435.

A

The Court's recent Takings Clause decisions teach that *nonphysical* government intrusions on private property, such as zoning ordinances and other land-use restrictions, have become the rule rather than the exception. Modern government regulation exudes intangible "externalities" that may diminish the value of private property far more than minor physical touchings. Nevertheless, as the Court recognizes, it has "often upheld substantial regulation of an owner's use of his own property where deemed necessary to promote the public interest." *Ante*, at 426. See, e. g., *Agins v. City of Tiburon*, 447 U. S. 255 (1980); *Penn Central Transportation Co. v. New York City*, 438 U. S. 104, 124-125 (1978); *Village of Euclid v. Ambler Realty Co.*, 272 U. S. 365 (1926).

Precisely because the extent to which the government may injure private interests now depends so little on whether or not it has authorized a "physical contact," the Court has avoided *per se* takings rules resting on outmoded distinctions between physical and nonphysical intrusions. As one commentator has observed, a takings rule based on such a distinction is inherently suspect because "its capacity to distinguish, even crudely, between significant and insignificant losses is too puny to be taken seriously." Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1227 (1967).

Surprisingly, the Court draws an even finer distinction today—between "temporary physical invasions" and "perma-

ment physical occupations." When the government authorizes the latter type of intrusion, the Court would find "a taking without regard to the public interests" the regulation may serve. *Ante*, at 426. Yet an examination of each of the three words in the Court's "permanent physical occupation" formula illustrates that the newly created distinction is even less substantial than the distinction between physical and nonphysical intrusions that the Court already has rejected.

First, what does the Court mean by "permanent"? Since all "temporary limitations on the right to exclude" remain "subject to a more complex balancing process to determine whether they are a taking," *ante*, at 435, n. 12, the Court presumably describes a government intrusion that lasts forever. But as the Court itself concedes, § 828 does not require appellant to permit the cable installation forever, but only "[s]o long as the property remains residential and a CATV company wishes to retain the installation." *Ante*, at 439. This is far from "permanent."

The Court reaffirms that "States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails." *Ante*, at 440. Thus, § 828 merely defines one of the many statutory responsibilities that a New Yorker accepts when she enters the rental business. If appellant occupies her own building, or converts it into a commercial property, she becomes perfectly free to exclude Teleprompter from her one-eighth cubic foot of roof space. But once appellant chooses to use her property for rental purposes, she must comply with all reasonable government statutes regulating the landlord-tenant relationship.⁶ If § 828 authorizes a "permanent" occupation,

⁶In my view, the fact that § 828 incidentally protects so-called "crossover" wires that do not currently serve tenants, see *ante*, at 422, n. 2, does not affect § 828's fundamental character as a piece of landlord-tenant legislation. As the Court recognizes, *ante*, at 422, crossovers are crucial links in the cable "highway," and represent the simplest and most economical

and thus works a taking "without regard to the public interests that it may serve," then all other New York statutes that require a landlord to make physical attachments to his rental property also must constitute takings, even if they serve indisputably valid public interests in tenant protection and safety.⁷

The Court denies that its theory invalidates these statutes, because they "do not require the landlord to suffer the physical occupation of a portion of his building by a third party." *Ante*, at 440. But surely this factor cannot be determinative, since the Court simultaneously recognizes that tem-

way to provide service to tenants in a group of buildings in close proximity. Like the Court, I find "no constitutional difference between a crossover and a noncrossover installation," *ante*, at 438. Even assuming, *arguendo*, that the crossover extension in this case works a taking, I would be prepared to hold that the incremental governmental intrusion caused by that 4- to 6-foot wire, which occupies the cubic volume of a child's building block, is a *de minimis* deprivation entitled to no compensation.

⁷See, *e. g.*, N. Y. Mult. Dwell. Law § 35 (McKinney 1974) (requiring entrance doors and lights); § 36 (windows and skylights for public halls and stairs); § 50-a (Supp. 1982) (locks and intercommunication systems); § 50-c (lobby attendants); § 51-a (peepholes); § 51-b (elevator mirrors); § 53 (fire escapes); § 57 (bells and mail receptacles); § 67(3) (fire sprinklers). See also *Queenside Hills Realty Co. v. Saxl*, 328 U. S. 80 (1946) (upholding constitutionality of New York fire sprinkler provision).

These statutes specify in far greater detail than § 828 what types of physical facilities a New York landlord must provide his tenants and where he must provide them. See, *e. g.*, N. Y. Mult. Dwell. Law § 75 (McKinney 1974) (owners of multiple dwellings must provide "proper appliances to receive and distribute an adequate supply of water," including "a proper sink with running water and with a two-inch waste and trap"); § 35 (owners of multiple dwellings with frontage exceeding 22 feet must provide "at least two lights, one at each side of the entrance way, with an aggregate illumination of one hundred fifty watts or equivalent illumination"); § 50-a(2) (Supp. 1981-1982) (owners of Class A multiple dwellings must provide intercommunication system "located at an automatic self-locking door giving public access to the main entrance hall or lobby").

Apartment building rooftops are not exempted. See § 62 (landlords must place parapet walls and guardrails on their roofs "three feet six inches or more in height above the level of such area").

porary invasions by third parties are not subject to a *per se* rule. Nor can the qualitative difference arise from the incidental fact that, under § 828, Teleprompter, rather than appellant or her tenants, owns the cable installation. Cf. *ante*, at 440, and n. 19. If anything, § 828 leaves appellant better off than do other housing statutes, since it ensures that her property will not be damaged esthetically or physically, see n. 4, *supra*, without burdening her with the cost of buying or maintaining the cable.

In any event, under the Court's test, the "third party" problem would remain even if appellant herself owned the cable. So long as Teleprompter continuously passed its electronic signal through the cable, a litigant could argue that the second element of the Court's formula—a "physical touching" by a stranger—was satisfied and that § 828 therefore worked a taking.⁸ Literally read, the Court's test opens the door to endless metaphysical struggles over whether or not an individual's property has been "physically" touched. It was precisely to avoid "permit[ting] technicalities of form to dictate consequences of substance," *United States v. Central Eureka Mining Co.*, 357 U. S. 155, 181 (1958) (Harlan, J., dissenting), that the Court abandoned a "physical contacts" test in the first place.

Third, the Court's talismanic distinction between a continuous "occupation" and a transient "invasion" finds no basis in either economic logic or Takings Clause precedent. In the landlord-tenant context, the Court has upheld against takings challenges rent control statutes permitting "tempo-

⁸ Indeed, appellant's counsel made precisely this claim at oral argument. Urging the rule which the Court now adopts, appellant's counsel suggested that a taking would result even if appellant owned the cable. "[T]he precise location of the easement [taken by Teleprompter changes] from the surface of the roof to inside the wire. . . . [T]he wire itself is owned by the landlord, but the cable company has the right to pass its signal through the wire without compensation to the landlord, for its commercial benefit." Tr. of Oral Arg. 15.

rary" physical invasions of considerable economic magnitude. See, e. g., *Block v. Hirsh*, 256 U. S. 135 (1921) (statute permitting tenants to remain in physical possession of their apartments for two years after the termination of their leases). Moreover, precedents record numerous other "temporary" officially authorized invasions by third parties that have intruded into an owner's enjoyment of property far more deeply than did Teleprompter's long-unnoticed cable. See, e. g., *PruneYard Shopping Center v. Robins*, 447 U. S. 74 (1980) (leafletting and demonstrating in busy shopping center); *Kaiser Aetna v. United States*, 444 U. S. 164 (1979) (public easement of passage to private pond); *United States v. Causby*, 328 U. S. 256 (1946) (noisy airplane flights over private land). While, under the Court's balancing test, some of these "temporary invasions" have been found to be takings, the Court has subjected none of them to the inflexible *per se* rule now adapted to analyze the far less obtrusive "occupation" at issue in the present case. Cf. *ante*, at 430-431, 432-435.

In sum, history teaches that takings claims are properly evaluated under a multifactor balancing test. By directing that all "permanent physical occupations" automatically are compensable, "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner," *ante*, at 434-435, the Court does not further equity so much as it encourages litigants to manipulate their factual allegations to gain the benefit of its *per se* rule. Cf. n. 8, *supra*. I do not relish the prospect of distinguishing the inevitable flow of certiorari petitions attempting to shoe-horn insubstantial takings claims into today's "set formula."

B

Setting aside history, the Court also states that the permanent physical occupation authorized by § 828 is a *per se* taking because it uniquely impairs appellant's powers to dispose of, use, and exclude others from, her property. See *ante*, at

435–438. In fact, the Court's discussion nowhere demonstrates how § 828 impairs these private rights in a manner *qualitatively* different from other garden-variety landlord-tenant legislation.

The Court first contends that the statute impairs appellant's legal right to dispose of cable-occupied space by transfer and sale. But that claim dissolves after a moment's reflection. If someone buys appellant's apartment building, but does not use it for rental purposes, that person can have the cable removed, and use the space as he wishes. In such a case, appellant's right to dispose of the space is worth just as much as if § 828 did not exist.

Even if another landlord buys appellant's building for rental purposes, § 828 does not render the cable-occupied space valueless. As a practical matter, the regulation ensures that tenants living in the building will have access to cable television for as long as that building is used for rental purposes, and thereby likely increases both the building's resale value and its attractiveness on the rental market.⁹

In any event, § 828 differs little from the numerous other New York statutory provisions that require landlords to install physical facilities "permanently occupying" common spaces in or on their buildings. As the Court acknowledges, the States traditionally—and constitutionally—have exercised their police power "to require landlords to . . . provide utility connections, mailboxes, smoke detectors, fire extinguishers, and the like in the common area of a building." *Ante*, at 440. Like § 828, these provisions merely ensure tenants access to services the legislature deems important, such as water, electricity, natural light, telephones, intercommunication systems, and mail service. See n. 7, *supra*. A landlord's dispositional rights are affected no more ad-

⁹ In her pretrial deposition, appellant conceded not only that owners of other apartment buildings thought that the cable's presence had enhanced the market value of their buildings, App. 102–103, but also that her own tenants would have been upset if the cable connection had been removed. *Id.*, at 107, 108, 110.

versely when he sells a building to another landlord subject to § 828, than when he sells that building subject only to these other New York statutory provisions.

The Court also suggests that § 828 unconstitutionally alters appellant's right to control the *use* of her one-eighth cubic foot of roof space. But other New York multiple dwelling statutes not only oblige landlords to surrender significantly larger portions of common space for their tenants' use, but also compel the *landlord*—rather than the tenants or the private installers—to pay for and to maintain the equipment. For example, New York landlords are required by law to provide and pay for mailboxes that occupy more than five times the volume that Teleprompter's cable occupies on appellant's building. See Tr. of Oral Arg. 42–43, citing N. Y. Mult. Dwell. Law § 57 (McKinney 1974). If the State constitutionally can insist that appellant make this sacrifice so that her tenants may receive mail, it is hard to understand why the State may not require her to surrender less space, *filled at another's expense*, so that those same tenants can receive television signals.

For constitutional purposes, the relevant question cannot be solely *whether* the State has interfered in some minimal way with an owner's use of space on her building. Any intelligible takings inquiry must also ask whether the *extent* of the State's interference is so severe as to constitute a compensable taking in light of the owner's alternative uses for the property.¹⁰ Appellant freely admitted that she would have

¹⁰ For this reason, the Court provides no support for its *per se* rule by asserting that the State could not require landlords, without compensation, "to permit third parties to install swimming pools," *ante*, at 436, or vending and washing machines, *ante*, at 439, n. 17, for the convenience of tenants. Presumably, these more intrusive government regulations would create difficult takings problems even under our traditional balancing approach. Depending on the character of the governmental action, its economic impact, and the degree to which it interfered with an owner's reasonable investment-backed expectations, among other things, the Court's hypothetical examples might or might not constitute takings. These examples

had no other use for the cable-occupied space, were Teleprompter's equipment not on her building. See App. 97 (Deposition of Jean A. Loretto).

The Court's third and final argument is that § 828 has deprived appellant of her "power to exclude the occupier from possession and use of the space" occupied by the cable. *Ante*, at 435. This argument has two flaws. First, it unjustifiably assumes that appellant's tenants have no countervailing property interest in permitting Teleprompter to use that space.¹¹ Second, it suggests that the New York Legislature may not exercise its police power to affect appellant's common-law right to exclude Teleprompter even from one-eighth cubic foot of roof space. But this Court long ago recognized that new social circumstances can justify legislative modification of a property owner's common-law rights, without compensation, if the legislative action serves sufficiently important public interests. See *Munn v. Illinois*, 94 U. S. 113, 134 (1877) ("A person has no property, no vested interest, in any rule of the common law. . . . Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstance"); *United States v. Causby*, 328 U. S., at 260-261 (In the modern world, "[c]ommon sense revolts at the idea" that legislatures cannot alter common-law ownership rights).

hardly prove, however, that a permanent physical occupation that works a *de minimis* interference with a private property interest is a taking *per se*.

¹¹ It is far from clear that, under New York law, appellant's tenants would lack all property interests in the few square inches on the exterior of the building to which Teleprompter's cable and hardware attach. Under modern landlord-tenant law, a residential tenancy is not merely a possessory interest in specified space, but also a contract for the provision of a package of services and facilities necessary and appurtenant to that space. See R. Schoshinski, *American Law of Landlord and Tenant* § 3:14 (1980). A modern urban tenant's leasehold often includes not only contractual, but also statutory, rights, including the rights to an implied warranty of habitability, rent control, and such services as the landlord is obliged by statute to provide. Cf. n. 7, *supra*.

As the Court of Appeals recognized, § 828 merely deprives appellant of a common-law trespass action against Teleprompter, but only for as long as she uses her building for rental purposes, and as long as Teleprompter maintains its equipment in compliance with the statute. JUSTICE MARSHALL recently and most aptly observed:

"[Appellant's] claim in this case amounts to no less than a suggestion that the common law of trespass is not subject to revision by the State If accepted, that claim would represent a return to the era of *Lochner v. New York*, 198 U. S. 45 (1905), when common-law rights were also found immune from revision by State or Federal Government. Such an approach would freeze the common law as it has been constructed by the courts, perhaps at its 19th-century state of development. It would allow no room for change in response to changes in circumstance. The Due Process Clause does not require such a result." *PruneYard Shopping Center v. Robins*, 447 U. S., at 93 (concurring opinion).

III

In the end, what troubles me most about today's decision is that it represents an archaic judicial response to a modern social problem. Cable television is a new and growing, but somewhat controversial, communications medium. See Brief for New York State Cable Television Association as *Amicus Curiae* 6-7 (about 25% of American homes with televisions—approximately 20 million families—currently subscribe to cable television, with the penetration rate expected to double by 1990). The New York Legislature not only recognized, but also responded to, this technological advance by enacting a statute that sought carefully to balance the interests of all private parties. See nn. 3 and 4, *supra*. New York's courts in this litigation, with only one jurist in dissent, unanimously upheld the constitutionality of that considered legislative judgment.

This Court now reaches back in time for a *per se* rule that disrupts that legislative determination.¹² Like Justice Black, I believe that “the solution of the problems precipitated by . . . technological advances and new ways of living cannot come about through the application of rigid constitutional restraints formulated and enforced by the courts.” *United States v. Causby*, 328 U. S., at 274 (dissenting opinion). I would affirm the judgment and uphold the reasoning of the New York Court of Appeals.

¹² Happily, the Court leaves open the question whether § 828 provides landlords like appellant sufficient compensation for their actual losses. See *ante*, at 441. Since the State Cable Television Commission’s regulations permit higher than nominal awards if a landlord makes “a special showing of greater damages,” App. 52, the concurring opinion in the New York Court of Appeals found that the statute awards just compensation. See 53 N. Y. 2d, at 155, 423 N. E. 2d, at 336 (“[I]t is obvious that a landlord who actually incurs damage to his property or is restricted in the use to which he might put that property will receive compensation commensurate with the greater injury”). If, after the remand following today’s decision, this minor physical invasion is declared to be a taking deserving little or no compensation, the net result will have been a large expenditure of judicial resources on a constitutional claim of little moment.

WASHINGTON ET AL. v. SEATTLE SCHOOL
DISTRICT NO. 1 ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

No. 81–9. Argued March 22, 1982—Decided June 30, 1982

In 1978, appellee Seattle School District No. 1 (District) enacted the so-called Seattle Plan for desegregation of its schools. The plan makes extensive use of mandatory busing. Subsequently, a statewide initiative (Initiative 350) was drafted to terminate the use of mandatory busing for purposes of racial integration in the public schools of the State of Washington. The initiative prohibits school boards from requiring any student to attend a school other than the one geographically nearest or next nearest to his home. It sets out a number of broad exceptions to this requirement, however: a student may be assigned beyond his neighborhood school if he requires special educational programs, or if the nearest or next nearest school is overcrowded or unsafe, or if it lacks necessary physical facilities. These exceptions permit school boards to assign students away from their neighborhood schools for virtually all of the non-integrative purposes required by their educational policies. After the initiative was passed at the November 1978 general election, the District, together with two other districts, brought suit against appellant State in Federal District Court, challenging the constitutionality of Initiative 350 under the Equal Protection Clause of the Fourteenth Amendment. The District Court held the initiative unconstitutional on the ground, *inter alia*, that it established an impermissible racial classification in violation of *Hunter v. Erickson*, 393 U. S. 385, and *Lee v. Nyquist*, 318 F. Supp. 710 (WDNY), summarily aff’d, 402 U. S. 935, “because it permits busing for non-racial reasons but forbids it for racial reasons.” The court permanently enjoined implementation of the initiative’s restrictions. The Court of Appeals affirmed.

Held: Initiative 350 violates the Equal Protection Clause. Pp. 467–487.

(a) When a State allocates governmental power nonneutrally, by explicitly using the *racial* nature of a decision to determine the decision-making process, its action “places *special* burdens on racial minorities within the governmental process,” *Hunter v. Erickson*, 393 U. S., at 391, thereby “making it *more* difficult for certain racial and religious minorities [than for other members of the community] to achieve legislation that is in their interest.” *Id.*, at 395. Such a structuring of the po-

knows if he will be charged and of what offense he will be accused.

To force persons to make this kind of choice between two fundamental rights places an intolerable burden on the exercise of those rights. "It cuts down on the privilege [of testifying in one's own defense] by making its assertion costly," *Griffin v. California, supra*, at 614, and is therefore forbidden.

II

I have explained why I believe the use for impeachment purposes of a defendant's prearrest failure to volunteer his version of events to the authorities is constitutionally impermissible. I disagree not only with the Court's holding in this case, but as well with its emerging conception of the individual's duty to assist the State in obtaining convictions, including his own—a conception which, I believe, is fundamentally at odds with our constitutional system. See, *e. g.*, *Roberts v. United States*, 445 U. S. 552, 569–572 (1980) (MARSHALL, J., dissenting). This conception disparages not only individual freedoms, but also the social interest in preserving those liberties and in the integrity of the criminal justice system. There is no doubt an important social interest in enabling police and prosecutors to obtain convictions. But the Court does not serve the Nation well by subordinating to that interest the safeguards that the Constitution guarantees to the criminal defendant.

AGINS ET UX. *v.* CITY OF TIBURON

APPEAL FROM THE SUPREME COURT OF CALIFORNIA

No. 79–602. Argued April 15, 1980—Decided June 10, 1980

After appellants had acquired five acres of unimproved land in appellee city for residential development, the city was required by California law to prepare a general plan governing land use and the development of open-space land. In response, the city adopted zoning ordinances that placed appellants' property in a zone in which property may be devoted to one-family dwellings, accessory buildings, and open-space uses, with density restrictions permitting appellants to build between one and five single-family residences on their tract. Without having sought approval for development of their tract under the ordinances, appellants brought suit against the city in state court, alleging that the city had taken their property without just compensation in violation of the Fifth and Fourteenth Amendments, and seeking, *inter alia*, a declaration that the zoning ordinances were facially unconstitutional. The city's demurrer claiming that the complaint failed to state a cause of action was sustained by the trial court, and the California Supreme Court affirmed.

Held: The zoning ordinances on their face do not take appellants' property without just compensation. Pp. 260–263.

(a) The ordinances substantially advance the legitimate governmental goal of discouraging premature and unnecessary conversion of open-space land to urban uses and are proper exercises of the city's police power to protect its residents from the ill effects of urbanization. Pp. 261–262.

(b) Appellants will share with other owners the benefits and burdens of the city's exercise of such police power, and in assessing the fairness of the ordinances these benefits must be considered along with any diminution in market value that appellants might suffer. P. 262.

(c) Although the ordinances limit development, they neither prevent the best use of appellants' land nor extinguish a fundamental attribute of ownership. Since at this juncture appellants are free to pursue their reasonable investment expectations by submitting a development plan to the city, it cannot be said that the impact of the ordinances has denied them the "justice and fairness" guaranteed by the Fifth and Fourteenth Amendments. Pp. 262–263.

24 Cal. 3d 266, 598 P. 2d 25, affirmed.

POWELL, J., delivered the opinion for a unanimous Court.

Gideon Kanner argued the cause for appellants. With him on the briefs were *John P. Pollock* and *Reginald G. Hearn*.

E. Clement Shute, Jr., argued the cause *pro hac vice* for appellee. With him on the brief were *Robert I. Conn* and *Gary T. Ragghianti*.*

*Briefs of *amici curiae* urging reversal were filed by *Robert A. Ferris* for the California Forest Protective Association; by *Les J. Weinstein* and *Aaron M. Peck* for the Glendale Federal Savings and Loan Association; by *Howard N. Ellman*, *Kenneth N. Burns*, and *Michael J. Burke* for Half Moon Bay Properties, Inc.; by *Gus Bauman* for the National Association of Home Builders et al.; by *Ronald A. Zumbun* and *Thomas E. Hookano* for the Pacific Legal Foundation; and, *pro se*, by *Burton J. Goldstein*, *M. Reed Hunter*, *Jess S. Jackson, Jr.*, *Jerrold A. Fadem*, *Michael M. Berger*, *Roger M. Sullivan*, *Richard F. Desmond*, *Stephen J. Wagner*, *Gerald B. Hansen*, and *Alfred P. Chasuk* for Mr. Goldstein et al.

Briefs of *amici curiae* urging affirmance were filed by *Solicitor General McCree*, *Assistant Attorney General Moorman*, *Deputy Solicitor General Claiborne*, *Elinor Hadley Stillman*, and *Jacques B. Gelin* for the United States; by *George Deukmejian*, *Attorney General*, *N. Gregory Taylor*, *Assistant Attorney General*, and *Richard C. Jacobs*, *Deputy Attorney General*, for the State of California; by the Attorneys General and other officials of their respective jurisdictions as follows: *J. D. MacFarlane*, *Attorney General of Colorado*; *Richard S. Gebelein*, *Attorney General of Delaware*, and *Regina M. Small*, *State Solicitor*; *Jim Smith*, *Attorney General of Florida*, and *Richard Hixson*, *Assistant Attorney General*; *Wayne Minami*, *Attorney General of Hawaii*; *William J. Scott*, *Attorney General of Illinois*, and *George Wolff*, *Assistant Attorney General*; *William J. Guste, Jr.*, *Attorney General of Louisiana*, and *Kendall Vick*, *Assistant Attorney General*; *Richard S. Cohen*, *Attorney General of Maine*, and *Cabanne Howard*, *Assistant Attorney General*; *Stephen H. Sachs*, *Attorney General of Maryland*, and *Paul F. Strain* and *Thomas A. Deming*, *Deputy Attorneys General*; *Francis X. Bellotti*, *Attorney General of Massachusetts*, and *Stephen M. Leonard*, *Assistant Attorney General*; *Robert Abrams*, *Attorney General of New York*; *William J. Brown*, *Attorney General of Ohio*, and *Colleen Nissl*, *Assistant Attorney General*; *James A. Redden*, *Attorney General of Oregon*, and *Peter S. Herman* and *Mary J. Deits*, *Deputy Attorneys General*; *M. Jerome Diamond*, *Attorney General of Vermont*, and *Bensen D. Scotch*, *Assistant Attorney General*; *Slade Gorton*, *Attorney General of Washington*, and *Charles B. Roe, Jr.*, *Senior*

MR. JUSTICE POWELL delivered the opinion of the Court.

The question in this case is whether municipal zoning ordinances took appellants' property without just compensation in violation of the Fifth and Fourteenth Amendments.

I

After the appellants acquired five acres of unimproved land in the city of Tiburon, Cal., for residential development, the city was required by state law to prepare a general plan governing both land use and the development of open-space land. Cal. Govt. Code Ann. §§ 65302 (a) and (e) (West Supp. 1979); see § 65563. In response, the city adopted two ordinances that modified existing zoning requirements. Tiburon, Cal., Ordinances Nos. 123 N. S. and 124 N. S. (June 28, 1973). The zoning ordinances placed the appellants' property in "RPD-1," a Residential Planned Development and Open Space Zone. RPD-1 property may be devoted to one-family dwellings, accessory buildings, and open-space uses. Density restrictions permit the appellants to build between one and five single-family residences on their 5-acre tract. The appellants never have sought approval for development of their land under the zoning ordinances.¹

Assistant Attorney General; and *Bronson C. La Follette*, *Attorney General of Wisconsin*, for the State of Colorado et al.; by *John H. Larson* and *Paul T. Hanson* for the County of Los Angeles; by *Robert J. Logan* and *Jeffrey P. Widman* for the City of San Jose et al.; by *Daniel Riesel*, *Nicholas A. Robinson*, *Joel H. Sachs*, *Ross Sandler*, and *Philip Weinberg* for the Committee on Environmental Law of the Association of the Bar of the City of New York; by *David Bonderman* for the Conservation Foundation et al.; and by *Elliott E. Blinderman* for the Federation of Hillside and Canyon Associations, Inc., et al.

Briefs of *amici curiae* were filed by *Timothy B. Flynn* and *A. Thomas Hunt* for the American Planning Association et al.; by *Frank Schnidman* for the National Association of Manufacturers; and by *Louis E. Goebel* and *Guenter S. Cohn* for San Diego Gas & Electric Co.

¹Shortly after it enacted the ordinances, the city began eminent domain proceedings against the appellants' land. The following year, however, the

The appellants filed a two-part complaint against the city in State Superior Court. The first cause of action sought \$2 million in damages for inverse condemnation.² The second cause of action requested a declaration that the zoning ordinances were facially unconstitutional. The gravamen of both claims was the appellants' assertion that the city had taken their property without just compensation in violation of the Fifth and Fourteenth Amendments. The complaint alleged that land in Tiburon has greater value than any other suburban property in the State of California. App. 3. The ridge-lands that appellants own "possess magnificent views of San Francisco Bay and the scenic surrounding areas [and] have the highest market values of all lands" in Tiburon. *Id.*, at 4. Rezoning of the land "forever prevented [its] development for residential use. . . ." *Id.*, at 5. Therefore, the appellants contended, the city had "completely destroyed the value of [appellants'] property for any purpose or use whatsoever. . . ." *Id.*, at 7.³

The city demurred, claiming that the complaint failed to state a cause of action. The Superior Court sustained the demurrer,⁴ and the California Supreme Court affirmed. 24 Cal. 3d 266, 598 P. 2d 25 (1979). The State Supreme Court

city abandoned those proceedings, and its complaint was dismissed. The appellants were reimbursed for costs incurred in connection with the action.

²Inverse condemnation should be distinguished from eminent domain. Eminent domain refers to a legal proceeding in which a government asserts its authority to condemn property. *United States v. Clarke*, 445 U. S. 253, 255-258 (1980). Inverse condemnation is "a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted." *Id.*, at 257.

³The appellants also contended that the city's aborted attempt to acquire the land through eminent domain had destroyed the use of the land during the pendency of the condemnation proceedings. App. 10.

⁴The State Superior Court granted the appellants leave to amend the cause of action seeking a declaratory judgment, but the appellants did not avail themselves of that opportunity.

first considered the inverse condemnation claim. It held that a landowner who challenges the constitutionality of a zoning ordinance may not "sue in inverse condemnation and thereby transmute an excessive use of the police power into a lawful taking for which compensation in eminent domain must be paid." *Id.*, at 273, 598 P. 2d, at 28. The sole remedies for such a taking, the court concluded, are mandamus and declaratory judgment. Turning therefore to the appellants' claim for declaratory relief, the California Supreme Court held that the zoning ordinances had not deprived the appellants of their property without compensation in violation of the Fifth Amendment.⁵

We noted probable jurisdiction. 444 U. S. 1011 (1980). We now affirm the holding that the zoning ordinances on their face do not take the appellants' property without just compensation.⁶

⁵The California Supreme Court also rejected appellants' argument that the institution and abandonment of eminent domain proceedings themselves constituted a taking. The court found that the city had acted reasonably and that general municipal planning decisions do not violate the Fifth Amendment.

⁶The appellants also contend that the state courts erred by sustaining the demurrer despite their uncontroverted allegations that the zoning ordinances would "forever preven[t] . . . development for residential use," *id.*, at 5, and "completely destro[y] the value of [appellant's] property for any purpose or use whatsoever . . ." *id.*, at 7. The California Supreme Court compared the express terms of the zoning ordinances with the factual allegations of the complaint. The terms of the ordinances permit construction of one to five residences on the appellants' 5-acre tract. The court therefore rejected the contention that the ordinances prevented all use of the land. Under California practice, allegations in a complaint are taken to be true unless "contrary to law or to a fact of which a court may take judicial notice." *Dale v. City of Mountain View*, 55 Cal. App. 3d 101, 105, 127 Cal. Rptr. 520, 522 (1976); see *Martinez v. Socoma Cos.*, 11 Cal. 3d 394, 399-400, 521 P. 2d 841, 844 (1974). California courts may take judicial notice of municipal ordinances. Cal. Evid. Code Ann. § 452 (b) (West 1966). In this case, the State Supreme Court merely rejected allegations inconsistent with the explicit terms of the ordinance under

II

The Fifth Amendment guarantees that private property shall not "be taken for public use, without just compensation." The appellants' complaint framed the question as whether a zoning ordinance that prohibits all development of their land effects a taking under the Fifth and Fourteenth Amendments. The California Supreme Court rejected the appellants' characterization of the issue by holding, as a matter of state law, that the terms of the challenged ordinances allow the appellants to construct between one and five residences on their property. The court did not consider whether the zoning ordinances would be unconstitutional if applied to prevent appellants from building five homes. Because the appellants have not submitted a plan for development of their property as the ordinances permit, there is as yet no concrete controversy regarding the application of the specific zoning provisions. See *Socialist Labor Party v. Gilligan*, 406 U. S. 583, 588 (1972). See also *Goldwater v. Carter*, 444 U. S. 996, 997 (1979) (POWELL, J., concurring). Thus, the only question properly before us is whether the mere enactment of the zoning ordinances constitutes a taking.

The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, see *Nectow v. Cambridge*, 277 U. S. 183, 188 (1928), or denies an owner economically viable use of his land, see *Penn Central Transp. Co. v. New York City*, 438 U. S. 104, 138, n. 36 (1978). The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest. Although no precise rule de-

review. The appellants' objection to the State Supreme Court's application of state law does not raise a federal question appropriate for review by this Court. See *Patterson v. Colorado ex rel. Attorney General*, 205 U. S. 454, 461 (1907).

termines when property has been taken, see *Kaiser Aetna v. United States*, 444 U. S. 164 (1979), the question necessarily requires a weighing of private and public interests. The seminal decision in *Euclid v. Ambler Co.*, 272 U. S. 365 (1926), is illustrative. In that case, the landowner challenged the constitutionality of a municipal ordinance that restricted commercial development of his property. Despite alleged diminution in value of the owner's land, the Court held that the zoning laws were facially constitutional. They bore a substantial relationship to the public welfare, and their enactment inflicted no irreparable injury upon the landowner. *Id.*, at 395-397.

In this case, the zoning ordinances substantially advance legitimate governmental goals. The State of California has determined that the development of local open-space plans will discourage the "premature and unnecessary conversion of open-space land to urban uses." Cal. Govt. Code Ann. § 65561 (b) (West. Supp. 1979).⁷ The specific zoning regulations at issue are exercises of the city's police power to protect the residents of Tiburon from the ill effects of urbanization.⁸ Such governmental purposes long have been recognized as legitimate. See *Penn Central Transp. Co. v. New York City*, *supra*, at 129; *Village of Belle Terre v.*

⁷ The State also recognizes that the preservation of open space is necessary "for the assurance of the continued availability of land for the production of food and fiber, for the enjoyment of scenic beauty, for recreation and for the use of natural resources." Cal. Govt. Code Ann. § 65561 (a) (West. Supp. 1979); see Tiburon, Cal., Ordinance No. 124 N. S. §§ 1 (f) and (h).

⁸ The City Council of Tiburon found that "[i]t is in the public interest to avoid unnecessary conversion of open space land to strictly urban uses, thereby protecting against the resultant adverse impacts, such as air, noise and water pollution, traffic congestion, destruction of scenic beauty, disturbance of the ecology and environment, hazards to geology, fire and flood, and other demonstrated consequences of urban sprawl." *Id.*, § 1 (c).

Boraas, 416 U. S. 1, 9 (1974); *Euclid v. Ambler Co.*, *supra*, at 394-395.

The ordinances place appellants' land in a zone limited to single-family dwellings, accessory buildings, and open-space uses. Construction is not permitted until the builder submits a plan compatible with "adjoining patterns of development and open space." Tiburon, Cal., Ordinance No. 123 N. S. § 2 (F). In passing upon a plan, the city also will consider how well the proposed development would preserve the surrounding environment and whether the density of new construction will be offset by adjoining open spaces. *Ibid.* The zoning ordinances benefit the appellants as well as the public by serving the city's interest in assuring careful and orderly development of residential property with provision for open-space areas. There is no indication that the appellants' 5-acre tract is the only property affected by the ordinances. Appellants therefore will share with other owners the benefits and burdens of the city's exercise of its police power. In assessing the fairness of the zoning ordinances, these benefits must be considered along with any diminution in market value that the appellants might suffer.

Although the ordinances limit development, they neither prevent the best use of appellants' land, see *United States v. Causby*, 328 U. S. 256, 262, and n. 7 (1946), nor extinguish a fundamental attribute of ownership, see *Kaiser Aetna v. United States*, *supra*, at 179-180. The appellants have alleged that they wish to develop the land for residential purposes, that the land is the most expensive suburban property in the State, and that the best possible use of the land is residential. App. 3-4. The California Supreme Court has decided, as a matter of state law, that appellants may be permitted to build as many as five houses on their five acres of prime residential property. At this juncture, the appellants are free to pursue their reasonable investment expectations by submitting a development plan to local officials. Thus, it cannot be said that the impact of general land-use regulations has denied

appellants the "justice and fairness" guaranteed by the Fifth and Fourteenth Amendments. See *Penn Central Transp. Co. v. New York City*, 438 U. S., at 124.⁹

III

The State Supreme Court determined that the appellants could not recover damages for inverse condemnation even if the zoning ordinances constituted a taking. The court stated that only mandamus and declaratory judgment are remedies available to such a landowner. Because no taking has occurred, we need not consider whether a State may limit the remedies available to a person whose land has been taken without just compensation.

The judgment of the Supreme Court of California is

Affirmed.

⁹ Appellants also claim that the city's precondemnation activities constitute a taking. See nn. 1, 3, and 5, *supra*. The State Supreme Court correctly rejected the contention that the municipality's good-faith planning activities, which did not result in successful prosecution of an eminent domain claim, so burdened the appellants' enjoyment of their property as to constitute a taking. See also *City of Walnut Creek v. Leadership Housing Systems, Inc.*, 73 Cal. App. 3d 611, 620-624, 140 Cal. Rptr. 690, 695-697 (1977). Even if the appellants' ability to sell their property was limited during the pendency of the condemnation proceeding, the appellants were free to sell or develop their property when the proceedings ended. Mere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are "incidents of ownership." They cannot be considered as a 'taking' in the constitutional sense." *Danforth v. United States*, 308 U. S. 271, 285 (1939). See *Thomas W. Garland, Inc. v. City of St. Louis*, 596 F. 2d 784, 787 (CA8), cert. denied, 444 U. S. 899 (1979); *Reservation Eleven Associates v. District of Columbia*, 136 U. S. App. D. C. 311, 315-316, 420 F. 2d 153, 157-158 (1969); *Virgin Islands v. 50.05 Acres of Land*, 185 F. Supp. 495, 498 (V. I. 1960); 2 J. Sackman & P. Rohan, *Nichols' Law of Eminent Domain* § 6.13 [3] (3d ed. 1979).

PENN CENTRAL TRANSPORTATION CO. ET AL. v.
NEW YORK CITY ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK

No. 77-444. Argued April 17, 1978—Decided June 26, 1978

Under New York City's Landmarks Preservation Law (Landmarks Law), which was enacted to protect historic landmarks and neighborhoods from precipitate decisions to destroy or fundamentally alter their character, the Landmarks Preservation Commission (Commission) may designate a building to be a "landmark" on a particular "landmark site" or may designate an area to be a "historic district." The Board of Estimate may thereafter modify or disapprove the designation, and the owner may seek judicial review of the final designation decision. The owner of the designated landmark must keep the building's exterior "in good repair" and before exterior alterations are made must secure Commission approval. Under two ordinances owners of landmark sites may transfer development rights from a landmark parcel to proximate lots. Under the Landmarks Law, the Grand Central Terminal (Terminal), which is owned by the Penn Central Transportation Co. and its affiliates (Penn Central) was designated a "landmark" and the block it occupies a "landmark site." Appellant Penn Central, though opposing the designation before the Commission, did not seek judicial review of the final designation decision. Thereafter appellant Penn Central entered into a lease with appellant UGP Properties, whereby UGP was to construct a multistory office building over the Terminal. After the Commission had rejected appellants' plans for the building as destructive of the Terminal's historic and aesthetic features, with no judicial review thereafter being sought, appellants brought suit in state court claiming that the application of the Landmarks Law had "taken" their property without just compensation in violation of the Fifth and Fourteenth Amendments and arbitrarily deprived them of their property without due process of law in violation of the Fourteenth Amendment. The trial court's grant of relief was reversed on appeal, the New York Court of Appeals ultimately concluding that there was no "taking" since the Landmarks Law had not transferred control of the property to the city, but only restricted appellants' exploitation of it; and that there was no denial of due process because (1) the same use of the Terminal was permitted as before; (2) the appellants had not shown that they could not earn a reasonable return on their invest-

ment in the Terminal itself; (3) even if the Terminal proper could never operate at a reasonable profit, some of the income from Penn Central's extensive real estate holdings in the area must realistically be imputed to the Terminal; and (4) the development rights above the Terminal, which were made transferable to numerous sites in the vicinity, provided significant compensation for loss of rights above the Terminal itself. *Held*: The application of the Landmarks Law to the Terminal property does not constitute a "taking" of appellants' property within the meaning of the Fifth Amendment as made applicable to the States by the Fourteenth Amendment. Pp. 123-138.

(a) In a wide variety of contexts the government may execute laws or programs that adversely affect recognized economic values without its action constituting a "taking," and in instances such as zoning laws where a state tribunal has reasonably concluded that "the health, safety, morals, or general welfare" would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected real property interests. In many instances use restrictions that served a substantial public purpose have been upheld against "taking" challenges, *e. g.*, *Goldblatt v. Hempstead*, 369 U. S. 590; *Hadacheck v. Sebastian*, 239 U. S. 394, though a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to constitute a "taking," *e. g.*, *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393, and government acquisitions of resources to permit uniquely public functions constitute "takings," *e. g.*, *United States v. Causby*, 328 U. S. 256. Pp. 123-128.

(b) In deciding whether particular governmental action has effected a "taking," the character of the action and nature and extent of the interference with property rights (here the city tax block designated as the "landmark site") are focused upon, rather than discrete segments thereof. Consequently, appellants cannot establish a "taking" simply by showing that they have been denied the ability to exploit the superjacent airspace, irrespective of the remainder of appellants' parcel. Pp. 130-131.

(c) Though diminution in property value alone, as may result from a zoning law, cannot establish a "taking," as appellants concede, they urge that the regulation of individual landmarks is different because it applies only to selected properties. But it does not follow that landmark laws, which embody a comprehensive plan to preserve structures of historic or aesthetic interest, are discriminatory, like "reverse spot" zoning. Nor can it be successfully contended that designation of a landmark involves only a matter of taste and therefore will inevitably

lead to arbitrary results, for judicial review is available and there is no reason to believe it will be less effective than would be so in the case of zoning or any other context. Pp. 131-133.

(d) That the Landmarks Law affects some landowners more severely than others does not itself result in "taking," for that is often the case with general welfare and zoning legislation. Nor, contrary to appellants' contention, are they solely burdened and unbenefited by the Landmarks Law, which has been extensively applied and was enacted on the basis of the legislative judgment that the preservation of landmarks benefits the citizenry both economically and by improving the overall quality of city life. Pp. 133-135.

(e) The Landmarks Law no more effects an appropriation of the airspace above the Terminal for governmental uses than would a zoning law appropriate property; it simply prohibits appellants or others from occupying certain features of that space while allowing appellants gainfully to use the remainder of the parcel. *United States v. Causby, supra*, distinguished. P. 135.

(f) The Landmarks Law, which does not interfere with the Terminal's present uses or prevent Penn Central from realizing a "reasonable return" on its investment, does not impose the drastic limitation on appellants' ability to use the air rights above the Terminal that appellants claim, for on this record there is no showing that a smaller, harmonizing structure would not be authorized. Moreover, the pre-existing air rights are made transferable to other parcels in the vicinity of the Terminal, thus mitigating whatever financial burdens appellants have incurred. Pp. 135-137.

42 N. Y. 2d 324, 366 N. E. 2d 1271, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which STEWART, WHITE, MARSHALL, BLACKMUN, and POWELL, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and STEVENS, J., joined, *post*, p. 138.

Daniel M. Gribbon argued the cause for appellants. With him on the briefs were *John R. Bolton* and *Carl Helmetag, Jr.*

Leonard Koerner argued the cause for appellees. With him on the brief were *Allen G. Schwartz*, *L. Kevin Sheridan*, and *Dorothy Miner*.

Assistant Attorney General Wald argued the cause for the United States as *amicus curiae* urging affirmance. On the

brief were *Solicitor General McCree*, *Assistant Attorney General Moorman*, *Peter R. Steenland, Jr.*, and *Carl Strass*.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question presented is whether a city may, as part of a comprehensive program to preserve historic landmarks and historic districts, place restrictions on the development of individual historic landmarks—in addition to those imposed by applicable zoning ordinances—without effecting a "taking" requiring the payment of "just compensation." Specifically, we must decide whether the application of New York City's Landmarks Preservation Law to the parcel of land occupied by Grand Central Terminal has "taken" its owners' property in violation of the Fifth and Fourteenth Amendments.

I

A

Over the past 50 years, all 50 States and over 500 municipalities have enacted laws to encourage or require the preservation of buildings and areas with historic or aesthetic importance.¹ These nationwide legislative efforts have been

*Briefs of *amici curiae* urging affirmance were filed by *David Bonderman* and *Frank B. Gilbert* for the National Trust for Historic Preservation et al.; by *Paul S. Byard*, *Ralph C. Menapace, Jr.*, *Terence H. Bendow*, *William C. Chanler*, *Richard H. Pershan*, *Francis T. P. Plimpton*, *Whitney North Seymour*, and *Bethuel M. Webster* for the Committee to Save Grand Central Station et al.; and by *Louis J. Leskowitz*, Attorney General, *Samuel A. Hirshowitz*, First Assistant Attorney General, and *Philip Weinberg*, Assistant Attorney General, for the State of New York.

Briefs of *amici curiae* were filed by *Evelle J. Younger*, Attorney General, *E. Clement Shute, Jr.*, and *Robert H. Connett*, Assistant Attorneys General, and *Richard C. Jacobs*, Deputy Attorney General, for the State of California; and by *Eugene J. Morris* for the Real Estate Board of New York, Inc.

¹ See National Trust for Historic Preservation, *A Guide to State Historic Preservation Programs* (1976); National Trust for Historic Preservation,

precipitated by two concerns. The first is recognition that, in recent years, large numbers of historic structures, landmarks, and areas have been destroyed² without adequate consideration of either the values represented therein or the possibility of preserving the destroyed properties for use in economically productive ways.³ The second is a widely shared belief that structures with special historic, cultural, or architectural significance enhance the quality of life for all. Not only do these buildings and their workmanship represent the lessons of the past and embody precious features of our heritage, they serve as examples of quality for today. "[H]istoric conservation is but one aspect of the much larger problem, basically an environmental one, of enhancing—or perhaps developing for the first time—the quality of life for people."⁴

New York City, responding to similar concerns and acting

Directory of Landmark and Historic District Commissions (1976). In addition to these state and municipal legislative efforts, Congress has determined that "the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people," National Historic Preservation Act of 1966, 80 Stat. 915, 16 U. S. C. § 470 (b) (1976 ed.), and has enacted a series of measures designed to encourage preservation of sites and structures of historic, architectural, or cultural significance. See generally Gray, *The Response of Federal Legislation to Historic Preservation*, 36 *Law & Contemp. Prob.* 314 (1971).

² Over one-half of the buildings listed in the Historic American Buildings Survey, begun by the Federal Government in 1933, have been destroyed. See Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 *Harv. L. Rev.* 574, 574 n. 1 (1972), citing Huxtable, *Bank's Building Plan Sets Off Debate on "Progress,"* *N. Y. Times*, Jan. 17, 1971, section 8, p. 1, col. 2.

³ See, e. g., *N. Y. C. Admin. Code* § 205-1.0 (a) (1976).

⁴ Gilbert, *Introduction, Precedents for the Future*, 36 *Law & Contemp. Prob.* 311, 312 (1971), quoting address by Robert Stipe, 1971 Conference on Preservation Law, Washington, D. C., May 1, 1971 (unpublished text, pp. 6-7).

pursuant to a New York State enabling Act,⁵ adopted its Landmarks Preservation Law in 1965. See *N. Y. C. Admin. Code*, ch. 8-A, § 205-1.0 *et seq.* (1976). The city acted from the conviction that "the standing of [New York City] as a world-wide tourist center and world capital of business, culture and government" would be threatened if legislation were not enacted to protect historic landmarks and neighborhoods from precipitate decisions to destroy or fundamentally alter their character. § 205-1.0 (a). The city believed that comprehensive measures to safeguard desirable features of the existing urban fabric would benefit its citizens in a variety of ways: e. g., fostering "civic pride in the beauty and noble accomplishments of the past"; protecting and enhancing "the city's attractions to tourists and visitors"; "support[ing] and stimul[ating] business and industry"; "strengthen[ing] the economy of the city"; and promoting "the use of historic districts, landmarks, interior landmarks and scenic landmarks for the education, pleasure and welfare of the people of the city." § 205-1.0 (b).

The New York City law is typical of many urban landmark laws in that its primary method of achieving its goals is not by acquisitions of historic properties,⁶ but rather by involving public entities in land-use decisions affecting these properties

⁵ See *N. Y. Gen. Mun. Law* § 96-a (McKinney 1977). It declares that it is the public policy of the State of New York to preserve structures and areas with special historical or aesthetic interest or value and authorizes local governments to impose reasonable restrictions to perpetuate such structures and areas.

⁶ The consensus is that widespread public ownership of historic properties in urban settings is neither feasible nor wise. Public ownership reduces the tax base, burdens the public budget with costs of acquisitions and maintenance, and results in the preservation of public buildings as museums and similar facilities, rather than as economically productive features of the urban scene. See Wilson & Winkler, *The Response of State Legislation to Historic Preservation*, 36 *Law & Contemp. Prob.* 329, 330-331, 339-340 (1971).

and providing services, standards, controls, and incentives that will encourage preservation by private owners and users.⁷ While the law does place special restrictions on landmark properties as a necessary feature to the attainment of its larger objectives, the major theme of the law is to ensure the owners of any such properties both a "reasonable return" on their investments and maximum latitude to use their parcels for purposes not inconsistent with the preservation goals.

The operation of the law can be briefly summarized. The primary responsibility for administering the law is vested in the Landmarks Preservation Commission (Commission), a broad based, 11-member agency⁸ assisted by a technical staff. The Commission first performs the function, critical to any landmark preservation effort, of identifying properties and areas that have "a special character or special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation." § 207-1.0 (n); see § 207-1.0 (h). If the Commission determines, after giving all interested parties an opportunity to be heard, that a building or area satisfies the ordinance's criteria, it will designate a building to be a "landmark," § 207-1.0 (n),⁹ situ-

⁷ See *Costonis, supra* n. 2, at 580-581; *Wilson & Winkler, supra* n. 6; *Rankin, Operation and Interpretation of the New York City Landmark Preservation Law*, 36 *Law & Contemp. Prob.* 366 (1971).

⁸ The ordinance creating the Commission requires that it include at least three architects, one historian qualified in the field, one city planner or landscape architect, one realtor, and at least one resident of each of the city's five boroughs. N. Y. C. Charter § 534 (1976). In addition to the ordinance's requirements concerning the composition of the Commission, there is, according to a former chairman, a "prudent tradition" that the Commission include one or two lawyers, preferably with experience in municipal government, and several laymen with no specialized qualifications other than concern for the good of the city. *Goldstone, Aesthetics in Historic Districts*, 36 *Law & Contemp. Prob.* 379, 384-385 (1971).

⁹ "Landmark." Any improvement, any part of which is thirty years old or older, which has a special character or special historical or aesthetic interest or value as part of the development, heritage or cultural character-

ated on a particular "landmark site," § 207-1.0 (o),¹⁰ or will designate an area to be a "historic district," § 207-1.0 (h).¹¹ After the Commission makes a designation, New York City's Board of Estimate, after considering the relationship of the designated property "to the master plan, the zoning resolution, projected public improvements and any plans for the renewal of the area involved," § 207-2.0 (g) (1), may modify or disapprove the designation, and the owner may seek judicial review of the final designation decision. Thus far, 31 historic districts and over 400 individual landmarks have been finally designated,¹² and the process is a continuing one.

Final designation as a landmark results in restrictions upon the property owner's options concerning use of the landmark site. First, the law imposes a duty upon the owner to keep the exterior features of the building "in good repair" to assure that the law's objectives not be defeated by the landmark's

istics of the city, state or nation and which has been designated as a landmark pursuant to the provisions of this chapter." § 207-1.0 (n).

¹⁰ "Landmark site." An improvement parcel or part thereof on which is situated a landmark and any abutting improvement parcel or part thereof used as and constituting part of the premises on which the landmark is situated, and which has been designated as a landmark site pursuant to the provisions of this chapter." § 207-1.0 (o).

¹¹ "Historic district." Any area which: (1) contains improvements which: (a) have a special character or special historical or aesthetic interest or value; and (b) represent one or more periods or styles of architecture typical of one or more eras in the history of the city; and (c) cause such area, by reason of such factors, to constitute a distinct section of the city; and (2) has been designated as a historic district pursuant to the provisions of this chapter." § 207-1.0 (h). The Act also provides for the designation of a "scenic landmark," see § 207-1.0 (w), and an "interior landmark." See § 207-1.0 (m).

¹² See *Landmarks Preservation Commission of the City of New York, Landmarks and Historic Districts* (1977). Although appellants are correct in noting that some of the designated landmarks are publicly owned, the vast majority are, like Grand Central Terminal, privately owned structures.

falling into a state of irremediable disrepair. See § 207-10.0 (a). Second, the Commission must approve in advance any proposal to alter the exterior architectural features of the landmark or to construct any exterior improvement on the landmark site, thus ensuring that decisions concerning construction on the landmark site are made with due consideration of both the public interest in the maintenance of the structure and the landowner's interest in use of the property. See §§ 207-4.0 to 207-9.0.

In the event an owner wishes to alter a landmark site, three separate procedures are available through which administrative approval may be obtained. First, the owner may apply to the Commission for a "certificate of no effect on protected architectural features": that is, for an order approving the improvement or alteration on the ground that it will not change or affect any architectural feature of the landmark and will be in harmony therewith. See § 207-5.0. Denial of the certificate is subject to judicial review.

Second, the owner may apply to the Commission for a certificate of "appropriateness." See § 207-6.0. Such certificates will be granted if the Commission concludes—focusing upon aesthetic, historical, and architectural values—that the proposed construction on the landmark site would not unduly hinder the protection, enhancement, perpetuation, and use of the landmark. Again, denial of the certificate is subject to judicial review. Moreover, the owner who is denied either a certificate of no exterior effect or a certificate of appropriateness may submit an alternative or modified plan for approval. The final procedure—seeking a certificate of appropriateness on the ground of "insufficient return," see § 207-8.0—provides special mechanisms, which vary depending on whether or not the landmark enjoys a tax exemption,¹³ to ensure that designation does not cause economic hardship.

¹³ If the owner of a non-tax-exempt parcel has been denied certificates of appropriateness for a proposed alteration and shows that he is not earning

Although the designation of a landmark and landmark site restricts the owner's control over the parcel, designation also enhances the economic position of the landmark owner in one significant respect. Under New York City's zoning laws, owners of real property who have not developed their property

a reasonable return on the property in its present state, the Commission and other city agencies must assume the burden of developing a plan that will enable the landmark owner to earn a reasonable return on the landmark site. The plan may include, but need not be limited to, partial or complete tax exemption, remission of taxes, and authorizations for alterations, construction, or reconstruction appropriate for and not inconsistent with the purposes of the law. § 207-8.0 (c). The owner is free to accept or reject a plan devised by the Commission and approved by the other city agencies. If he accepts the plan, he proceeds to operate the property pursuant to the plan. If he rejects the plan, the Commission may recommend that the city proceed by eminent domain to acquire a protective interest in the landmark, but if the city does not do so within a specified time period, the Commission must issue a notice allowing the property owner to proceed with the alteration or improvement as originally proposed in his application for a certificate of appropriateness.

Tax-exempt structures are treated somewhat differently. They become eligible for special treatment only if four preconditions are satisfied: (1) the owner previously entered into an agreement to sell the parcel that was contingent upon the issuance of a certificate of approval; (2) the property, as it exists at the time of the request, is not capable of earning a reasonable return; (3) the structure is no longer suitable to its past or present purposes; and (4) the prospective buyer intends to alter the landmark structure. In the event the owner demonstrates that the property in its present state is not earning a reasonable return, the Commission must either find another buyer for it or allow the sale and construction to proceed.

But this is not the only remedy available for owners of tax-exempt landmarks. As the case at bar illustrates, see *infra*, at 121, if an owner files suit and establishes that he is incapable of earning a "reasonable return" on the site in its present state, he can be afforded judicial relief. Similarly, where a landmark owner who enjoys a tax exemption has demonstrated that the landmark structure, as restricted, is totally inadequate for the owner's "legitimate needs," the law has been held invalid as applied to that parcel. See *Lutheran Church v. City of New York*, 35 N. Y. 2d 121, 316 N. E. 2d 305 (1974).

to the full extent permitted by the applicable zoning laws are allowed to transfer development rights to contiguous parcels on the same city block. See New York City, Zoning Resolution Art. I, ch. 2, § 12-10 (1978) (definition of "zoning lot"). A 1968 ordinance gave the owners of landmark sites additional opportunities to transfer development rights to other parcels. Subject to a restriction that the floor area of the transferee lot may not be increased by more than 20% above its authorized level, the ordinance permitted transfers from a landmark parcel to property across the street or across a street intersection. In 1969, the law governing the conditions under which transfers from landmark parcels could occur was liberalized, see New York City Zoning Resolutions 74-79 to 74-793, apparently to ensure that the Landmarks Law would not unduly restrict the development options of the owners of Grand Central Terminal. See Marcus, Air Rights Transfers in New York City, 36 Law & Contemp. Prob. 372, 375 (1971). The class of recipient lots was expanded to include lots "across a street and opposite to another lot or lots which except for the intervention of streets or street intersections f[or]m a series extending to the lot occupied by the landmark building[, provided that] all lots [are] in the same ownership." New York City Zoning Resolution 74-79 (emphasis deleted).¹⁴ In addition, the 1969 amendment permits, in highly commer-

¹⁴ To obtain approval for a proposed transfer, the landmark owner must follow the following procedure. First, he must obtain the permission of the Commission which will examine the plans for the development of the transferee lot to determine whether the planned construction would be compatible with the landmark. Second, he must obtain the approbation of New York City's Planning Commission which will focus on the effects of the transfer on occupants of the buildings in the vicinity of the transferee lot and whether the landmark owner will preserve the landmark. Finally, the matter goes to the Board of Estimate, which has final authority to grant or deny the application. See also Costonis, *supra* n. 2, at 585-586.

cialized areas like midtown Manhattan, the transfer of all unused development rights to a single parcel. *Ibid.*

B

This case involves the application of New York City's Landmarks Preservation Law to Grand Central Terminal (Terminal). The Terminal, which is owned by the Penn Central Transportation Co. and its affiliates (Penn Central), is one of New York City's most famous buildings. Opened in 1913, it is regarded not only as providing an ingenious engineering solution to the problems presented by urban railroad stations, but also as a magnificent example of the French beaux-arts style.

The Terminal is located in midtown Manhattan. Its south facade faces 42d Street and that street's intersection with Park Avenue. At street level, the Terminal is bounded on the west by Vanderbilt Avenue, on the east by the Commodore Hotel, and on the north by the Pan-American Building. Although a 20-story office tower, to have been located above the Terminal, was part of the original design, the planned tower was never constructed.¹⁵ The Terminal itself is an eight-story structure which Penn Central uses as a railroad station and in which it rents space not needed for railroad purposes to a variety of commercial interests. The Terminal is one of a number of properties owned by appellant Penn Central in this area of midtown Manhattan. The others include the Barclay, Biltmore, Commodore, Roosevelt, and Waldorf-Astoria Hotels, the Pan-American Building and other office buildings along Park Avenue, and the Yale Club. At least eight of these are eligible to be recipients of development rights afforded the Terminal by virtue of landmark designation.

On August 2, 1967, following a public hearing, the Commission designated the Terminal a "landmark" and designated the

¹⁵ The Terminal's present foundation includes columns, which were built into it for the express purpose of supporting the proposed 20-story tower.

“city tax block” it occupies a “landmark site.”¹⁶ The Board of Estimate confirmed this action on September 21, 1967. Although appellant Penn Central had opposed the designation before the Commission, it did not seek judicial review of the final designation decision.

On January 22, 1968, appellant Penn Central, to increase its income, entered into a renewable 50-year lease and sublease agreement with appellant UGP Properties, Inc. (UGP), a wholly owned subsidiary of Union General Properties, Ltd., a United Kingdom corporation. Under the terms of the agreement, UGP was to construct a multistory office building above the Terminal. UGP promised to pay Penn Central \$1 million annually during construction and at least \$3 million annually thereafter. The rentals would be offset in part by a loss of some \$700,000 to \$1 million in net rentals presently received from concessionaires displaced by the new building.

Appellants UGP and Penn Central then applied to the Commission for permission to construct an office building atop the Terminal. Two separate plans, both designed by architect Marcel Breuer and both apparently satisfying the terms of the applicable zoning ordinance, were submitted to the Commission for approval. The first, Breuer I, provided for the construction of a 55-story office building, to be cantilevered above the existing facade and to rest on the roof of the Terminal. The second, Breuer II Revised,¹⁷ called for tearing

¹⁶ The Commission's report stated:

“Grand Central Station, one of the great buildings of America, evokes a spirit that is unique in this City. It combines distinguished architecture with a brilliant engineering solution, wedded to one of the most fabulous railroad terminals of our time. Monumental in scale, this great building functions as well today as it did when built. In style, it represents the best of the French Beaux Arts.” Record 2240.

¹⁷ Appellants also submitted a plan, denominated Breuer II, to the Commission. However, because appellants learned that Breuer II would have violated existing easements, they substituted Breuer II Revised for Breuer II, and the Commission evaluated the appropriateness only of Breuer II Revised.

down a portion of the Terminal that included the 42d Street facade, stripping off some of the remaining features of the Terminal's facade, and constructing a 53-story office building. The Commission denied a certificate of no exterior effect on September 20, 1968. Appellants then applied for a certificate of “appropriateness” as to both proposals. After four days of hearings at which over 80 witnesses testified, the Commission denied this application as to both proposals.

The Commission's reasons for rejecting certificates respecting Breuer II Revised are summarized in the following statement: “To protect a Landmark, one does not tear it down. To perpetuate its architectural features, one does not strip them off.” Record 2255. Breuer I, which would have preserved the existing vertical facades of the present structure, received more sympathetic consideration. The Commission first focused on the effect that the proposed tower would have on one desirable feature created by the present structure and its surroundings: the dramatic view of the Terminal from Park Avenue South. Although appellants had contended that the Pan-American Building had already destroyed the silhouette of the south facade and that one additional tower could do no further damage and might even provide a better background for the facade, the Commission disagreed, stating that it found the majestic approach from the south to be still unique in the city and that a 55-story tower atop the Terminal would be far more detrimental to its south facade than the Pan-American Building 375 feet away. Moreover, the Commission found that from closer vantage points the Pan-American Building and the other towers were largely cut off from view, which would not be the case of the mass on top of the Terminal planned under Breuer I. In conclusion, the Commission stated:

“[We have] no fixed rule against making additions to designated buildings—it all depends on how they are done But to balance a 55-story office tower above

a flamboyant Beaux-Arts facade seems nothing more than an aesthetic joke. Quite simply, the tower would overwhelm the Terminal by its sheer mass. The 'addition' would be four times as high as the existing structure and would reduce the Landmark itself to the status of a curiosity.

"Landmarks cannot be divorced from their settings—particularly when the setting is a dramatic and integral part of the original concept. The Terminal, in its setting, is a great example of urban design. Such examples are not so plentiful in New York City that we can afford to lose any of the few we have. And we must preserve them in a meaningful way—with alterations and additions of such character, scale, materials and mass as will protect, enhance and perpetuate the original design rather than overwhelm it." *Id.*, at 2251.¹⁸

Appellants did not seek judicial review of the denial of either certificate. Because the Terminal site enjoyed a tax exemption,¹⁹ remained suitable for its present and future uses, and was not the subject of a contract of sale, there were no further administrative remedies available to appellants as to the Breuer I and Breuer II Revised plans. See n. 13, *supra*. Further, appellants did not avail themselves of the opportunity to develop

¹⁸ In discussing Breuer I, the Commission also referred to a number of instances in which it had approved additions to landmarks: "The office and reception wing added to Gracie Mansion and the school and church house added to the 12th Street side of the First Presbyterian Church are examples that harmonize in scale, material and character with the structures they adjoin. The new Watch Tower Bible and Tract Society building on Brooklyn Heights, though completely modern in idiom, respects the qualities of its surroundings and will enhance the Brooklyn Heights Historic District, as Butterfield House enhances West 12th Street, and Breuer's own Whitney Museum its Madison Avenue locale." Record 2251.

¹⁹ See N. Y. Real Prop. Tax Law § 489-aa *et seq.* (McKinney Supp. 1977).

and submit other plans for the Commission's consideration and approval. Instead, appellants filed suit in New York Supreme Court, Trial Term, claiming, *inter alia*, that the application of the Landmarks Preservation Law had "taken" their property without just compensation in violation of the Fifth and Fourteenth Amendments and arbitrarily deprived them of their property without due process of law in violation of the Fourteenth Amendment. Appellants sought a declaratory judgment, injunctive relief barring the city from using the Landmarks Law to impede the construction of any structure that might otherwise lawfully be constructed on the Terminal site, and damages for the "temporary taking" that occurred between August 2, 1967, the designation date, and the date when the restrictions arising from the Landmarks Law would be lifted. The trial court granted the injunctive and declaratory relief, but severed the question of damages for a "temporary taking."²⁰

Appellees appealed, and the New York Supreme Court, Appellate Division, reversed. 50 App. Div. 2d 265, 377 N. Y. S. 2d 20 (1975). The Appellate Division held that the restrictions on the development of the Terminal site were necessary to promote the legitimate public purpose of protecting landmarks and therefore that appellants could sustain their constitutional claims only by proof that the regulation deprived them of all reasonable beneficial use of the property. The Appellate Division held that the evidence appellants

²⁰ Although that court suggested that any regulation of private property to protect landmark values was unconstitutional if "just compensation" were not afforded, it also appeared to rely upon its findings: first, that the cost to Penn Central of operating the Terminal building itself, exclusive of purely railroad operations, exceeded the revenues received from concessionaires and tenants in the Terminal; and second, that the special transferable development rights afforded Penn Central as an owner of a landmark site did not "provide compensation to plaintiffs or minimize the harm suffered by plaintiffs due to the designation of the Terminal as a landmark."

introduced at trial—"Statements of Revenues and Costs," purporting to show a net operating loss for the years 1969 and 1971, which were prepared for the instant litigation—had not satisfied their burden.²¹ First, the court rejected the claim that these statements showed that the Terminal was operating at a loss, for in the court's view, appellants had improperly attributed some railroad operating expenses and taxes to their real estate operations, and compounded that error by failing to impute any rental value to the vast space in the Terminal devoted to railroad purposes. Further, the Appellate Division concluded that appellants had failed to establish either that they were unable to increase the Terminal's commercial income by transforming vacant or underutilized space to revenue-producing use, or that the unused development rights over the Terminal could not have been profitably transferred to one or more nearby sites.²² The Appellate Division concluded that all appellants had succeeded in showing was that they had been deprived of the property's most profitable use, and that this showing did not establish that appellants had been unconstitutionally deprived of their property.

The New York Court of Appeals affirmed. 42 N. Y. 2d 324, 366 N. E. 2d 1271 (1977). That court summarily rejected any claim that the Landmarks Law had "taken"

²¹ These statements appear to have reflected the costs of maintaining the exterior architectural features of the Terminal in "good repair" as required by the law. As would have been apparent in any case therefore, the existence of the duty to keep up the property was here—and will presumably always be—factored into the inquiry concerning the constitutionality of the landmark restrictions.

The Appellate Division also rejected the claim that an agreement of Penn Central with the Metropolitan Transit Authority and the Connecticut Transit Authority provided a basis for invalidating the application of the Landmarks Law.

²² The record reflected that Penn Central had given serious consideration to transferring some of those rights to either the Biltmore Hotel or the Roosevelt Hotel.

property without "just compensation," *id.*, at 329, 366 N. E. 2d, at 1274, indicating that there could be no "taking" since the law had not transferred control of the property to the city, but only restricted appellants' exploitation of it. In that circumstance, the Court of Appeals held that appellants' attack on the law could prevail only if the law deprived appellants of their property in violation of the Due Process Clause of the Fourteenth Amendment. Whether or not there was a denial of substantive due process turned on whether the restrictions deprived Penn Central of a "reasonable return" on the "privately created and privately managed ingredient" of the Terminal. *Id.*, at 328, 366 N. E. 2d, at 1273.²³ The Court of Appeals concluded that the Landmarks Law had not effected a denial of due process because: (1) the landmark regulation permitted the same use as had been made of the Terminal for more than half a century; (2) the appellants had failed to show that they could not earn a reasonable return on their investment in the Terminal itself; (3) even if the Terminal proper could never operate at a reasonable profit, some of the income from Penn Central's extensive real estate holdings in the area, which include hotels and office buildings, must realistically be imputed to the Terminal; and

²³ The Court of Appeals suggested that in calculating the value of the property upon which appellants were entitled to earn a reasonable return, the "publicly created" components of the value of the property—*i. e.*, those elements of its value attributable to the "efforts of organized society" or to the "social complex" in which the Terminal is located—had to be excluded. However, since the record upon which the Court of Appeals decided the case did not, as that court recognized, contain a basis for segregating the privately created from the publicly created elements of the value of the Terminal site and since the judgment of the Court of Appeals in any event rests upon bases that support our affirmance, see *infra*, this page and 122, we have no occasion to address the question whether it is permissible or feasible to separate out the "social increments" of the value of property. See Costonis, *The Disparity Issue: A Context for the Grand Central Terminal Decision*, 91 Harv. L. Rev. 402, 416-417 (1977).

(4) the development rights above the Terminal, which had been made transferable to numerous sites in the vicinity of the Terminal, one or two of which were suitable for the construction of office buildings, were valuable to appellants and provided "significant, perhaps 'fair,' compensation for the loss of rights above the terminal itself." *Id.*, at 333-336, 366 N. E. 2d, at 1276-1278.

Observing that its affirmance was "[o]n the present record," and that its analysis had not been fully developed by counsel at any level of the New York judicial system, the Court of Appeals directed that counsel "should be entitled to present . . . any additional submissions which, in the light of [the court's] opinion, may usefully develop further the factors discussed." *Id.*, at 337, 366 N. E. 2d, at 1279. Appellants chose not to avail themselves of this opportunity and filed a notice of appeal in this Court. We noted probable jurisdiction. 434 U. S. 983 (1977). We affirm.

II

The issues presented by appellants are (1) whether the restrictions imposed by New York City's law upon appellants' exploitation of the Terminal site effect a "taking" of appellants' property for a public use within the meaning of the Fifth Amendment, which of course is made applicable to the States through the Fourteenth Amendment, see *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 239 (1897), and, (2), if so, whether the transferable development rights afforded appellants constitute "just compensation" within the meaning of the Fifth Amendment.²⁴ We need only address the question whether a "taking" has occurred.²⁵

²⁴ Our statement of the issues is a distillation of four questions presented in the jurisdictional statement:

"Does the social and cultural desirability of preserving historical landmarks through government regulation derogate from the constitutional

[Footnote 25 is on p. 123]

A

Before considering appellants' specific contentions, it will be useful to review the factors that have shaped the jurisprudence of the Fifth Amendment injunction "nor shall private property be taken for public use, without just compensation." The question of what constitutes a "taking" for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty. While this Court has recognized that the "Fifth Amendment's guarantee . . . [is] designed 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," *Armstrong v. United States*, 364 U. S.

requirement that just compensation be paid for private property taken for public use?

"Is Penn Central entitled to no compensation for that large but unmeasurable portion of the value of its rights to construct an office building over the Grand Central Terminal that is said to have been created by the efforts of 'society as an organized entity'?"

"Does a finding that Penn Central has failed to establish that there is no possibility, without exercising its development rights, of earning a reasonable return on all of its remaining properties that benefit in any way from the operations of the Grand Central Terminal warrant the conclusion that no compensation need be paid for the taking of those rights?"

"Does the possibility accorded to Penn Central, under the landmark-preservation regulation, of realizing some value at some time by transferring the Terminal development rights to other buildings, under a procedure that is conceded to be defective, severely limited, procedurally complex and speculative, and that requires ultimate discretionary approval by governmental authorities, meet the constitutional requirements of just compensation as applied to landmarks?" Jurisdictional Statement 3-4.

The first and fourth questions assume that there has been a taking and raise the problem whether, under the circumstances of this case, the transferable development rights constitute "just compensation." The second and third questions, on the other hand, are directed to the issue whether a taking has occurred.

²⁵ As is implicit in our opinion, we do not embrace the proposition that a "taking" can never occur unless government has transferred physical control over a portion of a parcel.

40, 49 (1960), 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, rather than remain disproportionately concentrated on a few persons. See *Goldblatt v. Hempstead*, 369 U. S. 590, 594 (1962). Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that] case." *United States v. Central Eureka Mining Co.*, 357 U. S. 155, 168 (1958); see *United States v. Caltex, Inc.*, 344 U. S. 149, 156 (1952).

In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. See *Goldblatt v. Hempstead*, *supra*, at 594. So, too, is the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, see, e. g., *United States v. Causby*, 328 U. S. 256 (1946), than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

"Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law," *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393, 413 (1922), and this Court has accordingly recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values. Exercises of the taxing power are one obvious example. A second are the decisions in which this Court has dismissed "taking" challenges on the ground that, while the challenged government action caused

economic harm, it did not interfere with interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute "property" for Fifth Amendment purposes. See, e. g., *United States v. Willow River Power Co.*, 324 U. S. 499 (1945) (interest in high-water level of river for runoff for tailwaters to maintain power head is not property); *United States v. Chandler-Dunbar Water Power Co.*, 229 U. S. 53 (1913) (no property interest can exist in navigable waters); see also *Demorest v. City Bank Co.*, 321 U. S. 36 (1944); *Muhlker v. Harlem R. Co.*, 197 U. S. 544 (1905); Sax, *Takings and the Police Power*, 74 Yale L. J. 36, 61-62 (1964).

More importantly for the present case, in instances in which a state tribunal reasonably concluded that "the health, safety, morals, or general welfare" would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests. See *Nectow v. Cambridge*, 277 U. S. 183, 188 (1928). Zoning laws are, of course, the classic example, see *Euclid v. Ambler Realty Co.*, 272 U. S. 365 (1926) (prohibition of industrial use); *Gorieb v. Fox*, 274 U. S. 603, 608 (1927) (requirement that portions of parcels be left unbuilt); *Welch v. Swasey*, 214 U. S. 91 (1909) (height restriction), which have been viewed as permissible governmental action even when prohibiting the most beneficial use of the property. See *Goldblatt v. Hempstead*, *supra*, at 592-593, and cases cited; see also *Eastlake v. Forest City Enterprises, Inc.*, 426 U. S. 668, 674 n. 8 (1976).

Zoning laws generally do not affect existing uses of real property, but "taking" challenges have also been held to be without merit in a wide variety of situations when the challenged governmental actions prohibited a beneficial use to which individual parcels had previously been devoted and thus caused substantial individualized harm. *Miller v. Schoene*, 276 U. S. 272 (1928), is illustrative. In that case, a state entomologist, acting pursuant to a state statute, ordered

the claimants to cut down a large number of ornamental red cedar trees because they produced cedar rust fatal to apple trees cultivated nearby. Although the statute provided for recovery of any expense incurred in removing the cedars, and permitted claimants to use the felled trees, it did not provide compensation for the value of the standing trees or for the resulting decrease in market value of the properties as a whole. A unanimous Court held that this latter omission did not render the statute invalid. The Court held that the State might properly make "a choice between the preservation of one class of property and that of the other" and since the apple industry was important in the State involved, concluded that the State had not exceeded "its constitutional powers by deciding upon the destruction of one class of property [without compensation] in order to save another which, in the judgment of the legislature, is of greater value to the public." *Id.*, at 279.

Again, *Hadacheck v. Sebastian*, 239 U. S. 394 (1915), upheld a law prohibiting the claimant from continuing his otherwise lawful business of operating a brickyard in a particular physical community on the ground that the legislature had reasonably concluded that the presence of the brickyard was inconsistent with neighboring uses. See also *United States v. Central Eureka Mining Co.*, *supra* (Government order closing gold mines so that skilled miners would be available for other mining work held not a taking); *Atchison, T. & S. F. R. Co. v. Public Utilities Comm'n*, 346 U. S. 346 (1953) (railroad may be required to share cost of constructing railroad grade improvement); *Walls v. Midland Carbon Co.*, 254 U. S. 300 (1920) (law prohibiting manufacture of carbon black upheld); *Reinman v. Little Rock*, 237 U. S. 171 (1915) (law prohibiting livery stable upheld); *Mugler v. Kansas*, 123 U. S. 623 (1887) (law prohibiting liquor business upheld).

Goldblatt v. Hempstead, *supra*, is a recent example. There, a 1958 city safety ordinance banned any excavations below

the water table and effectively prohibited the claimant from continuing a sand and gravel mining business that had been operated on the particular parcel since 1927. The Court upheld the ordinance against a "taking" challenge, although the ordinance prohibited the present and presumably most beneficial use of the property and had, like the regulations in *Miller and Hadacheck*, severely affected a particular owner. The Court assumed that the ordinance did not prevent the owner's reasonable use of the property since the owner made no showing of an adverse effect on the value of the land. Because the restriction served a substantial public purpose, the Court thus held no taking had occurred. It is, of course, implicit in *Goldblatt* that a use restriction on real property may constitute a "taking" if not reasonably necessary to the effectuation of a substantial public purpose, see *Nectow v. Cambridge*, *supra*; cf. *Moore v. East Cleveland*, 431 U. S. 494, 513-514 (1977) (STEVENS, J., concurring), or perhaps if it has an unduly harsh impact upon the owner's use of the property.

Pennsylvania Coal Co. v. Mahon, 260 U. S. 393 (1922), is the leading case for the proposition that a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a "taking." There the claimant had sold the surface rights to particular parcels of property, but expressly reserved the right to remove the coal thereunder. A Pennsylvania statute, enacted after the transactions, forbade any mining of coal that caused the subsidence of any house, unless the house was the property of the owner of the underlying coal and was more than 150 feet from the improved property of another. Because the statute made it commercially impracticable to mine the coal, *id.*, at 414, and thus had nearly the same effect as the complete destruction of rights claimant had reserved from the owners of the surface land, see *id.*, at 414-415, the Court held that the statute was invalid as effecting a "taking"

without just compensation. See also *Armstrong v. United States*, 364 U. S. 40 (1960) (Government's complete destruction of a materialman's lien in certain property held a "taking"); *Hudson Water Co. v. McCarter*, 209 U. S. 349, 355 (1908) (if height restriction makes property wholly useless "the rights of property . . . prevail over the other public interest" and compensation is required). See generally Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1229-1234 (1967).

Finally, government actions that may be characterized as acquisitions of resources to permit or facilitate uniquely public functions have often been held to constitute "takings." *United States v. Causby*, 328 U. S. 256 (1946), is illustrative. In holding that direct overflights above the claimant's land, that destroyed the present use of the land as a chicken farm, constituted a "taking," *Causby* emphasized that Government had not "merely destroyed property [but was] using a part of it for the flight of its planes." *Id.*, at 262-263, n. 7. See also *Griggs v. Allegheny County*, 369 U. S. 84 (1962) (overflights held a taking); *Portsmouth Co. v. United States*, 260 U. S. 327 (1922) (United States military installations' repeated firing of guns over claimant's land is a taking); *United States v. Cress*, 243 U. S. 316 (1917) (repeated floodings of land caused by water project is a taking); but see *YMCA v. United States*, 395 U. S. 85 (1969) (damage caused to building when federal officers who were seeking to protect building were attacked by rioters held not a taking). See generally Michelman, *supra*, at 1226-1229; Sax, Takings and the Police Power, 74 Yale L. J. 36 (1964).

B

In contending that the New York City law has "taken" their property in violation of the Fifth and Fourteenth Amendments, appellants make a series of arguments, which, while tailored to the facts of this case, essentially urge that

any substantial restriction imposed pursuant to a landmark law must be accompanied by just compensation if it is to be constitutional. Before considering these, we emphasize what is not in dispute. Because this Court has recognized, in a number of settings, that States and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city, see *New Orleans v. Dukes*, 427 U. S. 297 (1976); *Young v. American Mini Theatres, Inc.*, 427 U. S. 50 (1976); *Village of Belle Terre v. Boraas*, 416 U. S. 1, 9-10 (1974); *Berman v. Parker*, 348 U. S. 26, 33 (1954); *Welch v. Swasey*, 214 U. S., at 108, appellants do not contest that New York City's objective of preserving structures and areas with special historic, architectural, or cultural significance is an entirely permissible governmental goal. They also do not dispute that the restrictions imposed on its parcel are appropriate means of securing the purposes of the New York City law. Finally, appellants do not challenge any of the specific factual premises of the decision below. They accept for present purposes both that the parcel of land occupied by Grand Central Terminal must, in its present state, be regarded as capable of earning a reasonable return,²⁶ and that the transferable development rights afforded appellants by virtue of the Terminal's designation as a landmark are valuable, even if not as valuable as the rights to construct above the Terminal. In appellants' view none of these factors derogate from their claim that New York City's law has effected a "taking."

²⁶ Both the Jurisdictional Statement 7-8, n. 7, and Brief for Appellants 8 n. 7 state that appellants are not seeking review of the New York courts' determination that Penn Central could earn a "reasonable return" on its investment in the Terminal. Although appellants suggest in their reply brief that the factual conclusions of the New York courts cannot be sustained unless we accept the rationale of the New York Court of Appeals, see Reply Brief for Appellants 12 n. 15, it is apparent that the findings concerning Penn Central's ability to profit from the Terminal depend in no way on the Court of Appeals' rationale.

They first observe that the airspace above the Terminal is a valuable property interest, citing *United States v. Causby, supra*. They urge that the Landmarks Law has deprived them of any gainful use of their "air rights" above the Terminal and that, irrespective of the value of the remainder of their parcel, the city has "taken" their right to this superjacent airspace, thus entitling them to "just compensation" measured by the fair market value of these air rights.

Apart from our own disagreement with appellants' characterization of the effect of the New York City law, see *infra*, at 134-135, the submission that appellants may establish a "taking" simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable. Were this the rule, this Court would have erred not only in upholding laws restricting the development of air rights, see *Welch v. Swasey, supra*, but also in approving those prohibiting both the subjacent, see *Goldblatt v. Hempstead*, 369 U. S. 590 (1962), and the lateral, see *Gorieb v. Fox*, 274 U. S. 603 (1927), development of particular parcels.²⁷ "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the

²⁷ These cases dispose of any contention that might be based on *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393 (1922), that full use of air rights is so bound up with the investment-backed expectations of appellants that governmental deprivation of these rights invariably—i. e., irrespective of the impact of the restriction on the value of the parcel as a whole—constitutes a "taking." Similarly, *Welch*, *Goldblatt*, and *Gorieb* illustrate the fallacy of appellants' related contention that a "taking" must be found to have occurred whenever the land-use restriction may be characterized as imposing a "servitude" on the claimant's parcel.

parcel as a whole—here, the city tax block designated as the "landmark site."

Secondly, appellants, focusing on the character and impact of the New York City law, argue that it effects a "taking" because its operation has significantly diminished the value of the Terminal site. Appellants concede that the decisions sustaining other land-use regulations, which, like the New York City law, are reasonably related to the promotion of the general welfare, uniformly reject the proposition that diminution in property value, standing alone, can establish a "taking," see *Euclid v. Ambler Realty Co.*, 272 U. S. 365 (1926) (75% diminution in value caused by zoning law); *Hadacheck v. Sebastian*, 239 U. S. 394 (1915) (87½% diminution in value); cf. *Eastlake v. Forest City Enterprises, Inc.*, 426 U. S., at 674 n. 8, and that the "taking" issue in these contexts is resolved by focusing on the uses the regulations permit. See also *Goldblatt v. Hempstead, supra*. Appellants, moreover, also do not dispute that a showing of diminution in property value would not establish a "taking" if the restriction had been imposed as a result of historic-district legislation, see generally *Maher v. New Orleans*, 516 F. 2d 1051 (CA5 1975), but appellants argue that New York City's regulation of individual landmarks is fundamentally different from zoning or from historic-district legislation because the controls imposed by New York City's law apply only to individuals who own selected properties.

Stated baldly, appellants' position appears to be that the only means of ensuring that selected owners are not singled out to endure financial hardship for no reason is to hold that any restriction imposed on individual landmarks pursuant to the New York City scheme is a "taking" requiring the payment of "just compensation." Agreement with this argument would, of course, invalidate not just New York City's law, but all comparable landmark legislation in the Nation. We find no merit in it.

It is true, as appellants emphasize, that both historic-district legislation and zoning laws regulate all properties within given physical communities whereas landmark laws apply only to selected parcels. But, contrary to appellants' suggestions, landmark laws are not like discriminatory, or "reverse spot," zoning: that is, a land-use decision which arbitrarily singles out a particular parcel for different, less favorable treatment than the neighboring ones. See 2 A. Rathkopf, *The Law of Zoning and Planning* 26-4, and n. 6 (4th ed. 1978). In contrast to discriminatory zoning, which is the antithesis of land-use control as part of some comprehensive plan, the New York City law embodies a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city,²⁸ and as noted, over 400 landmarks and 31 historic districts have been designated pursuant to this plan.

Equally without merit is the related argument that the decision to designate a structure as a landmark "is inevitably arbitrary or at least subjective, because it is basically a matter of taste," Reply Brief for Appellants 22, thus unavoidably singling out individual landowners for disparate and unfair treatment. The argument has a particularly hollow ring in this case. For appellants not only did not seek judicial review of either the designation or of the denials of the certificates of appropriateness and of no exterior effect, but do not even now suggest that the Commission's decisions concerning the Terminal were in any sense arbitrary or unprincipled. But, in

²⁸ Although the New York Court of Appeals contrasted the New York City Landmarks Law with both zoning and historic-district legislation and stated at one point that landmark laws do not "further a general community plan," 42 N. Y. 2d 324, 330, 366 N. E. 2d 1271, 1274 (1977), it also emphasized that the implementation of the objectives of the Landmarks Law constitutes an "acceptable reason for singling out one particular parcel for different and less favorable treatment." *Ibid.*, 366 N. E. 2d, at 1275. Therefore, we do not understand the New York Court of Appeals to disagree with our characterization of the law.

any event, a landmark owner has a right to judicial review of any Commission decision, and, quite simply, there is no basis whatsoever for a conclusion that courts will have any greater difficulty identifying arbitrary or discriminatory action in the context of landmark regulation than in the context of classic zoning or indeed in any other context.²⁹

Next, appellants observe that New York City's law differs from zoning laws and historic-district ordinances in that the Landmarks Law does not impose identical or similar restrictions on all structures located in particular physical communities. It follows, they argue, that New York City's law is inherently incapable of producing the fair and equitable distribution of benefits and burdens of governmental action which is characteristic of zoning laws and historic-district legislation and which they maintain is a constitutional requirement if "just compensation" is not to be afforded. It is, of course, true that the Landmarks Law has a more severe impact on some landowners than on others, but that in itself does not mean that the law effects a "taking." Legislation designed to promote the general welfare commonly burdens some more than others. The owners of the brickyard in *Hadacheck*, of the cedar trees in *Miller v. Schoene*, and of the gravel and sand mine in *Goldblatt v. Hempstead*, were uniquely burdened by the legislation sustained in those cases.³⁰ Similarly, zon-

²⁹ When a property owner challenges the application of a zoning ordinance to his property, the judicial inquiry focuses upon whether the challenged restriction can reasonably be deemed to promote the objectives of the community land-use plan, and will include consideration of the treatment of similar parcels. See generally *Nectow v. Cambridge*, 277 U. S. 183 (1928). When a property owner challenges a landmark designation or restriction as arbitrary or discriminatory, a similar inquiry presumably will occur.

³⁰ Appellants attempt to distinguish these cases on the ground that, in each, government was prohibiting a "noxious" use of land and that in the present case, in contrast, appellants' proposed construction above the Terminal would be beneficial. We observe that the uses in issue in

ing laws often affect some property owners more severely than others but have not been held to be invalid on that account. For example, the property owner in *Euclid* who wished to use its property for industrial purposes was affected far more severely by the ordinance than its neighbors who wished to use their land for residences.

In any event, appellants' repeated suggestions that they are solely burdened and unbenefited is factually inaccurate. This contention overlooks the fact that the New York City law applies to vast numbers of structures in the city in addition to the Terminal—all the structures contained in the 31 historic districts and over 400 individual landmarks, many of which are close to the Terminal.³¹ Unless we are to reject the judgment of the New York City Council that the preservation of landmarks benefits all New York citizens and all structures, both economically and by improving the quality of life in the city as a whole—which we are unwilling to do—we cannot

Hadacheck, *Miller*, and *Goldblatt* were perfectly lawful in themselves. They involved no "blameworthiness, . . . moral wrongdoing or conscious act of dangerous risk-taking which induce[d society] to shift the cost to a particular individual." Sax, Takings and the Police Power, 74 Yale L. J. 36, 50 (1964). These cases are better understood as resting not 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—not unlike historic preservation—expected to produce a widespread public benefit and applicable to all similarly situated property.

Nor, correlatively, can it be asserted that the destruction or fundamental alteration of a historic landmark is not harmful. The suggestion that the beneficial quality of appellants' proposed construction is established by the fact that the construction would have been consistent with applicable zoning laws ignores the development in sensibilities and ideals reflected in landmark legislation like New York City's. Cf. *West Bros. Brick Co. v. Alexandria*, 169 Va. 271, 282–283, 192 S. E. 881, 885–886, appeal dismissed for want of a substantial federal question, 302 U. S. 658 (1937).

³¹ There are some 53 designated landmarks and 5 historic districts or scenic landmarks in Manhattan between 14th and 59th Streets. See Landmarks Preservation Commission, *Landmarks and Historic Districts* (1977).

conclude that the owners of the Terminal have in no sense been benefited by the Landmarks Law. Doubtless appellants believe they are more burdened than benefited by the law, but that must have been true, too, of the property owners in *Miller*, *Hadacheck*, *Euclid*, and *Goldblatt*.³²

Appellants' final broad-based attack would have us treat the law as an instance, like that in *United States v. Causby*, in which government, acting in an enterprise capacity, has appropriated part of their property for some strictly governmental purpose. Apart from the fact that *Causby* was a case of invasion of airspace that destroyed the use of the farm beneath and this New York City law has in nowise impaired the present use of the Terminal, the Landmarks Law neither exploits appellants' parcel for city purposes nor facilitates nor arises from any entrepreneurial operations of the city. The situation is not remotely like that in *Causby* where the airspace above the property was in the flight pattern for military aircraft. The Landmarks Law's effect is simply to prohibit appellants or anyone else from occupying portions of the airspace above the Terminal, while permitting appellants to use the remainder of the parcel in a gainful fashion. This is no more an appropriation of property by government for its own uses than is a zoning law prohibiting, for "aesthetic" reasons, two or more adult theaters within a specified area, see *Young v. American Mini Theatres, Inc.*, 427 U. S. 50 (1976), or a safety regulation prohibiting excavations below a certain level. See *Goldblatt v. Hempstead*.

C

Rejection of appellants' broad arguments is not, however, the end of our inquiry, for all we thus far have established is

³² It is, of course, true that the fact the duties imposed by zoning and historic-district legislation apply throughout particular physical communities provides assurances against arbitrariness, but the applicability of the Landmarks Law to a large number of parcels in the city, in our view, provides comparable, if not identical, assurances.

that the New York City law is not rendered invalid by its failure to provide "just compensation" whenever a landmark owner is restricted in the exploitation of property interests, such as air rights, to a greater extent than provided for under applicable zoning laws. We now must consider whether the interference with appellants' property is of such a magnitude that "there must be an exercise of eminent domain and compensation to sustain [it]." *Pennsylvania Coal Co. v. Mahon*, 260 U. S., at 413. That inquiry may be narrowed to the question of the severity of the impact of the law on appellants' parcel, and its resolution in turn requires a careful assessment of the impact of the regulation on the Terminal site.

Unlike the governmental acts in *Goldblatt, Miller, Causby, Griggs*, and *Hadacheck*, the New York City law does not interfere in any way with the present uses of the Terminal. Its designation as a landmark not only permits but contemplates that appellants may continue to use the property precisely as it has been used for the past 65 years: as a railroad terminal containing office space and concessions. So the law does not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel. More importantly, on this record, we must regard the New York City law as permitting Penn Central not only to profit from the Terminal but also to obtain a "reasonable return" on its investment.

Appellants, moreover, exaggerate the effect of the law on their ability to make use of the air rights above the Terminal in two respects.³³ First, it simply cannot be maintained, on this record, that appellants have been prohibited from occupying *any* portion of the airspace above the Terminal. While the Commission's actions in denying applications to construct an

³³ Appellants, of course, argue at length that the transferable development rights, while valuable, do not constitute "just compensation." Brief for Appellants 36-43.

office building in excess of 50 stories above the Terminal may indicate that it will refuse to issue a certificate of appropriateness for any comparably sized structure, nothing the Commission has said or done suggests an intention to prohibit *any* construction above the Terminal. The Commission's report emphasized that whether any construction would be allowed depended upon whether the proposed addition "would harmonize in scale, material, and character with [the Terminal]." Record 2251. Since appellants have not sought approval for the construction of a smaller structure, we do not know that appellants will be denied any use of any portion of the airspace above the Terminal.³⁴

Second, to the extent appellants have been denied the right to build above the Terminal, it is not literally accurate to say that they have been denied *all* use of even those pre-existing air rights. Their ability to use these rights has not been abrogated; they are made transferable to at least eight parcels in the vicinity of the Terminal, one or two of which have been found suitable for the construction of new office buildings. Although appellants and others have argued that New York City's transferable development-rights program is far from ideal,³⁵ the New York courts here supportably found that, at least in the case of the Terminal, the rights afforded are valuable. While these rights may well not have constituted "just compensation" if a "taking" had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of regulation. Cf. *Goldblatt v. Hempstead*, 369 U. S., at 594 n. 3.

³⁴ Counsel for appellants admitted at oral argument that the Commission has not suggested that it would not, for example, approve a 20-story office tower along the lines of that which was part of the original plan for the Terminal. See Tr. of Oral Arg. 19.

³⁵ See *Costonis*, *supra* n. 2, at 585-589.

On this record, we conclude that the application of New York City's Landmarks Law has not effected a "taking" of appellants' property. The restrictions imposed are substantially related to the promotion of the general welfare and not only permit reasonable beneficial use of the landmark site but also afford appellants opportunities further to enhance not only the Terminal site proper but also other properties.³⁶

Affirmed.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and MR. JUSTICE STEVENS join, dissenting.

Of the over one million buildings and structures in the city of New York, appellees have singled out 400 for designation as official landmarks.¹ The owner of a building might initially be pleased that his property has been chosen by a distinguished committee of architects, historians, and city

³⁶ We emphasize that our holding today is on the present record, which in turn is based on Penn Central's present ability to use the Terminal for its intended purposes and in a gainful fashion. The city conceded at oral argument that if appellants can demonstrate at some point in the future that circumstances have so changed that the Terminal ceases to be "economically viable," appellants may obtain relief. See Tr. of Oral Arg. 42-43.

¹ A large percentage of the designated landmarks are public structures (such as the Brooklyn Bridge, City Hall, the Statue of Liberty and the Municipal Asphalt Plant) and thus do not raise Fifth Amendment taking questions. See Landmarks Preservation Commission of the City of New York, Landmarks and Historic Districts (1977 and Jan. 10, 1978, Supplement). Although the Court refers to the New York ordinance as a *comprehensive* program to preserve *historic* landmarks, *ante*, at 107, the ordinance is not limited to historic buildings and gives little guidance to the Landmarks Preservation Commission in its selection of landmark sites. Section 207-1.0 (n) of the Landmarks Preservation Law, as set forth in N. Y. C. Admin. Code, ch. 8-A (1976), requires only that the selected landmark be at least 30 years old and possess "a special character or special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation."

planners for such a singular distinction. But he may well discover, as appellant Penn Central Transportation Co. did here, that the landmark designation imposes upon him a substantial cost, with little or no offsetting benefit except for the honor of the designation. The question in this case is whether the cost associated with the city of New York's desire to preserve a limited number of "landmarks" within its borders must be borne by all of its taxpayers or whether it can instead be imposed entirely on the owners of the individual properties.

Only in the most superficial sense of the word can this case be said to involve "zoning."² Typical zoning restrictions may, it is true, so limit the prospective uses of a piece of property as to diminish the value of that property in the abstract because it may not be used for the forbidden purposes. But any such abstract decrease in value will more than likely be at least partially offset by an increase in value which flows from similar restrictions as to use on neighboring

² Even the New York Court of Appeals conceded that "[t]his is not a zoning case. . . . Zoning restrictions operate to advance a comprehensive community plan for the common good. Each property owner in the zone is both benefited and restricted from exploitation, presumably without discrimination, except for permitted continuing nonconforming uses. The restrictions may be designed to maintain the general character of the area, or to assure orderly development, objectives inuring to the benefit of all, which property owners acting individually would find difficult or impossible to achieve. . . ."

"Nor does this case involve landmark regulation of a historic district. . . . [In historic districting, as in traditional zoning,] owners although burdened by the restrictions also benefit, to some extent, from the furtherance of a general community plan."

"Restrictions on alteration of individual landmarks are not designed to further a general community plan. Landmark restrictions are designed to prevent alteration or demolition of a single piece of property. To this extent, such restrictions resemble 'discriminatory' zoning restrictions, properly condemned. . . ." 42 N. Y. 2d 324, 329-330, 366 N. E. 2d 1271, 1274 (1977).

properties. All property owners in a designated area are placed under the same restrictions, not only for the benefit of the municipality as a whole but also for the common benefit of one another. In the words of Mr. Justice Holmes, speaking for the Court in *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393, 415 (1922), there is "an average reciprocity of advantage."

Where a relatively few individual buildings, all separated from one another, are singled out and treated differently from surrounding buildings, no such reciprocity exists. The cost to the property owner which results from the imposition of restrictions applicable only to his property and not that of his neighbors may be substantial—in this case, several million dollars—with no comparable reciprocal benefits. And the cost associated with landmark legislation is likely to be of a completely different order of magnitude than that which results from the imposition of normal zoning restrictions. Unlike the regime affected by the latter, the landowner is not simply prohibited from using his property for certain purposes, while allowed to use it for all other purposes. Under the historic-landmark preservation scheme adopted by New York, the property owner is under an affirmative duty to *preserve* his property as a landmark at his own expense. To suggest that because traditional zoning results in some limitation of use of the property zoned, the New York City landmark preservation scheme should likewise be upheld, represents the ultimate in treating as alike things which are different. The rubric of "zoning" has not yet sufficed to avoid the well-established proposition that the Fifth Amendment bars the "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." *Armstrong v. United States*, 364 U. S. 40, 49 (1960). See discussion *infra*, at 147–150.

In August 1967, Grand Central Terminal was designated a landmark over the objections of its owner Penn Central. Immediately upon this designation, Penn Central, like all

owners of a landmark site, was placed under an affirmative duty, backed by criminal fines and penalties, to keep "exterior portions" of the landmark "in good repair." Even more burdensome, however, were the strict limitations that were thereupon imposed on Penn Central's use of its property. At the time Grand Central was designated a landmark, Penn Central was in a precarious financial condition. In an effort to increase its sources of revenue, Penn Central had entered into a lease agreement with appellant UGP Properties, Inc., under which UGP would construct and operate a multistory office building cantilevered above the Terminal building. During the period of construction, UGP would pay Penn Central \$1 million per year. Upon completion, UGP would rent the building for 50 years, with an option for another 25 years, at a guaranteed *minimum* rental of \$3 million per year. The record is clear that the proposed office building was in full compliance with all New York zoning laws and height limitations. Under the Landmarks Preservation Law, however, appellants could not construct the proposed office building unless appellee Landmarks Preservation Commission issued either a "Certificate of No Exterior Effect" or a "Certificate of Appropriateness." Although appellants' architectural plan would have preserved the facade of the Terminal, the Landmarks Preservation Commission has refused to approve the construction.

I

The Fifth Amendment provides in part: "nor shall private property be taken for public use, without just compensation."³

³ The guarantee that private property shall not be taken for public use without just compensation is applicable to the States through the Fourteenth Amendment. Although the state "legislature may prescribe a form of procedure to be observed in the taking of private property for public use, . . . it is not due process of law if provision be not made for compensation." *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 236 (1897).

In a very literal sense, the actions of appellees violated this constitutional prohibition. Before the city of New York declared Grand Central Terminal to be a landmark, Penn Central could have used its "air rights" over the Terminal to build a multistory office building, at an apparent value of several million dollars per year. Today, the Terminal cannot be modified in *any* form, including the erection of additional stories, without the permission of the Landmark Preservation Commission, a permission which appellants, despite good-faith attempts, have so far been unable to obtain. Because the Taking Clause of the Fifth Amendment has not always been read literally, however, the constitutionality of appellees' actions requires a closer scrutiny of this Court's interpretation of the three key words in the Taking Clause—"property," "taken," and "just compensation."⁴

A

Appellees do not dispute that valuable property rights have been destroyed. And the Court has frequently emphasized that the term "property" as used in the Taking Clause includes the entire "group of rights inhering in the citizen's [ownership]." *United States v. General Motors Corp.*, 323 U. S. 373 (1945). The term is not used in the

"vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. [Instead, it] . . . denote[s] the *group of rights* inhering in the citizen's relation to the physical thing, as

⁴ The Court's opinion touches base with, or at least attempts to touch base with, most of the major eminent domain cases decided by this Court. Its use of them, however, is anything but meticulous. In citing to *United States v. Caltex, Inc.*, 344 U. S. 149, 156 (1952), for example, *ante*, at 124, the only language remotely applicable to eminent domain is stated in terms of "the destruction of respondents' terminals by a trained team of engineers in the face of their impending seizure by the enemy." 344 U. S., at 156.

the right to possess, use and dispose of it. . . . The constitutional provision is addressed to *every sort of interest* the citizen may possess." *Id.*, at 377-378 (emphasis added).

While neighboring landowners are free to use their land and "air rights" in any way consistent with the broad boundaries of New York zoning, Penn Central, absent the permission of appellees, must forever maintain its property in its present state.⁵ The property has been thus subjected to a nonconsensual servitude not borne by any neighboring or similar properties.⁶

B

Appellees have thus destroyed—in a literal sense, "taken"—substantial property rights of Penn Central. While the term "taken" might have been narrowly interpreted to include only physical seizures of property rights, "the construction of the phrase has not been so narrow. The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking." *Id.*, at 378. See also *United States v. Lynah*, 188 U. S. 445, 469

⁵ In particular, Penn Central cannot increase the height of the Terminal. This Court has previously held that the "air rights" over an area of land are "property" for purposes of the Fifth Amendment. See *United States v. Causby*, 328 U. S. 256 (1946) ("air rights" taken by low-flying airplanes); *Griggs v. Allegheny County*, 369 U. S. 84 (1962) (same); *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U. S. 327 (1922) (firing of projectiles over summer resort can constitute taking). See also *Butler v. Frontier Telephone Co.*, 186 N. Y. 486, 79 N. E. 716 (1906) (stringing of telephone wire across property constitutes a taking).

⁶ It is, of course, irrelevant that appellees interfered with or destroyed property rights that Penn Central had not yet physically used. The Fifth Amendment must be applied with "reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future." *Boom Co. v. Patterson*, 98 U. S. 403, 408 (1879) (emphasis added).

(1903);⁷ *Dugan v. Rank*, 372 U. S. 609, 625 (1963). Because "not every destruction or injury to property by governmental action has been held to be a 'taking' in the constitutional sense," *Armstrong v. United States*, 364 U. S., at 48, however, this does not end our inquiry. But an examination of the two exceptions where the destruction of property does not constitute a taking demonstrates that a compensable taking has occurred here.

1

As early as 1887, the Court recognized that the government can prevent a property owner from using his property to injure others without having to compensate the owner for the value of the forbidden use.

"A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be *injurious to the health, morals, or safety of the community*, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests. . . . The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, *by reason of their not being permitted, by a noxious use of*

⁷ "Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors." 188 U. S., at 470.

their property, to inflict injury upon the community." *Mugler v. Kansas*, 123 U. S. 623, 668–669.

Thus, there is no "taking" where a city prohibits the operation of a brickyard within a residential area, see *Hadacheck v. Sebastian*, 239 U. S. 394 (1915), or forbids excavation for sand and gravel below the water line, see *Goldblatt v. Hempstead*, 369 U. S. 590 (1962). Nor is it relevant, where the government is merely prohibiting a noxious use of property, that the government would seem to be singling out a particular property owner. *Hadacheck, supra*, at 413.⁸

The nuisance exception to the taking guarantee is not coterminous with the police power itself. The question is whether the forbidden use is dangerous to the safety, health, or welfare of others. Thus, in *Curtin v. Benson*, 222 U. S. 78 (1911), the Court held that the Government, in prohibiting the owner of property within the boundaries of Yosemite National Park from grazing cattle on his property, had taken the owner's property. The Court assumed that the Government could constitutionally require the owner to fence his land or take other action to prevent his cattle from straying onto others' land without compensating him.

"Such laws might be considered as strictly regulations of the use of property, of so using it that no injury could result to others. They would have the effect of making the owner of land herd his cattle on his own land and of making him responsible for a neglect of it." *Id.*, at 86.

The prohibition in question, however, was "not a prevention of a misuse or illegal use but the prevention of a legal and essential use, an attribute of its ownership." *Ibid.*

Appellees are not prohibiting a nuisance. The record is

⁸ Each of the cases cited by the Court for the proposition that legislation which severely affects some landowners but not others does not effect a "taking" involved noxious uses of property. See *Hadacheck*; *Miller v. Schoene*, 276 U. S. 272 (1928); *Goldblatt*. See *ante*, at 125–127, 133.

clear that the proposed addition to the Grand Central Terminal would be in full compliance with zoning, height limitations, and other health and safety requirements. Instead, appellees are seeking to preserve what they believe to be an outstanding example of beaux arts architecture. Penn Central is prevented from further developing its property basically because *too good* a job was done in designing and building it. The city of New York, because of its unadorned admiration for the design, has decided that the owners of the building must preserve it unchanged for the benefit of sightseeing New Yorkers and tourists.

Unlike land-use regulations, appellees' actions do not merely *prohibit* Penn Central from using its property in a narrow set of noxious ways. Instead, appellees have placed an *affirmative* duty on Penn Central to maintain the Terminal in its present state and in "good repair." Appellants are not free to use their property as they see fit within broad outer boundaries but must strictly adhere to their past use except where appellees conclude that alternative uses would not detract from the landmark. While Penn Central may continue to use the Terminal as it is presently designed, appellees otherwise "exercise complete dominion and control over the surface of the land," *United States v. Causby*, 328 U. S. 256, 262 (1946), and must compensate the owner for his loss. *Ibid.* "Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired." *United States v. Dickinson*, 331 U. S. 745, 748 (1947). See also *Dugan v. Rank*, *supra*, at 625.⁹

⁹ In *Monongahela Navigation Co. v. United States*, 148 U. S. 312 (1893), the Monongahela company had expended large sums of money in improving the Monongahela River by means of locks and dams. When the United States condemned this property for its own use, the Court held that full compensation had to be awarded. "Suppose, in the improvement of a navigable stream, it was deemed essential to construct a canal with locks, in order to pass around rapids or falls. Of the power of Congress

Even where the government prohibits a noninjurious use, the Court has ruled that a taking does not take place if the prohibition applies over a broad cross section of land and thereby "secure[s] an average reciprocity of advantage." *Pennsylvania Coal Co. v. Mahon*, 260 U. S., at 415.¹⁰ It is for this reason that zoning does not constitute a "taking." While zoning at times reduces *individual* property values, the burden is shared relatively evenly and it is reasonable to conclude that on the whole an individual who is harmed by one aspect of the zoning will be benefited by another.

Here, however, a multimillion dollar loss has been imposed on appellants; it is uniquely felt and is not offset by any benefits flowing from the preservation of some 400 other "landmarks" in New York City. Appellees have imposed a substantial cost on less than one 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. The Fifth Amendment

"prevents the public from loading upon one individual more than his just share of the burdens of government,

to condemn whatever land may be necessary for such canal, there can be no question; and of the equal necessity of paying full compensation for all private property taken there can be as little doubt." *Id.*, at 337. Under the Court's rationale, however, where the Government wishes to preserve a pre-existing canal system for public use, it need not condemn the property but need merely order that it be preserved in its present form and be kept "in good repair."

¹⁰ Appellants concede that the preservation of buildings of historical or aesthetic importance is a permissible objective of state action. Brief for Appellants 12. Cf. *Berman v. Parker*, 348 U. S. 26 (1954); *United States v. Gettysburg Electric R. Co.*, 160 U. S. 668 (1896).

For the reasons noted in the text, historic *zoning*, as has been undertaken by cities such as New Orleans, may well not require compensation under the Fifth Amendment.

and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him." *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 325 (1893).

Less than 20 years ago, this Court reiterated that the

"Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed 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." *Armstrong v. United States*, 364 U. S., at 49.

Cf. *Nashville, C. & St. L. R. Co. v. Walters*, 294 U. S. 405, 428-430 (1935).¹¹

As Mr. Justice Holmes pointed out in *Pennsylvania Coal Co. v. Mahon*, "the question at bottom" in an eminent domain case "is upon whom the loss of the changes desired should fall." 260 U. S., at 416. The benefits that appellees believe will flow from preservation of the Grand Central Terminal will accrue to all the citizens of New York City. There is no reason to believe that appellants will enjoy a substantially greater share of these benefits. If the cost of preserving Grand Central Terminal were spread evenly across the entire population of the city of New York, the burden per person would be in cents per year—a minor cost appellees would

¹¹ "It is true that the police power embraces regulations designed to promote public convenience or the general welfare, and not merely those in the interest of public health, safety and morals. . . . But when particular individuals are singled out to bear the cost of advancing the public convenience, that imposition must bear some reasonable relation to the evils to be eradicated or the advantages to be secured. . . . While moneys raised by general taxation may constitutionally be applied to purposes from which the individual taxed may receive no benefit, and indeed, suffer serious detriment, . . . so-called assessments for public improvements laid upon particular property owners are ordinarily constitutional only if based on benefits received by them." 294 U. S., at 429-430.

surely concede for the benefit accrued. Instead, however, appellees would impose the entire cost of several million dollars per year on Penn Central. But it is precisely this sort of discrimination that the Fifth Amendment prohibits.¹²

Appellees in response would argue that a taking only occurs where a property owner is denied *all* reasonable value of his property.¹³ The Court has frequently held that, even where a destruction of property rights would not *otherwise* constitute a taking, the inability of the owner to make a reasonable return on his property requires compensation under the Fifth Amendment. See, e. g., *United States v. Lynah*, 188 U. S., at 470. But the converse is not true. A taking does not become a noncompensable exercise of police power simply because the government in its grace allows the owner to make some "reasonable" use of his property. "[I]t is the character of the invasion, not the amount of damage resulting from it,

¹² The fact that the Landmarks Preservation Commission may have allowed additions to a relatively few landmarks is of no comfort to appellants. *Ante*, at 118 n. 18. Nor is it of any comfort that the Commission refuses to allow appellants to construct any additional stories because of their belief that such construction would not be aesthetic. *Ante*, at 117-118.

¹³ Difficult conceptual and legal problems are posed by a rule that a taking only occurs where the property owner is denied all reasonable return on his property. Not only must the Court define "reasonable return" for a variety of types of property (farmlands, residential properties, commercial and industrial areas), but the Court must define the particular property unit that should be examined. For example, in this case, if appellees are viewed as having restricted Penn Central's use of its "air rights," *all* return has been denied. See *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393 (1922). The Court does little to resolve these questions in its opinion. Thus, at one point, the Court implies that the question is whether the restrictions have "an unduly harsh impact upon the owner's use of the property," *ante*, at 127; at another point, the question is phrased as whether Penn Central can obtain "a 'reasonable return' on its investment," *ante*, at 136; and, at yet another point, the question becomes whether the landmark is "economically viable," *ante*, at 138 n. 36.

so long as the damage is substantial, that determines the question whether it is a taking." *United States v. Cress*, 243 U. S. 316, 328 (1917); *United States v. Causby*, 328 U. S., at 266. See also *Goldblatt v. Hempstead*, 369 U. S., at 594.

C

Appellees, apparently recognizing that the constraints imposed on a landmark site constitute a taking for Fifth Amendment purposes, do not leave the property owner empty-handed. As the Court notes, *ante*, at 113-114, the property owner may theoretically "transfer" his previous right to develop the landmark property to adjacent properties if they are under his control. Appellees have coined this system "Transfer Development Rights," or TDR's.

Of all the terms used in the Taking Clause, "just compensation" has the strictest meaning. The Fifth Amendment does not allow simply an approximate compensation but requires "a full and perfect equivalent for the property taken." *Monongahela Navigation Co. v. United States*, 148 U. S., at 326.

"[I]f the adjective 'just' had been omitted, and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the equivalent of the property. And this is made emphatic by the adjective 'just.' There can, in view of the combination of those two words, be no doubt that the compensation must be a full and perfect equivalent for the property taken." *Ibid.*

See also *United States v. Lynah*, *supra*, at 465; *United States v. Pewee Coal Co.*, 341 U. S. 114, 117 (1951). And the determination of whether a "full and perfect equivalent" has been awarded is a "judicial function." *United States v. New River Collieries Co.*, 262 U. S. 341, 343-344 (1923). The fact

that appellees may believe that TDR's provide full compensation is irrelevant.

"The legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry." *Monongahela Navigation Co. v. United States*, *supra*, at 327.

Appellees contend that, even if they have "taken" appellants' property, TDR's constitute "just compensation." Appellants, of course, argue that TDR's are highly imperfect compensation. Because the lower courts held that there was no "taking," they did not have to reach the question of whether or not just compensation has already been awarded. The New York Court of Appeals' discussion of TDR's gives some support to appellants:

"The many defects in New York City's program for development rights transfers have been detailed elsewhere The area to which transfer is permitted is severely limited [and] complex procedures are required to obtain a transfer permit." 42 N. Y. 2d 324, 334-335, 366 N. E. 2d 1271, 1277 (1977).

And in other cases the Court of Appeals has noted that TDR's have an "uncertain and contingent market value" and do "not adequately preserve" the value lost when a building is declared to be a landmark. *French Investing Co. v. City of New York*, 39 N. Y. 2d 587, 591, 350 N. E. 2d 381, 383, appeal dismissed, 429 U. S. 990 (1976). On the other hand, there is evidence in the record that Penn Central has been

offered substantial amounts for its TDR's. Because the record on appeal is relatively slim, I would remand to the Court of Appeals for a determination of whether TDR's constitute a "full and perfect equivalent for the property taken."¹⁴

II

Over 50 years ago, Mr. Justice Holmes, speaking for the Court, warned that the courts were "in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon*, 260 U. S., at 416. The Court's opinion in this case demonstrates that the danger thus foreseen has not abated. The city of New York is in a precarious financial state, and some may believe that the costs of landmark preservation will be more easily borne by corporations such as Penn Central than the overburdened individual tax-

¹⁴ The Court suggests, *ante*, at 131, that if appellees are held to have "taken" property rights of landmark owners, not only the New York City Landmarks Preservation Law, but "all comparable landmark legislation in the Nation," must fall. This assumes, of course, that TDR's are not "just compensation" for the property rights destroyed. It also ignores the fact that many States and cities in the Nation have chosen to preserve landmarks by purchasing or condemning restrictive easements over the facades of the landmarks and are apparently quite satisfied with the results. See, e. g., Ore. Rev. Stat. §§ 271.710, 271.720 (1977); Md. Ann. Code, Art 41, § 181A (1978); Va. Code §§ 10-145.1 and 10-138 (e) (1978); Richmond, Va., City Code § 17-23 *et seq.* (1975). The British National Trust has effectively used restrictive easements to preserve landmarks since 1937. See National Trust Act, 1937, 1 Edw. 8 and 1 Geo. 6 ch. lvii, §§ 4 and 8. Other States and cities have found that tax incentives are also an effective means of encouraging the private preservation of landmark sites. See, e. g., Conn. Gen. Stat. § 12-127a (1977); Ill. Rev. Stat., ch. 24, § 11-482-6 (1976); Va. Code § 10-139 (1978). The New York City Landmarks Preservation Law departs drastically from these traditional, and constitutional, means of preserving landmarks.

payers of New York. But these concerns do not allow us to ignore past precedents construing the Eminent Domain Clause to the end that the desire to improve the public condition is, indeed, achieved by a shorter cut than the constitutional way of paying for the change.

TAKINGS ISSUES IN LIGHT OF *LUCAS v. SOUTH CAROLINA COASTAL COUNCIL*: A DECISION FULL OF SOUND AND FURY SIGNIFYING NOTHING

*Glenn P. Sugameli**

TABLE OF CONTENTS

I.	INTRODUCTION	440
II.	THE POTENTIAL IMPACT OF TAKINGS CLAIMS ON REGULATION	441
	A. <i>Federal Administrative Efforts to Thwart Regulation: The Executive Order, Attorney General Guidelines and Other Administrative Actions</i>	442
	B. <i>Legislative Efforts to Codify the Anti-Regulation Agenda</i>	447
	C. <i>Litigation to Attack Regulation: The Battle of Competing Interests</i>	451
III.	THE LIMITED SCOPE AND IMPACT OF <i>LUCAS</i>	454
	A. <i>Contradictions and Inconsistencies: Lucas and Its Limited Potential to Extend the Reach of the Takings Clause</i>	456
	B. <i>Undermining Personal Property Claims</i>	461
	C. <i>Limited Impact on Real Property Claims</i>	462
	1. <i>Regulation in Accord with Background Principles of Property and Nuisance Law: No Taking, Even If Eliminating All Value</i>	464
	2. <i>Government Action Which Does Not Destroy All Economic Use: Beyond the Scope of Lucas</i>	469
	a. <i>The Government Action Requirement</i>	472
	b. <i>Prohibition of Particular Land Uses</i>	474
	c. <i>Regulating Part of the Rights in the Property as a Whole</i>	477
	d. <i>Temporally Limited Prohibitions</i>	483
	D. <i>Limited Impact on Major Categories of Regulations</i> ..	484
	1. <i>Lucas and Wetlands</i>	485
	2. <i>Lucas and Mining</i>	489

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3. Lucas and Species Protection	491
IV. THE LUCAS DECISION IN CONTEXT	493
A. Why Claimants Like David Lucas Might Nevertheless Fail	493
B. Lucas on Remand	496
C. Lucas in the Context of Other 1991-1992 Supreme Court Actions	497
D. Other Judicial Developments Since Lucas	499
1. Post-Lucas Supreme Court Developments	499
2. Continuing Judicial Rejection of Takings Claims ..	502
V. CONCLUSION	504

I. INTRODUCTION

To what extent does federal, state and local government regulation implicate the Fifth Amendment to the Constitution's provision "nor shall private property be taken for public use, without just compensation"?¹ Recently, debate on this issue focused on *Lucas v. South Carolina Coastal Council*² both before³ and after the U.S. Supreme Court's decision on the last day of the 1991-1992 term.⁴

From the outset, it is important to note that the Fifth Amendment Takings Clause does not prohibit takings of private property for public use; it only requires that just compensation be available through the courts where such a taking is found to have occurred. "[S]o long as compensation is available for those whose property is in fact taken, the government action is not unconstitutional."⁵ Thus, despite loose

¹ U.S. Const. amend. V. The Takings Clause is applied to state and local governments through the Fourteenth Amendment. *Chicago, B. & Q.R.R. Co. v. Chicago*, 166 U.S. 226, 241 (1897); see *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 481 n.10 (1987).

² 112 S. Ct. 2886 (June 29, 1992).

³ See, e.g., *Proceedings of the Fourth Annual Robert C. Byrd Conference on the Administrative Process*, 6 Admin. L.J. Am. U. 639 (1993) (including a pre-decision discussion of *Lucas* and takings by the author and other panelists headed "The Fifth Amendment's Just Compensation Clause: Implications for Regulatory Policy," which begins on page 674); *Lucas v. South Carolina Coastal Council: Colloquium*, 10 Pace Envtl. L. Rev. 1 (1992) (including the results of a colloquium that was held prior to the decision and that spawned published articles which were revised to reflect the Supreme Court's ruling).

⁴ Indeed, this Article is adapted and updated from materials the author presented at the October 29, 1992, United States Claims Court Judicial Conference, which devoted its morning session entirely to takings, and from the author's keynote presentation at the January 28, 1993, University of Michigan School of Law Symposium, *Regulatory Takings Claims: Implications for Environmental Law*. In *Lucas*, the author co-wrote a Supreme Court amicus brief for the National Wildlife Federation, other national and regional conservation organizations, coastal communities and leading coastal scientists in support of the South Carolina Coastal Council.

Throughout this Article, post-*Lucas* cases and other materials are cited with exact dates in order to emphasize their chronological context.

⁵ *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 128 (1985).

statements from anti-regulation advocates, and occasionally from courts, suits seeking just compensation do not involve the issue of whether an "unconstitutional taking" has occurred.

This Article stresses two critical points. First, Fifth Amendment regulatory takings claims involve not merely a potential monetary remedy but also broad public policy issues. Anti-environmental activists have attempted to employ takings lawsuits in their three-pronged administrative, legislative and judicial assault on governmental initiatives to protect the health, safety and property rights of average citizens.⁶ Second, the judicial prong of this assault experienced a serious setback due to a number of Supreme Court decisions during the 1991-1993 terms. In particular, the holding in *Lucas* itself is extremely narrow. The significant post-*Lucas* judicial developments discussed below will demonstrate that the case has very little practical effect on regulation of real property.⁷

Part II of this Article discusses the broad impact of takings claims on environmental regulations and how those regulations have weathered administrative, legislative and judicial attacks.

Part III addresses the *Lucas* opinion itself, first noting how its inconsistencies contribute to its limited impact, then discussing how its requirements for takings have been interpreted by subsequent courts as a refusal to expand takings law. Part III then examines how *Lucas* does not impact regulations governing wetlands, mining and endangered species.

Part IV examines *Lucas* in context: how takings claimants may lose under *Lucas*; how the claimant in *Lucas* fared on remand; how other decisions issued during the Supreme Court's 1991-1992 term shed light on the meaning of *Lucas*; and how post-*Lucas* federal and state court decisions interpret the opinion.

II. THE POTENTIAL IMPACT OF TAKINGS CLAIMS ON REGULATION

Takings cases do not just concern plaintiff property owners and the municipal, state or federal treasury: If successful, they can have virtually the same practical effect as invalidating the regulation in question. This effect can in turn have far-reaching impacts on public policy, potentially damaging the ability of government to regulate in

⁶ See, e.g., Thomas A. Lewis, *Cloaked in a Wise Disguise*, Nat'l Wildlife, Oct.-Nov. 1992, at 4-9 (describing the "Wise Use" alliance's agenda).

⁷ However, as discussed herein, the opinion has considerable practical effect in undercutting takings claims regarding personal property.

areas of important public interest such as health, safety and the environment.⁸ Justice Holmes, in *Pennsylvania Coal Co. v. Mahon* — the very opinion that created the concept of a regulatory taking⁹ — warned that “[g]overnment could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. . . . [S]ome values are enjoyed under an implied limitation and must yield to the police power.”¹⁰

Both sides in the current debate on takings recognize the larger stakes involved in every takings case.¹¹ Pro-takings advocates are using takings as a way to launch a back-door administrative, legislative and judicial attack on the laws and regulations that they cannot modify or repeal on the merits. In response, public interest advocates representing environmental, labor, health, safety and other concerns are working on all three takings fronts to protect these programs.

A. Federal Administrative Efforts to Thwart Regulation: The Executive Order, Attorney General Guidelines and Other Administrative Actions

Former Solicitor General Charles Fried¹² has described the Reagan Administration Justice Department under Attorney General Edwin Meese as determined to misuse the Takings Clause in order to thwart regulation:

Attorney General Meese and his young advisers — many drawn from the ranks of the then fledgling Federalist Societies and often devotees of the extreme libertarian views of Chicago law professor Richard Epstein — had a specific, aggressive, and, it seemed to me, quite radical project in mind: to use the Takings Clause of the Fifth Amendment as a severe brake

⁸ Chief Judge Loren A. Smith, in describing the nature of the United States Claims Court (recently re-named the United States Court of Federal Claims) and the ramifications of its decisions, stated that “[t]he interpretation of a contract dispute, a tax statute, or an employment regulation may have profound effects on the ability of the government to operate.” *Foreword*, 40 *Cath. U. L. Rev.* 509, 511-12 (1991).

⁹ “[W]hile property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking.” 260 U.S. 393, 415 (1922). See *infra* note 105 and accompanying text (noting recognition by majority and dissenting opinions in *Lucas* that regulatory takings law is a judicial construct); Robert Meltz, Congressional Research Serv., CRS Report for Congress No. 93-164 A, *Taking Decisions of the U.S. Supreme Court: A Chronology* 16 (1993); cf. *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1871) (holding that the continuous flooding of plaintiff’s property caused by a government dam was a taking, even without formal condemnation).

¹⁰ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 413.

¹¹ See Jessica Mathews, *One Man’s Land Is Another’s Pollution*, *Wash. Post*, Feb. 23, 1992, at C7.

¹² Charles Fried was Solicitor General from 1985-1989.

upon federal and state regulation of business and property. The grand plan was to make government pay compensation as for a taking of property every time its regulations impinged too severely on a property right — limiting the possible uses for a parcel of land or restricting or tying up a business in regulatory red tape. If the government labored under so severe an obligation, there would be, to say the least, much less regulation.¹³

Government compensation for actual takings is required by the Fifth Amendment and is available under the Tucker Act and state equivalents.¹⁴ The “radical” agenda of the Meese Justice Department, however, was to require compensation not only for actual takings, but “as for a taking . . . every time its regulations impinged too severely on a property right.”¹⁵ This “radical” position is clearly incompatible with the Department’s duty to defend government regulations and the public interest.

The embodiment and continuing legacy of the Meese Justice Department agenda is President Reagan’s Executive Order 12,630 on takings¹⁶ and the implementing Attorney General Guidelines of June 30, 1988.¹⁷ The Executive Order and Guidelines require that all federal regulations be approved by agencies and the Attorney General under a test that severely misrepresents Supreme Court precedent on

¹³ Charles Fried, *Order and Law: Arguing the Reagan Revolution — A Firsthand Account* 183 (1991); see also Douglas T. Kendall, Note, *The Limits to Growth and the Limits to the Takings Clause*, 11 Va. Envtl. L.J. 547, 549 (1992) (“Environmentalists . . . realize that a compensation requirement would essentially gut their efforts to protect endangered species and sensitive ecosystems, because the funds necessary to compensate these landowners simply do not and will not ever exist.”) (footnote omitted).

¹⁴ The Supreme Court, unanimously upholding an agency decision under Clean Water Act § 404, 33 U.S.C. § 1344 (1988), to expand jurisdiction over wetlands, stressed

that so long as compensation is available for those whose property is in fact taken, the governmental action is not unconstitutional. . . . [T]he possibility that the application of a regulatory program may in some instances result in the taking of individual pieces of property is no justification for the use of narrowing constructions to curtail the program if compensation will in any event be available in those cases where a taking has occurred. Under such circumstances, adoption of a narrowing construction does not constitute avoidance of a constitutional difficulty; it merely frustrates permissible applications of a statute or regulation. . . . [T]he Tucker Act, 28 U.S.C. § 1491, which presumptively supplies a means of obtaining compensation for any taking that may occur through the operation of a federal statute, is available to provide compensation for any takings that may result

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 128 (1985) (citations omitted).

¹⁵ Fried, *supra* note 13, at 183 (emphasis added).

¹⁶ Governmental Action and Interference with Constitutionally Protected Property Rights, Executive Order No. 12,630, 3 C.F.R. 554 (1988), reprinted in 5 U.S.C. § 601 (1988).

¹⁷ Attorney General’s Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings (1988) (on file with the *Virginia Environmental Law Journal*).

takings law.¹⁸ The Congressional Research Service and other analysts have demonstrated seven important flaws in the treatment of takings law in the Order and the Guidelines:

1. Both include an insupportable requirement that government health and safety protection "should be undertaken only in response to real and substantial threats to public health and safety," and "be no greater than is necessary to achieve the health and safety purpose."¹⁹
2. The Order and the Guidelines omit any reference to Supreme Court principles that weigh against finding a taking.
3. They require that conditions on permits must "substantially advance" the same governmental purpose as a prohibition.²⁰
4. Both impose an entirely new requirement that regulation must not be disproportionate to a property's contribution to the overall problem.²¹
5. Neither gives adequate deference to public health and safety regulations.
6. They state that regulations which "affect" — rather than deny all economically viable use of — the value, use or transfer of property may constitute a taking.
7. They apply to any "property interest" rather than the property as a whole.²²

In addition, there have been efforts to use President Reagan's Exec-

¹⁸ Two of the primary authors of the Executive Order and the Guidelines were Mark Pollot and Roger Marzulla, who have since left the Justice Department and pursued careers as zealous pro-takings advocates. See Mark L. Pollot, *Grand Theft and Petit Larceny: Property Rights in America* 161 (1993); Roger J. Marzulla & Nancie G. Marzulla, *Regulatory Takings in the United States Claims Court: Adjusting the Burdens that in Fairness and Equity Ought To Be Borne by Society as a Whole*, 40 *Cath. L. Rev.* 549 (1991); Roger J. Marzulla, *The New "Takings" Executive Order and Environmental Regulation—Collision or Cooperation?*, 18 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,254 (July 1988).

¹⁹ Executive Order No. 12,630 § 3(c).

²⁰ *Id.* § 4(a).

²¹ *Id.* § 4(d)(3).

²² Robert Meltz, *Federal Regulation of the Environment and the Taking Issue*, 37 *Fed. Bar News & J.* 95 (1990); Memorandum from American Law Division, Congressional Research Service, to ten Congressmen on "Comparison of Taking Principles in Executive Order No. 12630 with Supreme Court Taking Jurisprudence, and Related Questions" 6 (Dec. 15, 1988) [hereinafter CRS Memorandum] (on file with the *Virginia Environmental Law Journal*); Kirsten Engel, *Taking Risks: Executive Order 12,630 and Environmental Health and Safety Regulation*, 14 *Vt. L. Rev.* 213 (1989); Jerry Jackson & Lyle D. Albaugh, *A Critique of the Takings Executive Order in the Context of Environmental Regulation*, 18 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,463 (1988); James M. McElfish, Jr., *The Takings Executive Order: Constitutional Jurisprudence or Political Philosophy?*, 18 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,474, 10,476 (1988); see also Charles R. Wise, *The Changing Doctrine of Regulatory Taking and the Executive Branch: Will Taking Impact Analysis Enhance or Damage the Federal Government's Ability to Regulate?*, 44 *Admin. L. Rev.* 403, 426 (1992).

utive Order 12,630 to enhance the chilling effect on agencies that are concerned about the financial impact of possible future judgments.²³ Especially if government agencies are required to pay for regulation from strained agency budgets will there be less regulation to protect health and safety and to facilitate environmental protection, conservation and historic preservation.

Twenty distinguished academic experts on takings signed an April 2, 1993, letter to President Clinton urging him to rescind Executive Order 12,630. They concluded that the Order was "based on an erroneous, biased view of the law . . . [and] represents a misguided effort to use the specter of government liability under the Fifth Amendment in order to frustrate regulatory activity that certain members of the Reagan Administration opposed as a matter of policy."²⁴

In 1991, the United States Office of Surface Mining Reclamation and Enforcement (OSM) proposed a rule²⁵ which would have nullified the congressional protection afforded in the Surface Mining Control and Reclamation Act of 1977 (SMCRA) section 522(e) for sensitive national lands and private property.²⁶ The OSM proposed to open not only the National Parks but also the nation's backyards, school-

²³ Executive Order 12,630 instructed the Office of Management and Budget (OMB) to "take action to ensure that all takings awards levied against agencies are properly accounted for in agency budget submissions," which is "said to require that after being paid out of the Judgment Fund, taking awards are to be subtracted on a dollar-for-dollar basis from an agency's next-fiscal-year budget request to Congress." CRS Memorandum, *supra* note 22, at 25 (citing the November 4, 1988, remarks of then-Assistant Attorney General Roger Marzulla before the United States Claims Court Bar). President Bush's Administration, especially the Council on Competitiveness chaired by Vice President Quayle, went even further, urging legislation requiring that takings awards be payable from agency budgets. Letter from Attorney General Dick Thornburgh and Richard G. Darman, Director of the Office of Management and Budget, to Speaker of the House Thomas S. Foley (July 10, 1991) (on file with the *Virginia Environmental Law Journal*). Bills introduced in a number of states have similar provisions.

²⁴ Letter from Bruce A. Ackerman, Carol M. Rose & Susan Rose-Ackerman, Yale Law School; Hope M. Babcock & Peter J. Byrne, Georgetown University Law Center; William W. Fisher, III, & Frank I. Michelman, Harvard University Law School; John A. Humbach & John Nolon, Pace University Law School; Jerold S. Kayden, Lincoln Institute of Land Policy; Richard J. Lazarus & Daniel R. Mandelker, Washington University School of Law; Jeremy R. Paul, University of Connecticut School of Law; Robert V. Percival, University of Maryland School of Law; Zygmunt J. B. Plater, Boston College Law School; Margaret J. Radin, Stanford Law School; Joseph L. Sax, University of California at Berkeley School of Law; Christopher H. Schroeder, Duke University School of Law; Peter R. Teachout & Norman Williams, Vermont Law School, to the President of the United States 1 (April 2, 1993) (on file with the *Virginia Environmental Law Journal*).

²⁵ 56 Fed. Reg. 33,152-65 (1991). The author submitted extensive comments opposing the OSM's proposal on behalf of the National Wildlife Federation and other citizen and environmental groups.

²⁶ SMCRA § 522(e), 30 U.S.C. § 1272(e) (1988), protects these areas, subject to "valid existing rights," which the Act does not define.

yards, churchyards and graveyards to strip mining. The OSM relied on the flawed Executive Order and Attorney General Guidelines to define the statutory exception for "valid existing rights" of coal companies contrary to the rights of surface private property owners and the public.²⁷

The OSM's proposed rule reaffirmed a 1988 Interior Department Statement of Policy²⁸ which effectively confirmed that the Reagan Administration agenda was motivated by concern for development interests like the coal industry, not for the property rights of average citizens.²⁹ The Statement of Policy declared that if companies initiated action to conduct mining in National Parks and other federal areas protected under SMCRA section 522(e)(1), then "subject to appropriation the Secretary of the Interior [would] use available authorities to seek to acquire such rights through exchange, negotiated purchase or condemnation."³⁰ This policy did not extend to the other subsections, including SMCRA section 522(e)(5), that protect the private property and other rights of surface owners in their homes, schools, churches and cemeteries.³¹

When the Bush Administration stated its intention to finalize the OSM rule after the 1992 presidential election, the *New York Times* reported on the plan in a widely syndicated front-page article.³² As a result of the firestorm of public and editorial criticism that followed,³³

²⁷ See *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 488 (1987) (upholding Pennsylvania's power "to protect the public interest in health, the environment, and the fiscal integrity of the area"); *Hodel v. Indiana*, 452 U.S. 314, 329 (1981) ("Congress adopted the [SMCRA] in order to insure that production of coal for interstate commerce would not be at the expense of agriculture, the environment, or public health and safety . . .").

²⁸ Department Policy Pertaining to the Exercise of Valid Existing Rights in Areas Covered by Section 522(e)(1) of the Surface Mining Control and Reclamation Act of 1977, 53 Fed. Reg. 52,384 (1988).

²⁹ 56 Fed. Reg. 33,152, 33,154 (proposed July 18, 1991).

³⁰ *Id.* (citing the 1988 Statement of Policy).

³¹ By its terms this policy was restricted to § 522(e)(1), and thus did not address land that is "within three hundred feet from any occupied dwelling, . . . within three hundred feet of any public building, school, church, community, or institutional building, public park, or within one hundred feet of a cemetery," 30 U.S.C. § 1272(e)(5) (1988).

³² Keith Schneider, *U.S. Set to Open National Forests for Strip Mining*, N.Y. Times, Sept. 28, 1992, at A1; Keith Schneider, *Public Lands May Be Open for Mining; Bush Administration Makes Policy Change*, Houston Chron., Sept. 28, 1992, at A1; see also Boyce Rensberger, *Strip Mining on U.S. Land Debated: Environmentalists Say Interior Dept. Rule Would Threaten Acreage*, Wash. Post, Sept. 29, 1992, at A10.

³³ Editorials which criticized the proposed rule included *National Parks: Bush Is Much Too Willing to Invite in Strip Miners*, Detroit Free Press, Oct. 18, 1992, at 2G; *Minerals Rights and Wrongs*, St. Louis Post-Dispatch, Oct. 1, 1992, at 28; *Strip Mining National Parks*, S.F. Examiner, Sept. 29, 1992, at A16; *Just Say No to Strip Miners*, Atlanta Const., Sept. 29, 1992, at A8; *Coal Cash*, St. Petersburg Times, Sept. 29, 1992, at 16A; see also *Stripping a National Asset*, Boston Globe, Sept. 30, 1992, at 16 (prompting an exchange involving the author in the

the House-Senate conference committee included a provision blocking this rule for one year in the final version of the comprehensive Energy Policy Act of 1992.³⁴

B. Legislative Efforts to Codify the Anti-Regulation Agenda

Some state and federal lawmakers, seeking to legitimize the erroneous view of takings law favored by anti-regulation partisans, have introduced legislation patterned after Executive Order 12,630.³⁵ An amendment offered by former Senator Steve Symms to require certain types of future regulations to be "in compliance with Executive Order 12,630 or similar procedures" was initially rejected in 1990 by a Senate floor vote.³⁶ In 1991, the Senate approved the Symms amendment in an expanded form applicable to all federal agencies,³⁷ but the takings provision was removed in conference committee with the House,³⁸ in response to heavy pressure from the House leadership³⁹ and from labor, environmental, consumer, historic preservation, planning, civil rights and other public interest groups.⁴⁰ This year, Senate Minority Leader Robert Dole introduced a bill⁴¹ which would go a step beyond even the Symms amendment to codify explicitly Execu-

Globe's "Letters to the Editor" on the takings issue: Richard L. Lawson, President, National Coal Ass'n, *Strip Mining Issue Is Not About a Giveaway*, Oct. 10, 1992, and Glenn P. Sugameli, National Wildlife Fed'n, *Interior Strip-Mining Proposal Must Be Blocked*, Oct. 23, 1992).

³⁴ See § 2504(b) of the Act as reported at 138 Cong. Rec. H12,146 (daily ed. Oct. 5, 1992).

³⁵ 53 Fed. Reg. 8859 (1988). The author is working with grassroots and public interest groups to oppose such legislation.

³⁶ See 136 Cong. Rec. S10,909-17 (daily ed. July 27, 1990) (amendment tabled by a vote of 52 to 43).

³⁷ The amendment passed after a motion to table was defeated 44 to 55. See 137 Cong. Rec. S7542-49, S7552-62 (daily ed. June 12, 1991).

³⁸ See H.R. Conf. Rep. No. 404, 102d Cong., 1st Sess. 354 (1991), reprinted in 1991 U.S.C.C.A.N. 1734.

³⁹ A letter to Robert A. Roe, Chairman of the House Committee on Public Works and Transportation, detailed the dangers of mandating a takings analysis:

Such a provision would severely, and needlessly, hinder Congressionally-authorized health, safety and environmental programs, as well as impede Federal agencies in implementing their statutory obligations. . . . We do not wish to see Federal laws that apply to pharmaceutical product safety, safety of workers in factories and mines, public housing, air and water quality, and fish and wildlife programs, hamstrung by such sweeping and underhanded legislative action.

Letter from Reps. Walter B. Jones, Gerry E. Studds, Jack Brooks, George Miller, Barney Frank, John Conyers, Jr., and Bruce E. Vento to Rep. Robert A. Roe (Nov. 14, 1991) (on file with the *Virginia Environmental Law Journal*).

⁴⁰ A July 18, 1991, letter to members of the House was signed by 20 groups. Letter on file with the *Virginia Environmental Law Journal*.

⁴¹ S. 177, 103d Cong., 1st Sess. (introduced January 21, 1993). House versions were introduced as H.R. 385 and H.R. 561.

tive-Order 12,630 "as in effect in 1991." The Dole bill contains no provision for modifications to reflect developments in takings case law.

At the state level, too, numerous takings bills have been introduced,⁴² invariably under the guise of protecting private property rights.⁴³ Most of this legislation would either codify the faulty analysis in the Reagan executive order⁴⁴ or would require the state attorney general or state agencies to develop guidelines for assessing the potential takings that might occur from any proposed regulation or other defined government action.⁴⁵ Other proposals would require that the state or localities compensate landowners whenever a regulation reduced the speculative value of any portion of property by more than forty or fifty percent.⁴⁶

From both legal and practical perspectives, there are numerous fundamental flaws in these federal and state bills. Like Executive Order 12,630, for example, many of them purportedly would require a takings determination — and typically a dollar assessment — at the time any regulation was proposed. Such a requirement would conflict with the Supreme Court's existing takings policy and experience: The

⁴² In Arizona, which passed a takings bill in 1992, implementation is delayed pending a November 1994 referendum on repeal of S.B. 1053. See *Ariz. Rev. Stat. Ann.* §§ 37-221 to 37-223 (1992); Marianne Lavelle, *The "Property Rights" Revolt*, Nat'l L.J., May 10, 1993, at L-34. Also, Washington passed a limited takings bill in 1991 (H.B. 1025 § 18), as did Delaware in 1992 (S.B. 130), and Indiana (H.B. 1646) and Utah (H.B. 171) in 1993. Virginia also passed a 1993 resolution to study the need for legislation (H.B. 624). In 1993, bills were also introduced in the following states: Florida (S.B. 1000) (bill to study the need for legislation); Massachusetts (S.B. 1212); Missouri (H.B. 544, H.B. 174); Nevada (S.B. 142, S.B. 285); New York (S.B. 2832); Oregon (H.B. 2935); Pennsylvania (H.B. 303). As of this writing many states had already killed takings bills: California (A.B. 145); Colorado (S.B. 133, H.B. 1194); Delaware (S.B. 49, S.B. 56); Florida (H.B. 1437); Hawaii (H.B. 2128, S.B. 1645); Idaho (H.B. 322) (vetoed); Iowa (H.B. 350); Kansas (S.B. 293); Louisiana (H.B. 1748); Maine (L.B. 672); Maryland (S.B. 34); Montana (H.B. 570); New Hampshire (H.B. 608); New Mexico (H.B. 684, H.B. 536); Oklahoma (H.B. 1812); Rhode Island (H.B. 6391); South Carolina (S.B. 125); Texas (H.B. 485); Vermont (S.B. 110); Washington (H.B. 1349, H.B. 1488, H.B. 1843, S.B. 5431, S.B. 5475); and Wyoming (H.B. 110). For a general discussion of state takings bills in 1993, see Lavelle, *supra*, at 1, 34 (including comments by the author).

⁴³ See, e.g., S.B. 2832 § 1, 215th N.Y. Gen. Assembly, 1st Reg. Sess. (1993) ("This article shall be known and may be cited as the 'Private Property Protection Act.'").

⁴⁴ See, e.g., A.B. 145 § 1, Cal. Assembly, 1992-94 Reg. Sess. (1993) (proposing to substantially codify 53 Fed. Reg. 8859 § 3 (1988) at Cal. Gov't Code § 15,871); H.B. 1194 § 1, 59th Colo. Gen. Assembly, 2d Reg. Sess. (1993) (proposing to substantially codify 53 Fed. Reg. 8859 § 3 (1988) at Colo. Rev. Stat. § 24-4.3-104).

⁴⁵ See, e.g., H.B. 485 §§ 3-4, Tex. 73d Legis. Sess., 1st Reg. Sess. (1993) (requiring the Texas Attorney General to issue guidelines by January 1, 1994).

⁴⁶ See, e.g., S.B. 2832 § 1, 215th N.Y. Gen. Assembly, 1st Reg. Sess. (1993) (deeming any regulatory program to be a taking if it "operates to reduce the fair market value of real property to less than 50% of its fair market value for uses permitted at the time the owner acquired title, or Jan. 1, 1994, whichever is later . . .").

Court has repeatedly emphasized its own inability to come up with a prospective takings test and consequently has determined that takings questions require case-by-case judicial determinations based on the specific circumstances of a particular piece of property.⁴⁷ The Delaware legislature passed such a bill in 1992.⁴⁸ The State Attorney General's Office stated that it conducts a "canned" regulatory review. The Office noted that virtually all regulations involving real property *might* result in a taking and that a more meaningful analysis can only be done on a property-specific basis.⁴⁹

Experience in Maryland has demonstrated that as a practical matter it would be prohibitively expensive to implement such a scheme. The official fiscal note prepared for an unsuccessful 1993 Maryland takings bill⁵⁰ estimated that it would cost \$10,000 to even attempt to conduct a takings appraisal for each commercial or industrial property affected by a regulation.⁵¹ The massive funding required to engage in such a meaningless exercise statewide would have necessitated higher taxes or diversion of existing funding from vital services. This cost simply would not have been offset by any potential savings achieved by avoiding regulatory takings judgments.⁵²

⁴⁷ The Supreme Court stated that it "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 . . ." *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). It is "a question of degree—and therefore cannot be disposed of by general propositions." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922). The process relies "on ad hoc, factual inquiries into the circumstances of each particular case." *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 224 (1986). The Supreme Court's takings cases "uniformly reflect an insistence on knowing the nature and extent of permitted development [of a particular piece of property] before adjudicating the constitutionality of the regulations that purport to limit it." *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 351 (1986). *Accord Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495 (1987).

As discussed below, *Lucas* reemphasized the necessity of such case-by-case judicial determinations. Even where the Court assumed, based upon the conclusions of the trial court, that a regulation had deprived the property of 100% of its economically beneficial value, a remand was necessary for a property-specific analysis of, *inter alia*, impacts on the public and on neighboring property owners attributable to the proposed use. 112 S. Ct. at 2896, 2900-01.

⁴⁸ See Del. Code Ann. tit. 29, § 605 (1992).

⁴⁹ Letter from Ralph S. Tyler, Deputy Attorney General of Maryland, to Delegate Donald B. Elliot, Maryland House of Delegates 1 (Mar. 26, 1993) (concluding that Tyler's conversation with the Delaware Attorney General's Office underscored "the central conceptual flaw" of a similar Maryland bill: "[I]t is impossible to conduct a meaningful 'takings' analysis in the abstract . . .") (on file with the *Virginia Environmental Law Journal*).

⁵⁰ S.B. 34, 407th Legis. Sess. (1993).

⁵¹ Department of Fiscal Services, Maryland Gen. Assembly, Fiscal Note, Senate Bill 34, at 3 (Jan. 28, 1993) (on file with the *Virginia Environmental Law Journal*).

⁵² The amount of such judgments in recent years has been extremely modest. See *infra* note 331. The largest takings judgment, in the not-yet-final *Whitney Benefits* case, resulted from a

Other bills which would require compensation when government action causes a forty or fifty percent reduction in the speculative value of real property — or, in the case of a bill introduced in the U.S. House of Representatives in 1993, *any* reduction in value⁵³ — are at odds with the Supreme Court's Fifth Amendment interpretations that have allowed higher value reductions without requiring compensation.⁵⁴ For local governments, these laws would have a host of untoward consequences.⁵⁵ The National Governors Association resolved in February 1992 that the Takings Clause

is the appropriate province of the courts, and that legislative requirements are not warranted. . . . Congress should not legislate a definition of compensable taking of private property A statutory definition of a compensable taking would have far-reaching implications for state and local zoning, land management, and public health laws of all kinds.⁵⁶

A final, glaring conceptual flaw of takings bills is their assertion that government should minimize the impact of its actions on "the" property interest involved. Most bills track Executive Order 12,630 in excluding from the definition of "policies that have takings implications," "actions abolishing regulations, discontinuing governmental programs, or modifying regulations in a manner that lessens interference with the use of private property." This limited focus on a single property interest ignores that there are often many competing interests in property and that, for example, allowing strip-mining may

legislative taking with no relevance to these bills which address potential regulatory takings. See *Whitney Benefits, Inc. v. Peter Kiewit Sons' Co.*, 25 Cl. Ct. 232 (1992).

⁵³ H.R. 1388, 103d Cong., 1st Sess. (1993).

⁵⁴ See, e.g., *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (allowing a 75% reduction in value from downzoning); *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2895 n.8 (1992) (recognizing that in at least some cases, "the landowner with 95% loss will get nothing"); *Concrete Pipe & Prods., Inc. v. Construction Laborers Pension Trust*, 61 U.S.L.W. 4611, 4623 (U.S. June 14, 1993) (holding that diminution in value, "however serious, is insufficient to demonstrate a taking").

⁵⁵ See *Legislature Should Quickly Kill Measure to Scrap Land-Use Controls*, Tampa Trib., Mar. 9, 1993, at 6 (editorial) ("Under this measure, a factory could be built beside a retirement village, a massage parlor next to a church, or a night club on a quiet residential street. One irresponsible developer could spoil a neighborhood and ruin property values of its residents without fear of governmental interference. This, apparently, is some legislators' idea of property rights."); *Wronging Two Rights: 'Property' Bill Does It*, Miami Herald, Mar. 4, 1993 (editorial) ("[The bill] effectually guts planning, zoning, and environmental preservation laws. Lawmakers may as well order a direct transfer of the public treasury to the state's largest land speculators. The bill provides one escape hatch: rescission. And that's apparently its point, to prevent implementation of laws that this bill's supporters don't have the votes or public support to repeal outright.").

⁵⁶ See National Governors Ass'n, Annual Meeting Res. 23.9.4.4 (Feb. 4, 1992) (on file with the *Virginia Environmental Law Journal*).

destroy not only the property interests of surface owners of the same property but also the property, health and safety interests of both those who live nearby and the public at large.⁵⁷

C. Litigation to Attack Regulation: The Battle of Competing Interests

Pro-takings activists have targeted litigation as an important means of achieving their ends.⁵⁸ Despite attempts by others to characterize the issue in takings cases as governmental theft of private property, the Court in *Lucas* recognized that takings cases by their nature involve a balancing test between competing land uses.⁵⁹ This recognition echoes prior Supreme Court takings decisions that have emphasized the importance of the interests of other property owners and the community, including two cases rejecting takings challenges to federal and state restrictions on coal mining.⁶⁰

Often the parties affected by regulatory takings disputes are not readily discernible, and their interests in the regulation's protection of public and private health, safety and natural resources can go unrecognized and unrepresented. Indeed, courts have recognized that the government cannot represent all of the interests involved in takings cases.⁶¹

⁵⁷ See, e.g., *supra* notes 25-27 and accompanying text (discussing the 1991 OSM proposed rule); *Two Bills Seek Compromise Between Miners, Ranchers*, Cong. Q., Mar. 6, 1993, at 514 (noting that H.R. 239 and S. 336 "would require miners seeking to prospect for hard-rock minerals under federal lands to notify ranchers who use the same land of their intentions"); see also *Alves v. United States*, No. 93-261 L (Fed. Cl. filed Apr. 29, 1993) (alleging a taking from a failure to cancel federal grazing permits and licenses of owners of a contiguous parcel who allegedly improperly grazed on the plaintiff's fee and leased federal grazing lands); *Hage v. United States*, No. 91-1270L (Fed. Cl. Sept. 21, 1992) (alleging a taking from the reduction of the plaintiff's grazing permits on federal land); discussion of *Hage infra* note 116.

⁵⁸ See Pollot, *supra* note 18, at 161 ("If lasting change is to come in property rights protection, it will come from court actions that resolve questions that are presently unresolved. Legislation is too open to change whereas judicial rulings of constitutional dimension cannot be changed by the legislature, however imperfectly rendered.").

⁵⁹ In particular, a regulation is never a taking if it tracks state nuisance law, which is defined in terms of broader impacts of a regulated activity on neighbors and society. 112 S. Ct. at 2901.

⁶⁰ *Hodel v. Indiana*, 452 U.S. 314, 329 (1981) (holding that a "prohibition against mining near churches, schools, parks, public buildings, and occupied dwellings is plainly directed toward ensuring that surface coal mining does not endanger life and property in coal mining communities"); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 488 (1987) (finding that a law requiring that underground coal operators leave 50% of the coal in place beneath protected structures to prevent subsidence damage legitimately sought to "protect the public interest in health, the environment, and the fiscal integrity of the area" and that the operators' contract rights to the coal could not prevent "the Commonwealth from exercising its police power to abate activity *akin to a public nuisance*") (emphasis added).

⁶¹ See Brief of Amici Curiae for Reversal, *Florida Rock Indus. v. United States*, 791 F.2d

The insufficiency of representation by the government and by property owners warrants participation by public interest groups which can pursue intervention by right, permissive intervention and participation by amici.⁶² Even when there are no such motions, however, courts must look beyond the litigants in takings disputes and consider those interests that are not represented by the plaintiff or by the government.

During the 1991-1992 Supreme Court term, attention focused heavily on three questions: the substantive due process claim in *PFZ Properties, Inc. v. Rodriguez*,⁶³ the physical takings claim in *Yee v. City of Escondido*,⁶⁴ and — best known — the regulatory takings claim in *Lucas*. The extraordinary popular interest in *Lucas* was matched by a proliferation of amicus briefs. Sixteen amicus briefs

893 (Fed. Cir. 1991) (No. 91-5156). Amici National Wildlife Federation and Environmental Defense Fund argued the importance of wetland preservation, whereas the Government focused its defense of the permit denial on jurisdictional arguments. The Government is not an adequate representative for the interests of environmental groups. See *In re Sierra Club*, 945 F.2d 776, 780 (4th Cir. 1991); see also *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528-29 (9th Cir. 1983); *County of Fresno v. Andrus*, 622 F.2d 436, 438-39 (9th Cir. 1980).

Indeed, the Justice Department often is faced with representing differing governmental interests. For example, the author represented Indian tribes which sought assistance from the federal government in its trustee capacity in a Court of Claims case against the Forest Service. The tribe sought return of lands that were wrongfully excluded from reservation boundaries. See *Confederated Salish & Kootenai Tribes v. United States*, No. 50,233 (Cl. Ct. June 13, 1980).

Charles Fried's observation quoted in the text accompanying *supra* note 13 also confirms the inadequacy of government representation of all interests in takings cases: Government attorneys must conform their defense to the direction and agenda of the state or federal Attorney General. It would be wrong to limit defense of a regulation to government attorneys who may not consistently enforce regulations and who may be influenced by a "radical agenda" to use the Fifth Amendment's Takings Clause to block regulation.

⁶² See *American Satellite Co. v. United States*, 22 Cl. Ct. 547, 548-49 (1991) (advocating broad discretionary authority in allowing participation by amici). An applicant for intervention as of right must claim: (1) an interest (2) that will be impaired (3) without adequate representation. See, e.g., *Fed. R. Civ. P. 24(a)*; *Fed. Cl. R. 24(a)*; *Gould v. Alleco, Inc.*, 883 F.2d 281, 284 (4th Cir. 1989), *cert. denied*, 493 U.S. 1058 (1990). A valid recreational or environmental interest should be sufficient. See *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983); *County of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980). *But see Hage v. United States*, No. 91-1470L (Cl. Ct. Sept. 14, 1992) (Smith, C.J.) (oral order denying intervention by the state of Nevada, the National Wildlife Federation and other environmental groups in a challenge to Forest Service actions to control abusive grazing on federal public lands, although "litigating amicus" status was granted). Nevada's motion to intervene in *Hage* regarding a federal regulation illustrates that the United States may not adequately represent the interests of other governmental entities. Conversely, in *Lucas*, municipalities, states and the United States were granted amicus status in support of the South Carolina Coastal Council, illustrating that the Council, like the United States in *Hage*, could not adequately represent all parties with an interest in the regulation.

⁶³ 928 F.2d 28 (1st Cir. 1991), *cert. dismissed*, 112 S. Ct. 1151 (Mar. 9, 1992).

⁶⁴ 112 S. Ct. 1522 (Apr. 1, 1992).

were filed on behalf of petitioner David Lucas. The interests represented included, *inter alia*, various associations of land developers and builders, realtors, ranchers, mining and timber associations, and four United States Senators.⁶⁵ Eleven amicus briefs were filed on behalf of respondent South Carolina Coastal Council by a variety of interests — scientists; environmental, conservation and preservation groups; numerous cities, counties, states and United States territories; and several associations of municipal and governmental entities.⁶⁶

The importance of *Lucas* was also demonstrated by the internal dispute that erupted within the federal government over whether the United States should support the South Carolina Coastal Council's regulation — which had been approved and funded by the National Oceanic and Atmospheric Administration (NOAA) — or side with

⁶⁵ Amicus curiae briefs in support of petitioner David Lucas were filed by: Institute for Justice; Pacific Legal Foundation; Mountain States Legal Foundation and National Cattle-men's Association; National Association of Home Builders and International Council of Shopping Centers; National Association of Realtors; Defenders of Property Rights, American Sheep Industries Association, Inc., Environmental Conservation Organization, Land Improvement Contractors Association, and Outdoor Advertising Association of America, Inc.; Washington Legal Foundation, Allied Educational Foundation, Property Rights Preservation Association, Inc., and Fairness to Land Owners Committee; Chamber of Commerce of the United States of America; American Mining Congress, National Coal Association, National Forest Products Association, American Forest Council, and American Forest Resource Alliance; American Farm Bureau Federation and South Carolina Farm Bureau Federation; South Carolina Policy Council Education Foundation and Georgia Public Policy Foundation; Nemours Foundation, Inc.; Northern Virginia Chapter of the National Association of Industrial and Office Parks, and Northern Virginia Building Industry Association, Inc.; Fire Island Association; Long Beach Island Oceanfront Homeowners Association and Coastal Advocate, Inc.; and United States Senators Steve Symms, Larry E. Craig, Don Nickles and Conrad Burns.

⁶⁶ Amicus curiae briefs in support of respondent South Carolina Coastal Council were filed by: Nueces County, Texas, Scituate, Massachusetts Conservation Commission, Chatham, Massachusetts Conservation Commission, American Littoral Society, Chesapeake Bay Foundation, Coast Alliance, Environmental Defense Fund, National Audubon Society, Natural Resources Defense Council, National Wildlife Federation, South Carolina Wildlife Federation, Dr. Joseph F. Donoghue, Dr. Paul T. Gayes, Dr. Joseph T. Kelly, Dr. Orrin Pilkey, Dr. Rutherford H. Platt and Dr. Stan Riggs; State of California; U.S. Conference of Mayors, Council of State Governments, International City/County Management Association, National Association of Counties, National Conference of State Legislatures, National Institute of Municipal Law Officers, and National League of Cities; American Planning Association and Tahoe Regional Planning Agency; Sierra Club, Humane Society of the United States, and American Institute of Biological Sciences; Municipal Art Society of New York, Inc.; States of Florida, Alabama, Connecticut, Delaware, Georgia, Hawaii, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New Hampshire, New York, North Carolina, Oregon, Pennsylvania, Rhode Island and Rhode Island Coastal Resources Commission, Utah, Vermont, Virginia, Wisconsin, Texas and Territory of Guam and Commonwealth of Puerto Rico; California Cities and Counties; Broward County, Leon County, Manatee County and the City of North Miami Beach; National Growth Management Leadership Project; and National Trust for Historic Preservation.

David Lucas.⁶⁷ The Solicitor General ultimately filed an amicus brief on behalf of the United States siding with Lucas in support of reversal.⁶⁸ Faced with objections from NOAA, the Army Corps of Engineers, the Federal Energy Management Agency (FEMA) and the Environmental Protection Agency (EPA), however, the Solicitor General rejected positions taken in a strongly pro-takings draft brief by Acting Assistant Attorney General Barry Hartman of the Justice Department's Environment and Natural Resources Division.⁶⁹ The resulting discussion in *Lucas* suggests that the nature of the issue warrants the participation of varied interests.

III. THE LIMITED SCOPE AND IMPACT OF *LUCAS*

On June 29, 1992, the U.S. Supreme Court unanimously rejected the argument by David Lucas and — in amicus briefs — by the mining and timber industries and the American Farm Bureau Federation⁷⁰ that there is no nuisance exception to the Fifth Amendment's requirement that private property not be taken without just compensation.⁷¹ Justice Scalia wrote an opinion for a bare majority of the

⁶⁷ See Paul M. Barrett & Rose Gutfeld, *Administration To Urge Broader Limits on Health, Safety, Environmental Rules*, Wall St. J., Jan. 3, 1992, at A8; Paul M. Barrett & Rose Gutfeld, *Justice Department Division Backs Curbs on Health, Safety, Environmental Rules*, Wall St. J., Dec. 23, 1991, at A5.

⁶⁸ Brief for the United States as Amicus Curiae in Support of Reversal (Jan. 1992).

⁶⁹ Hartman's draft brief was circulated for comment to NOAA, the Army Corps of Engineers, FEMA, the EPA and the Interior Department in a December 12, 1991, letter from Peter R. Steenland, Jr., Chief of the Appellate Section of the Environment and Natural Resources Division of the Department of Justice. Letter on file with the author. Responses included a letter from Thomas A. Campbell, General Counsel, NOAA, to Steenland (Dec. 5, 1991); a letter from William J. Haynes, II, General Counsel, Department of the Army, to Steenland (Dec. 20, 1991); a letter from Patricia M. Gormley, General Counsel, FEMA, to Steenland (Dec. 20, 1991); and an internal memorandum from Raymond B. Ludwizewski, Acting General Counsel, EPA, to the EPA Administrator and other administrators (Dec. 20, 1991). Referenced documents on file with the author. See *Memo Puts Hartman in "Takings" Crossfire*, DOJ Alert, Feb. 1992, at 4-6; Paul M. Barrett & Rose Gutfeld, *Administration To Urge Broader Limits on Health, Safety, Environmental Rules*, *supra* note 67, at A8; Paul M. Barrett & Rose Gutfeld, *Justice Department Division Backs Curbs on Health, Safety, Environmental Rules*, *supra* note 67, at A5; see also Barry M. Hartman, *Lucas v. South Carolina Coastal Council: The Takings Test Turns a Corner*, 23 *Envtl. L. Rep.* (Envtl. L. Inst.) 10,003 (Jan. 1993). See generally John G. Roberts, Jr., *Riding the Coattails of the Solicitor General*, *Legal Times*, Mar. 29, 1993, at 30, 31 (discussing the advantages of having the United States, as amicus curiae, support one's position).

⁷⁰ Petitioner's Brief on the Merits at 11-19; Brief of Amici Curiae American Mining Congress, National Coal Association, National Forest Products Association, American Forest Council, and American Forest Resource Alliance in Support of Petitioner at 7-11; Brief Amicus Curiae of American Farm Bureau Federation and South Carolina Farm Bureau Federation in Support of Petitioner at 16-21.

⁷¹ *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992).

Court, in which Chief Justice Rehnquist and Justices White, O'Connor and Thomas joined.⁷² Justice Kennedy filed an opinion concurring in the judgment,⁷³ Justices Blackmun⁷⁴ and Stevens⁷⁵ filed dissenting opinions, and Justice Souter filed a separate statement.⁷⁶

The majority opinion held that land use statutes or regulations that deny *all* economically beneficial or productive use of an *entire* parcel of land generally effect a taking unless they merely repeat restrictions that are inherent in the title to property.⁷⁷ That is, regulations prohibiting those activities that are not permitted by "background principles of the State's law of property and nuisance" *never* effect a taking, even if such prohibition deprives a landowner of *all* economic use of the land.⁷⁸

In *Lucas*, the Supreme Court reversed the South Carolina Supreme Court's decision⁷⁹ and remanded for a determination of whether the state's 1988 Beachfront Management Act⁸⁰ had effected a taking by banning all permanent habitable structures forward of the setback line that lay entirely landward of Lucas's property. Lucas had purchased the property in 1986, two years prior to the Act. The Supreme Court assumed but did not hold that the trial court was correct in finding that the statute deprived the plaintiff of all economically viable use of his land.⁸¹

⁷² 112 S. Ct. at 2888.

⁷³ *Id.* at 2902.

⁷⁴ *Id.* at 2904.

⁷⁵ *Id.* at 2917.

⁷⁶ *Id.* at 2925.

⁷⁷ *Id.* at 2900.

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.

Id. "The principal 'otherwise' . . . is destruction of 'real and personal property, in cases of actual necessity, to prevent the spreading of a fire' or to forestall other grave threats to the lives and property of others." *Id.* at 2900 n.16 (quoting *Bowditch v. Boston*, 101 U.S. 16, 18 (1879)). In addition, "perhaps a law of general application that . . . destroys the value of land without being aimed at land . . . cannot constitute a taking." *Id.* at 2899 n.14.

⁷⁸ *Id.* at 2900. Justice Scalia never answered the issue that he described in the first paragraph: "This case *requires us to decide* whether the Act's dramatic effect on the economic value of Lucas's lots accomplished a taking of private property under the Fifth and Fourteenth Amendments requiring the payment of 'just compensation.'" *Id.* at 2889 (emphasis added). Instead, the case was remanded to the South Carolina Supreme Court for the State to "identify background principles of nuisance and property law that prohibit the uses he now intends in the circumstances in which the property is presently found." *Id.* at 2901-02.

⁷⁹ 404 S.E.2d 895 (S.C. 1991).

⁸⁰ S.C. Code Ann. §§ 48-39-10 to 48-39-360 (Law Co-op. 1987 & Supp. 1991).

⁸¹ 112 S. Ct. at 2896 n.9.

The precedential value of *Lucas* is undercut by numerous analytical contradictions and inconsistencies in Justice Scalia's majority opinion.⁸² Examples of those weaknesses as they pertain to substantive takings law are discussed below. Additional problems regarding the opinion's treatment of ripeness and standing are largely beyond the scope of this Article.⁸³

A. Contradictions and Inconsistencies: *Lucas* and Its Limited Potential to Extend the Reach of the Takings Clause

In his majority opinion, Justice Scalia sought categorical rules to determine when a taking would occur. In two instances, he wrote, courts can categorically find a taking without a broad inquiry into competing interests:

[O]ur decision in [*Pennsylvania Coal Co. v. Mahon*] offered little insight into when, and under what circumstances, a given regulation would be seen as going "too far" for purposes of the Fifth Amendment. In 70-odd years of succeeding "regulatory takings" jurisprudence, we have generally eschewed any "set formula" for determining how far is too far, preferring to "engag[e] in . . . essentially ad hoc, factual inquiries," We have, however, described at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint. The first encompasses regulations that compel the property owner to suffer a physical "invasion" of his property. . . .

The second situation in which we have found categorical treatment appropriate is where a regulation denies all economically beneficial or productive use of land.⁸⁴

Justice Scalia's analysis is inconsistent with the Court's holding in another decision from the Court's 1991-1992 term. Specifically, Justice Scalia's description of "permanent physical occupation"⁸⁵ as a type of regulatory taking contrasts with Justice O'Connor's virtually contemporaneous discussion in *Yee v. City of Escondido*.⁸⁶ Throughout her opinion for the Court in *Yee*, Justice O'Connor clearly distin-

⁸² Justice Blackmun began his dissent by declaring: "Today the Court launches a missile to kill a mouse." *Id.* at 2904. As discussed herein, Justice Scalia's majority opinion engages in major analytical contortions in order to address a problem that rarely, if ever, exists in the real world: government regulation that destroys 100% of the value of real property.

⁸³ See *id.* at 2907-08 n.5 (Blackmun, J., dissenting); *id.* at 2917-18 (Stevens, J., dissenting).

⁸⁴ *Id.* at 2893 (citations omitted).

⁸⁵ *Id.* at 2900.

⁸⁶ 112 S. Ct. 1522, 1526-34 (Apr. 1, 1992).

guished physical-occupation takings from regulatory takings.⁸⁷ According to Justice O'Connor, these constitute

two distinct classes. Where the government authorizes a physical occupation of property (or actually takes title), 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. The first category of cases requires courts to apply a clear rule; the second necessarily entails complex factual assessments of the purposes and economic effects of government actions.⁸⁸

In addition, Justice Scalia's attempt to describe a "discrete categor[y] of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint"⁸⁹ is analytically flawed. As Donald Ayer has written, "[w]hile stating his holding in terms of a categorical rule, Scalia recognized that this rule must be subject to a substantial exception—indeed one that makes the rule decidedly un-categorical."⁹⁰ In particular, the *Lucas* majority recognized that using a "total taking" analysis to determine whether "background principles of nuisance and property law . . . prohibit the uses [a landowner] now intends in the circumstances in which the property is presently found"⁹¹ would "ordinarily entail (as the application of state nuisance law ordinarily entails) analysis of, among other things, the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities."⁹²

⁸⁷ Justice Scalia joined Justice O'Connor's opinion for the Court in *Yee* and Justice O'Connor joined Justice Scalia's majority opinion in *Lucas*.

⁸⁸ *Yee*, 112 S. Ct. at 1526 (citations omitted).

⁸⁹ *Lucas*, 112 S. Ct. at 2893.

⁹⁰ Donald Ayer, *Straying from the Right Religion*, *Legal Times*, July 27, 1992, at S39. Donald Ayer was Deputy Attorney General from 1989 to 1990 and Principal Deputy Solicitor General from 1986 to 1988. See also Jed Rubenfeld, *Usings*, 102 *Yale L.J.* 1077, 1093 (1993) ("[W]hat began as a ringing endorsement of a per se economic-viability rule . . . ended with a direction to federal judges to decide takings claims by determining how the courts of the relevant state would have decided a hypothetical injunction action against the property owner under the state's common-law nuisance precedents. This result is astonishing . . .").

⁹¹ 112 S. Ct. at 2901-02.

⁹² *Id.* at 2901 (citing Restatement (Second) of Torts §§ 826, 827 (1979)). Justice Scalia's references to "common-law prohibition" and "common-law action for public nuisance," *id.*, incidentally raise the issue of how the *Lucas* doctrine will be applied to Louisiana's civil law system.

Contrary to Justice Scalia's initial description of the total-taking inquiry, then, courts will in fact be required to engage in a "case-specific inquiry into the public interest advanced in support of the restraint."⁹³ Even in the extraordinary case in which a regulation deprived land of all economic use, a fact-specific judicial determination will be necessary to decide whether the affected use is inherent in the title as defined not only by nuisance law but by property law as well.

The majority opinion indeed admits the existence of a separate fact-specific exception in the one area of taking jurisprudence that many had thought was categorical, "permanent physical occupation" of land:

Where "permanent physical occupation" of land is concerned, we have refused to allow the government to decree it anew (without compensation), no matter how weighty the asserted "public interests" involved, *Loretto v. Teleprompter Manhattan CATV Corp.*—though we assuredly would permit the government to assert a permanent easement that was a pre-existing limitation upon the landowner's title.⁹⁴

Ironically, the only categorical rule in the *Lucas* majority opinion is a *negative* one: If a property restriction repeats limitations inherent in the title to property, as defined by property and nuisance law — as well as by emergency circumstances⁹⁵ and by "perhaps" generally applicable criminal laws and other laws that destroy the value of land without being aimed at land⁹⁶ — the restriction *never* effects a taking.⁹⁷

Where the majority attempted to articulate the circumstances

⁹³ *Id.* at 2893.

⁹⁴ *Id.* at 2900 (citation omitted).

⁹⁵ *Id.* at 2900 n.16 ("actual necessity . . . or to forestall other grave threats to lives and property of others") (quoting *Bowditch v. Boston*, 101 U.S. 16, 18-19 (1879)).

⁹⁶ The multitude of criminal forfeiture statutes would presumably not require compensation under *Lucas* even as applied to seizure and sale of a home from which a recently criminalized "designer drug" was being sold. See *id.* at 2899 n.14 ("The equivalent of a law of general application that inhibits the practice of religion without being aimed at religion is a law that destroys the value of land without being aimed at land. Perhaps such a law—the generally applicable criminal prohibition on the manufacturing of alcoholic beverages challenged in *Mugler*, 123 U.S. 623 (1887) comes to mind—cannot constitute a compensable taking.") (citation omitted).

⁹⁷ See David Coursen, *Lucas v. South Carolina Coastal Council: Indirection in the Evolution of Takings Law*, 22 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,778, 10,788 (Dec. 1992) ("In the guise of articulating one categorical rule—a denial of all use works a taking—the Court has implicitly established another principle that state-imposed limitations on property use always defeat a taking claim. Moreover, while the articulated rule applies in only a narrow range of circumstances, the implicit rule applies in every case. Finally, when the two rules collide, the

under which a taking *would occur*, it was not compelling. In dicta, Justice Scalia stated that

affirmatively supporting a compensation requirement[] is the fact that regulations that leave the owner of land without economically beneficial or productive options for its use—typically, as here, by requiring land to be left substantially in its natural state—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.⁹⁸

In fact, however, even land left substantially in its natural state very often has valuable “economically beneficial or productive” options for its use — as grazing land, for example. Furthermore, speculators will purchase land despite current use restrictions, on the chance that changed factual circumstances or relaxed regulation would allow development to occur in the future. In 1986, for example, a five-judge panel of the Federal Circuit in *Florida Rock Industries v. United States*⁹⁹ rejected the position that denying an immediately viable use of land would effect a taking. According to the court, fair market value of the land must include the value to willing speculative buyers:

We do not perceive any legal reason why a well-informed “willing buyer” might not bet that the prohibition of rock mining, to protect the overlying wetlands, would some day be lifted. The statute would not have to change, only the perceptions of the Army engineers. . . . There is nothing so certain in life as that all certainties become uncertain, and some are replaced by their opposites. One who invests in land on this basis may be a speculator, but he is not on that account a gull.

Anyone who buys mineral property is speculating to a large extent, and so is even to some extent one who buys “blue chip” securities.¹⁰⁰

Finally, other glaring analytical flaws undercut the precedential value of the *Lucas* majority’s opinion.¹⁰¹ Justice Scalia initially

implicit rule controls: if [the landowner’s] property rights are subject to a state property or nuisance-law restriction, his taking claim will be defeated.”)

⁹⁸ 112 S. Ct. at 2894-95.

⁹⁹ 791 F.2d 893 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987).

¹⁰⁰ 791 F.2d at 902-03.

¹⁰¹ Analytical weaknesses in the *Lucas* decision can perhaps be attributed to the fact that the decision was issued on the last day of the term. The Court’s attention was divided among a host of important and very controversial decisions at that time, including *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992), which was issued the same day as *Lucas*.

Justice Scalia’s opinion lacks precision. For example, he refers to the basic concept of a total taking in 20 different ways. See Fred P. Bosselman, *The Lucas Decision in Historical Perspec-*

stated, for example, that "the distinction between regulation that 'prevents harmful use' and that which 'confers benefits' is difficult, if not impossible, to discern on an objective, value-free basis"¹⁰² He then looked to "the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's activities" to define nuisance.¹⁰³ The opinion thus makes the admittedly subjective harm inquiry the touchstone for finding a nuisance.¹⁰⁴

In addition, as Donald Ayer has written,

Justice Scalia arrived at his constitutional rule announced in *Lucas* only by both rewriting and ignoring history. Despite Scalia's assertion, there is no longstanding rule that the denial of economically viable use of land is itself adequate basis for finding a taking. As both Justices Blackmun and Stevens noted in dissent, this conclusion is supported only by dicta in a number of recent cases. . . .

The Court's most striking rejection of history is its open acknowledgment that the entire body of takings jurisprudence is a judicial construct without basis in the intentions of the framers or the practice at the time. This is all the more noteworthy coming from one who has made historical practice the alpha and omega of constitutional limitations on governmental action.¹⁰⁵

tive, Paper Presented at the 1992 Annual Meeting of the American Bar Association's Section on Urban, State and Local Government Law 3-4 (Aug. 10, 1992) (on file with the *Virginia Environmental Law Journal*).

¹⁰² 112 S. Ct. at 2899.

¹⁰³ *Id.* at 2901. In his dissent, Justice Blackmun aptly stated that "[i]n determining what is a nuisance at common law, state courts make exactly the decision that the Court finds so troubling today: they determine whether the use is harmful. Common-law public and private nuisance law is simply a determination whether a particular use causes harm." *Id.* at 2914 (citing William L. Prosser, *Private Action for Public Nuisance*, 52 Va. L. Rev. 997, 997 (1966) ("Nuisance is a French word which means nothing more than harm.")). For a similar criticism, see Rubinfeld, *supra* note 90, at 1093 ("If the harm principle is to be jettisoned because there is no 'objective conception of noxiousness' that permits a 'distinction between harm-preventing and benefit-conferring regulation,' how then can judges be asked to evaluate 'the degree of harm . . . posed by the claimant's proposed activities' and 'their suitability to the locality in question?'" (footnote and additional quotation marks omitted) (quoting *Lucas*, 112 S.Ct. at 2897, 2901).

¹⁰⁴ Justice Scalia also noted that "an affirmative decree eliminating all economically beneficial uses may be defended only if an *objectively reasonable application* of relevant precedents would exclude those beneficial uses in the circumstances in which the land is presently found." 112 S. Ct. at 2902 n.18.

¹⁰⁵ Ayer, *supra* note 90, at S38-S39. See *Lucas*, 112 S. Ct. at 2892, 2900 n.15 (acknowledging conflict with pre-*Pennsylvania Coal Co. v. Mahon* cases, early practice of the states and views of early constitutional theorists, who "did not believe the Takings Clause embraced regulations of property at all"); *id.* at 2911-12 & n.11, 2914-15 & n.23 (Blackmun, J., dissenting); *id.* at 2918-19 (Stevens, J., dissenting). That is, "[t]he purpose of the takings clause was to assure compensation for cases of physical taking." John A. Humbach, *What Is Behind the*

B. Undermining Personal Property Claims

Lucas should have its most significant practical impact by undercutting regulatory takings claims involving personal property. The relevant language in Justice Scalia's majority opinion makes a fundamental distinction between real and personal property:

[I]n the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, [the owner] ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale).¹⁰⁶

Subsequent state and federal decisions have cited this distinction in denying personal property takings claims. The Supreme Court of New Jersey, for example, understood *Lucas* as limited to real property in an opinion rejecting a claim that state conditions on the withdrawal of an automobile insurance company from the state market constituted a regulatory taking.¹⁰⁷ Likewise, a federal district court cited *Lucas* in rejecting a takings claim that challenged a state ban on the use of gill nets in the Indiana waters of Lake Michigan.¹⁰⁸ The court

"Property Rights" Debate?, 10 Pace Envtl. L. Rev. 21, 24 (1992) (*Lucas* Colloquium article) (citing William M. Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L.J. 694, 711 (1985)). From the right of Justice Scalia, Mark Pollot bemoans "the majority's all too willing acquiescence in the claim that, prior to the 1922 case of *Mahon*, courts believed that only direct confiscations of property violated the Constitution's property protections." Pollot, *supra* note 18, at 195.

¹⁰⁶ 112 S. Ct. at 2899-900 (citing *Andrus v. Allard*, 444 U.S. 51 (1979), which upheld a prohibition on the sale of eagle feathers). This language from *Lucas* contradicts the Federal Circuit's prior decision that the government had "taken" a quarantined turkey flock in *Yancey v. United States*, 915 F.2d 1534 (Fed. Cir. 1990). Other than the language quoted, Justice Scalia offers no explanation for this dichotomy, which was apparently necessitated by the desire to establish a rule for real property that would be compatible with the innumerable instances where regulation destroys all value and use of personal property. Many of these instances involve legislatively created prohibitions on possession, manufacture or sale of previously legal and valuable goods — actions which clearly go beyond "background principles" of property and nuisance law. Mark Pollot argues that "there is no constitutional or principled basis for distinguishing between real property and personal property in this regard." Pollot, *supra* note 18, at 195.

¹⁰⁷ *In re the Plan*, 609 A.2d 1248 (N.J. July 29, 1992), cert. denied sub nom. *Twin City Fire Ins. Co. v. Fortunato*, 113 S. Ct. 1066 (Jan. 19, 1993); see also *In re Producer Assignment Program*, 618 A.2d 894, 900 (N.J. Super. Ct. App. Div. Jan. 8, 1993). Similarly, in *Millcreek Township v. N.E.A. Cross Co.*, 620 A.2d 558, 562 (Pa. Commw. Ct. Jan. 12, 1993), the court noted that "*Lucas* involved a fee simple interest in land which was rendered valueless by the relevant regulation, and there is nothing in that opinion to indicate that the holding extends to leasehold interests." The *Millcreek* court relied on state court precedent in remanding the case for an evidentiary hearing on whether a ban on oil and gas wells in agricultural and residential zoning districts was unreasonably restrictive and hence a taking. *Id.* at 562.

¹⁰⁸ *Burns Harbor Fish Co. v. Ralston*, 800 F. Supp. 722, 726 (S.D. Ind. July 23, 1992).

also raised the issue of the ban's impact on the "investment-backed expectations" of gill net and fishing license purchasers:

When an individual or corporate entity purchases personal property (as opposed to real property) to engage in a commercial venture the purchaser is taking a risk that government regulation will diminish the value of that property. . . . Indeed, where the item purchased could potentially invoke environmental concerns the purchaser must be especially wary in these days of growing environmental concern.¹⁰⁹

C. Limited Impact on Real Property Claims

Although *Lucas* has begun to undermine takings claims involving personal property, its impact on claims involving real property will likely be slight. *Lucas* recognized several rules that limit real property takings claims. The majority held that to forbid uses of real property that are barred by background principles of property and nuisance law does not effect a taking, even if forbidding such uses were to deprive the land of all economic value. The majority also acknowledged that the government can flatly prohibit particular uses of land. Moreover, it left undisturbed existing law allowing the government to regulate some portion of the whole collection of rights in property, or to deprive an owner temporarily but completely of his land's value without effecting a taking.

The Supreme Court's takings analysis will likely change upon the retirement of Justice White at the end of the 1992-1993 term. Justice White was the fifth vote for Justice Scalia's bare majority opinion in *Lucas*. His departure thus calls into question the viability of the majority opinion's dicta regarding real property claims, especially in light of the contradictions and inconsistencies discussed above. Justice Kennedy, who may now hold the decisive vote on regulatory takings issues, expressed very different views in his *Lucas* concurrence than did Justice Scalia.¹¹⁰

¹⁰⁹ *Id.* (citing *Andrus v. Allard*, 444 U.S. 51, 66-68 (1979)). *But see* *Nixon v. United States*, 978 F.2d 1269 (D.C. Cir. Nov. 17, 1992) (finding a physical taking by the Presidential Recordings and Materials Preservation Act, 44 U.S.C. § 2111 (1988)).

¹¹⁰ For example, Justice Kennedy stressed the general principle that reasonable expectations must be understood in light of the whole of our legal tradition. The common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent society. *Goldblatt v. Hempstead*, 369 U.S. 590, 593 . . . (1962). The State should not be prevented from enacting new regulatory initiatives in response to changing conditions, and courts must consider all reasonable expectations whatever the source. The Takings Clause does not require a static body of state property law I do not

Even without regard to Justice White's imminent departure, the practical effect of the *Lucas* majority opinion on takings claims involving real property is extremely limited.¹¹¹ For example, at least with respect to anything less than total deprivation of economic use, government can apply new restrictions to land; "the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State."¹¹² The government can also enforce restrictions in force at the time of purchase

believe [nuisance prevention] can be the sole source of state authority to impose severe restrictions.

112 S. Ct. at 2903.

Procedurally, the Supreme Court accepted the case on the "factual assumption" that David Lucas had no remaining economic use of his property, without deciding the issue. *Id.* at 2896 n.9. In his concurring opinion, Justice Kennedy went out of his way essentially to invite the state Supreme Court on remand to find that the property indeed had value. *See id.* at 2903.

On the more general issue of coastal regulation, Justice Kennedy stated that "[c]oastal property may present such unique concerns for a fragile land system that the State can go further in regulating its development and use than the common law of nuisance might otherwise permit." *Id.* On June 14, 1993, President Clinton announced his nomination of D.C. Circuit Court Judge Ruth Bader Ginsburg to fill the upcoming open seat on the Court.

¹¹¹ See Barry I. Pershkov & Robert F. Housman, *In the Wake of Lucas v. South Carolina Coastal Council: A Critical Look at Six Questions Practitioners Should Be Asking*, 23 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 10,008 (1993) ("Assuming that courts will read the *Lucas* total economic deprivation test correctly and will apply *Lucas* only when a total loss of economically viable use has occurred, the decision's impact on takings law will be minimal."); Richard A. Epstein, *Yee v. City of Escondido: The Supreme Court Strikes Again*, 26 *Loy. L.A. L. Rev.* 1, 4 (1992) (arguing that the importance of *Lucas* "is limited because the Court appears to have adopted a powerful 'hands off' attitude to all forms of partial restrictions on land use—a subject that dwarfs the importance of the peculiar circumstances of *Lucas*, the total wipeout of all land uses").

Mark Pollot relies heavily on the very shaky dicta of *Lucas* footnote seven in claiming that "*Lucas* is an extremely significant decision, not only for what it directly decided but also for what it suggests the Court may do in the future." Pollot, *supra* note 18, at 188, 191-92. Pollot himself admits his isolation in this view, stating that "many property rights advocates . . . reacted to the opinion by minimizing its importance." *Id.* at 188. See also Robert M. Washburn, *Land Use Control, the Individual, and Society: Lucas v. South Carolina Coastal Council*, 52 *Md. L. Rev.* 162, 164 (1993) ("In the short time since [*Lucas*] was issued, it has become a landmark addition to land use regulatory takings jurisprudence, providing much-needed and long-awaited guidance for land developers, regulators, and lower courts."). Despite this sweeping assertion, which appears in the introduction of the article, Washburn does not cite a single post-*Lucas* case; federal and state courts in fact have repeatedly found the narrow "total takings" analysis in *Lucas* inapplicable. See *infra* part IV.

¹¹² 112 S. Ct. at 2899; see *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 130 (1978) (rejecting as "quite simply untenable" the contention that property owners "may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development"); *Agins v. City of Tiburon*, 447 U.S. 255, 262-63 (1980) (finding no taking where the city adopted new ordinances limiting development after the plaintiffs acquired extremely valuable undeveloped land for residential development); *Deltona Corp. v. United States*, 657 F.2d 1184, 1190-91, 1193 (Ct. Cl. 1981) (rejecting a takings claim by a plaintiff who had purchased property in 1964, before the Army Corps' jurisdiction was extended from "navigable waters of the United

without effecting a taking, despite the possibility of total value deprivation.¹¹³ Additionally, according to the majority opinion, "perhaps" a law "that destroys the value of land without being aimed at land . . . — the generally applicable criminal prohibition on the manufacturing of alcoholic beverages challenged in *Mugler* comes to mind — cannot constitute a compensable taking."¹¹⁴

1. *Regulation in Accord with Background Principles of Property and Nuisance Law: No Taking, Even If Eliminating All Value*

Justice Scalia's majority opinion recognizes that it is not a taking to forbid uses barred by "background principles of the State's law of property and nuisance."¹¹⁵ This should include uses that are incom-

States" to "all navigable waters" and the substantive provisions for granting permits had been significantly stiffened), *cert. denied*, 455 U.S. 1017 (1982).

¹¹³ Justice Scalia's discussion rejects the concept "that the State may subsequently eliminate all economically valuable use" and stresses that "[a]ny limitation so severe cannot be newly legislated or decreed." 112 S. Ct. at 2900 (emphasis added). This result is consistent with the Claims Court's pre-*Lucas* statement that in determining whether the plaintiff's expectations are "reasonable," "the Supreme Court has made it clear that the degree to which the claimant has advance notice of the government action is relevant." *Ciampitti v. United States*, 22 Cl. Ct. 310, 320 (1991) (citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1006-07 (1984) ("Monsanto could not have had a reasonable investment-backed expectation that the EPA would keep the data confidential beyond the limits prescribed in the amended statute itself.") and *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 227 (1986) ("Prudent employers then had more than sufficient notice not only that pension plans were currently regulated, but also that withdrawal itself might trigger additional financial obligations.")). For example, purchasing wetlands with full knowledge of permit requirements precludes the argument that a permit denial interferes with one's reasonable investment-backed expectations. *Ciampitti*, 22 Cl. Ct. at 321.

¹¹⁴ 112 S. Ct. at 2899 n.14 (citations omitted).

Professor Fred Bosselman of IIT Chicago-Kent Law School (co-author with D. Callies and J. Banta of *The Taking Issue* (1973), which Justice Blackmun cites in his dissent, 112 S. Ct. at 2914-15) has stated: "It is interesting to speculate whether, for example, section 404 of the Water Pollution Control Act or section 9 of the Endangered Species Act, neither of which is specifically directed to land use, thereby become exempt from potential taking claims." Bosselman, *supra* note 101, at 8; see also Robert Meltz, Congressional Research Serv., CRS Report for Congress No. 93-346 A, *The Endangered Species Act and Private Property: A Legal Primer* 19-20 (1993) ("[Endangered Species Act] limitations on private defensive measures, not 'aimed at land,' may be constitutionally noncompensable as a matter of law."). For example, generally applicable criminal prohibitions of the Endangered Species Act, 16 U.S.C. § 1538 (1988), are not "aimed at land," but apply to the killing of protected species and other activities that could occur in the air from planes, in the water from boats and by trespassers regardless of any claimed property rights in land. This is a clearer example than the statute in *Mugler v. Kansas*, 123 U.S. 623 (1887), which prohibited an activity, the manufacture of alcoholic beverages, that necessarily involves real property.

¹¹⁵ 112 S. Ct. at 2900; see John A. Humbach, *Evolving Thresholds of Nuisance and the Takings Clause*, 18 Colum. J. Envtl. L. 1 (1993).

patible with, for example, the public trust doctrine¹¹⁶ or the state law principle that “[a]n owner of land 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.”¹¹⁷

One of Justice Scalia’s examples of “background principles” clearly refers to permits for lake beds and other wetlands under section 40 of the Clean Water Act.¹¹⁸ “[T]he owner of a lake bed . . . would not be entitled to compensation when he is denied the requisite permit to engage in a landfilling operation that would have the effect of flooding others’ land.”¹¹⁹ He explained the lake bed example by stating that “[s]uch regulatory action may well have the effect of eliminating the land’s only economically productive use, but it does not proscribe productive use that was previously permissible under relevant property and nuisance principles.”¹²⁰

Because nuisance law is continuously evolving, Justice Scalia’s analysis can justify even extraordinary cases in which newly enacted regulations would prohibit all land uses, even those that were not

¹¹⁶ See *Kreiter v. Chilea*, 595 So. 2d 111 (Fla. Dist. Ct. App. Feb. 11, 1992) (demonstrating the court’s reliance on the public trust doctrine to reject a takings claim in a pre-*Lucas* decision (with a post-*Lucas* denial of certiorari)), *review denied*, 601 So. 2d 552 (Fla. June 24, 1992), *cert. denied*, 113 S. Ct. 325 (Oct. 13, 1992). “The Public Trust Doctrine and Takings, A Public Trust View” was on the agenda for a conference on “The Use of the Public Trust Doctrine as a Management Tool for Public and Private Lands” at Albany Law School on December 1992. The United States, defending against a takings claim filed by rancher Wayne Hage regarding the reduction of grazing permits on federal land, cites *Light v. United States*, 2 U.S. 523, 535, 537 (1911), as recognizing that the private use of federal land does “not confer any vested right” because “the public lands of the nation are held in trust for the people of the whole country.” Defendant’s Memorandum in Support of Its Motion for Summary Judgment at 7, *Hage v. United States*, No. 91-1270L (Fed. Cl. Sept. 21, 1992). For a pre-*Lucas* discussion of the public trust doctrine, see Henry R. Bader, *Antaeus and the Public-Trust Doctrine: A New Approach to Substantive Environmental Protection in the Common Law*, 19 B.C. Env’t Aff. L. Rev. 749 (1992). For a general discussion of *Hage*, see Ted Williams, *Taking Back Range*, *Audubon*, Jan.-Feb. 1993, at 28.

¹¹⁷ *Just v. Marinette County*, 201 N.W.2d 761, 768 (Wis. 1972) (denying a wetlands takings claim). The *Just* analysis has been followed by other courts in denying wetlands takings claims, including a New Hampshire Supreme Court decision in which Justice Souter joined. See *Rowe v. Town of North Hampton*, 553 A.2d 1331, 1335 (N.H. 1989) (“[N]o taking occurs where the public policy advanced by a regulation is particularly important and the landowner’s action would substantially change the essential natural character of [the] 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.”) (quoting *Just*, 201 N.W.2d at 768); *Graham v. Estuary Properties, Inc.*, 399 So. 2d 1374, 1382 (Fla.), *cert. denied*, 454 U.S. 1083 (1981); *American Dredging Co. v. State Dep’t of Env’tl. Protection*, 391 A.2d 1265, 1271 (N.J. Super. Ct. Ch. Div. 1978), *aff’d*, 404 A.2d 1265 (N.J. Super. Ct. App. Div. 1979).

¹¹⁸ 33 U.S.C. § 1344 (1988).

¹¹⁹ 112 S. Ct. at 2900.

¹²⁰ *Id.* at 2900-01.

barred by "the restrictions that background principles of the State's law of property and nuisance"¹²¹ placed on land ownership at the time of purchase. In deciding what land uses satisfy property and nuisance law, courts should take account of newly perceived environmental dangers: "Changed circumstances or new knowledge may make what was previously permissible no longer so."¹²²

Lucas's reliance on the Restatement (Second) of Torts to define nuisance law¹²³ has additional limiting implications. First, the Restatement's definition of nuisance is broader than the definition upon which some recent lower court decisions have relied.¹²⁴ Second, as Professor Fred Bosselman has stated, the cases on which the Restatement is based "regularly rely on state statutes in determining whether a particular use is a nuisance."¹²⁵ Therefore, despite the concerns of Justices Blackmun¹²⁶ and Stevens¹²⁷ in dissent, *Lucas* does not foreclose a legislative role in defining nuisance, although it must be more than merely "the legislature's declaration that the uses [the property owner] desires are inconsistent with the public interest."¹²⁸

Professor Bosselman also stated that

The Court's reliance on nuisance law, and particularly its effective delegation of this issue to the law of each individual state, is perhaps the most unusual aspect of the opinion. The Court seems to provide no limits to the extent to which each state may use its own creativity in defining the concept of nuisance. This means that the interpretation of an important federal con-

¹²¹ *Id.* at 2900.

¹²² *Id.* at 2901 (citing Restatement (Second) of Torts § 827, cmt. g (1979)).

¹²³ *Id.*

¹²⁴ See, e.g., *Florida Rock Indus. v. United States*, 21 Cl. Ct. 161, 166-68 (1990), *appellate pending*.

¹²⁵ Bosselman, *supra* note 101, at 6.

¹²⁶ 112 S. Ct. at 2914-16.

¹²⁷ *Id.* at 2921-22.

¹²⁸ *Id.* at 2901. In his dissent, Justice Blackmun demonstrated how the majority deviated from the general rule of deference to legislative judgments, which applies to takings cases. *Id.* at 2909. Pace Law School Professor John Nolon has noted the

considerable irony in this reliance on the common law of nuisance in *Lucas*. . . . Scalia defines nuisance exclusively by reference to the case law. Under [*Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870, 871 (N.Y. 1970)], 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.

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, 11 n.60 (1992); see Robert Abrams & Val Washington, *The Misunderstood Law of Public Nuisance: A Comparison with Private Nuisance Twenty Years After Boomer*, 54 Alb. L. Rev. 359 (1990); Jeff L. Lewin, *Boomer and the American Law of Nuisance: Past, Present, and Future*, 54 Alb. L. Rev. 189 (1990).

stitutional principle is likely to vary widely from state to state.¹²⁹

Limits on state-created property rights may originate in either federal or state law. In contrast to Justice Scalia's understandable focus on "state law" in discussing the *Lucas* challenge to a South Carolina statute, it is significant that he cited as an example of "a pre-existing limitation upon the landowner's title" the Supreme Court's decision in *Scranton v. Wheeler*,¹³⁰ in which the navigational servitude was a federal law limitation on the landowner's title.¹³¹

Since *Lucas*, the Court of Federal Claims¹³² has recognized background federal limitations to property owners' state-created rights in real property. In *Preseault v. United States*,¹³³ Judge Nettlesheim relied on this language in *Lucas* in rejecting the plaintiffs' contention that under *Lucas* the inquiry into pre-existing limitations on the landowner's title is restricted to state law: "*Lucas* acknowledged only limitations that inhere in one's title, be they state or federal"¹³⁴ Judge Nettlesheim granted summary judgment against Vermont landowners who, purporting to hold reversionary interests in a former railroad right-of-way, claimed that the government had taken their property without just compensation by converting the allegedly abandoned right-of-way into a bicycle path under the National Trails System Act.¹³⁵

The landowners had repeatedly sold or transferred their interests as individuals and in a separate limited partnership entity during a period in which changes in federal law affected the conditions under which their reversionary interests could be expected to ripen. They argued that their property rights should be measured by the fee interests held by their predecessors in title when the parcels were first burdened by the railroad right-of-way as a servitude in 1899.¹³⁶ The court, however, held that under *Lucas*, the critical date for determin-

¹²⁹ Bosselman, *supra* note 101, at 6.

¹³⁰ 179 U.S. 141 (1900).

¹³¹ 112 S. Ct. at 2900.

¹³² Formerly the United States Claims Court, prior to the passage of the Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 4506 (1992). This court has jurisdiction in cases brought against the United States. 28 U.S.C. § 1491(a)(1) (1988) (stating that the court "shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department").

¹³³ 27 Fed. Cl. 69 (Nov. 10, 1993), *appeal pending*.

¹³⁴ *Id.* at 89.

¹³⁵ *Id.* at 71, 96; see *Preseault v. I.C.C.*, 494 U.S. 1 (1990) (upholding the constitutionality of the National Trails System Act without reaching the merits of the alleged taking).

¹³⁶ 27 Fed. Cl. at 88.

ing the plaintiffs' historically rooted expectancies — the "bundle of rights" that inhered in the title to the property — was necessarily fixed at the most recent transfer of title, even where the transfer was essentially between themselves as individuals and as a separate limited-partnership entity.¹³⁷ Addressing what it regarded as a question of first impression not clearly addressed by *Lucas*, the *Preseault* court ruled that

given long-standing, pervasive, and specific federal limitations on rights created by state law in respect of property burdened by a private easement for a public purpose, a landowner [could not have developed] a historically rooted expectation of compensation for postponement of those rights when state law does not recognize those rights independent of federal regulation.¹³⁸

Thus, the plaintiffs could not be said to have had compensable property interests in the railroad right-of-way at the time of the alleged taking.¹³⁹

State courts have also denied takings claims on the authority of the provision in *Lucas* for background state law limitations on state property rights. In *Stevens v. City of Cannon Beach*,¹⁴⁰ the Oregon Court of Appeals rebuffed a claim that denying permits to build a seawall as part of the eventual development of two lots for motel or hotel use constituted a taking. Upholding the trial court's reliance on *State ex rel. Thornton v. Hay*,¹⁴¹ the *Stevens* court found "that the denial of the applications took nothing from plaintiffs, because their property interests [had] never included development rights that could interfere with the public's use of the dry sand area."¹⁴² The court reasoned that under *Lucas*, whether the proscribed interests were part of the plaintiffs' title to begin with was to be decided under the state's law of nuisance and property; the *Hay* case was "an expression of state law that the purportedly taken property interest was not part of plaintiff's estate to begin with."¹⁴³

¹³⁷ *Id.* at 87-88.

¹³⁸ *Id.* at 89.

¹³⁹ *Id.* at 91.

¹⁴⁰ 835 P.2d 940 (Or. App. Aug. 5, 1992), *review granted*, 844 P.2d 206 (Or. Dec. 22, 1992).

¹⁴¹ 462 P.2d 671 (Or. 1969).

¹⁴² 835 P.2d at 941. The *Stevens* court noted that in *Hay*, the state

Supreme Court reasoned that the public had acquired the right to use the dry sand of Cannon Beach under the "doctrine of custom." That right was held to be superior to the rights of owners of property in the areas, insofar as they sought to use it in ways that could obstruct or interfere with the public's use.

Id.

¹⁴³ *Id.* at 942.

In *B. & F Trawlers, Inc. v. United States*, the Court of Federal Claims dismissed a takings claim that was based upon the Coast Guard's sinking of the STAR TREK, a vessel that represented a danger to navigation.¹⁴⁴ Judge Robinson relied in part on *Lucas's* recognition of the government's power to "abate nuisances that affect the public generally, or otherwise."¹⁴⁵

2. Government Action Which Does Not Destroy All Economic Use: Beyond the Scope of Lucas

In his *Lucas* opinion, Justice Scalia repeatedly emphasized the holding's narrow scope, a qualification presumably necessary to garner a bare majority. The opinion makes clear that *Lucas* applies only to denials of *all* economically beneficial uses of *entire* parcels of property, stating that "the 'interest in land' that *Lucas* has pleaded [to have lost in its entirety is] a fee simple interest,"¹⁴⁶ and that "[i]t is true that in at least *some* cases the landowner with 95% loss will get nothing, while the landowner with total loss will recover in full."¹⁴⁷ *Lucas* is limited to "relatively rare situations," "the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted."¹⁴⁸ *Lucas* is thus narrow indeed, for few if any environmental, historic preservation or land use laws prohibit *all* valuable use of an entire parcel.¹⁴⁹ Furthermore, the opinion places on the landowner the burden of proving that the government has deprived him of all "economically beneficial use of his land."¹⁵⁰

In one illustration of the holding's narrowness, the Supreme Judicial Court of Massachusetts in *Steinbergh v. City of Cambridge*¹⁵¹ rejected a takings claim arising from a city ordinance restricting removal of rent-controlled properties from the market for conversion and sale as condominiums, even though the court had in a prior

¹⁴⁴ 27 Fed. Cl. 299, 305-06 (Dec. 9, 1992).

¹⁴⁵ *Id.* at 305 (quoting *Lucas*, 112 S. Ct. at 2900).

¹⁴⁶ 112 S. Ct. at 2894 n.7.

¹⁴⁷ *Id.* at 2895 n.8.

¹⁴⁸ *Id.* at 2894. The Supreme Court has recently held that "mere diminution in the value of property, however serious, is insufficient to demonstrate a taking." *Concrete Pipe & Prods., Inc. v. Construction Laborers Pension Trust*, 61 U.S.L.W. 4611, 4623 (U.S. June 14, 1993).

¹⁴⁹ Stephen L. Kass & Michael B. Gerrard, "Lujan," "Lucas" and "Dague": *A Scalian Trilogy*, 208 N.Y. L.J. 3, 27 (July 31, 1992) ("[N]either the majority's nor the dissenters' dicta in *Lucas* is likely to have a significant effect on contemporary land use practice, which already affords 'hardship' relief from zoning and landmarking controls in virtually all jurisdictions (and, in some jurisdictions, from wetlands regulation as well) for property owners denied all economic use of their property.").

¹⁵⁰ 112 S. Ct. at 2893 n.6.

¹⁵¹ 604 N.E.2d 1269 (Mass. Dec. 10, 1992), *cert. denied*, 61 U.S.L.W. 3761 (U.S. May 17, 1993).

action invalidated the ordinance as exceeding the board's authority. The *Steinbergh* court distinguished *Lucas*, finding that because the plaintiffs continued to collect rents, the ordinance "did not deny all economically beneficial or productive use of the plaintiff's interest in the property."¹⁵² Moreover, the regulation substantially advanced the purpose of rent control¹⁵³ and did not interfere with the investment-backed expectations of the plaintiffs, who had acquired the property when the regulation was in effect.¹⁵⁴

In *Municipal Light Co. v. Commonwealth*, a Massachusetts appeals court distinguished *Lucas* and rejected a takings claim based on the State's opposition on health and safety grounds to licensure of the Seabrook nuclear power plant. The court reasoned that although obtaining value from the operating plant had "perhaps taken longer and cost more because of the Commonwealth's activity, . . . that [was] analogous to inconvenience. . . . [T]he plaintiffs [had] not been totally deprived of the value of their property."¹⁵⁵

Prior to *Lucas*, the Supreme Court had discussed two general inquiries for takings of real property, the two-part *Agins v. Tiburon* analysis set forth in dicta¹⁵⁶ and the three-part *Penn Central* analy-

¹⁵² 604 N.E.2d at 1274 (citing *Lucas*, 112 S. Ct. at 2893-95); see also *McAndrews v. Fleet Bank*, 989 F.2d 13, 17-20 (1st Cir. Mar. 19, 1993) (holding that a regulatory provision preventing a contracting party from terminating a contract with a bank in receivership was not a taking in light of the party's enjoyment of all other lessor rights and the lack of reasonable expectations that changes in pervasive regulations of banking would not affect a long-term bank lease); *Riverdale Realty Co. v. Town of Orangetown, New York*, 816 F. Supp. 937 (S.D.N.Y. Mar. 29, 1993) (citing *Lucas* in holding that an ordinance downzoning a residential area from one-acre to two-acre lots did not effect a taking because the property was not left "economically idle").

¹⁵³ 604 N.E.2d at 1276-77.

¹⁵⁴ *Id.* at 1274; see also *Szymkowiec v. District of Columbia*, 814 F. Supp. 124, 128 (D.D.C. Feb. 5, 1993) (citing *Lucas*, 112 S. Ct. at 2899, in denying a takings claim brought by plaintiffs who purchased a home and private alley with knowledge of a police ticketing problem and who thus did not suffer any "reduction from what they expected the property would be worth when they bought it").

¹⁵⁵ *Municipal Light Co. v. Commonwealth*, 608 N.E.2d 743, 749 (Mass. App. Ct. Feb. 25, 1993). The court stated:

There are collateral consequences from all manner of governmental decisions, e.g., to levy a tax; to impose a tariff; to impose standards of manufacture; to build a new and better road; to locate a new airport; to revoke a subsidy; or to reduce the budget for public safety. There would be no end to assaults on the public purse if persons who suffered economically by reason of public policy or changes in public policy could claim a de facto taking of their property.

Id. at 748.

¹⁵⁶ 447 U.S. 255, 260 (1980) (stating that there is a taking "if the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land").

sis.¹⁵⁷ By holding that a taking could result when a total loss of all economically beneficial use of property occurs, *Lucas* apparently endorsed the second prong of *Agins*.¹⁵⁸ Footnote eight of *Lucas*, however, suggests in dicta that takings claims which do not involve a total loss might possibly still succeed under the *Penn Central* test.¹⁵⁹

The Eleventh Circuit has subsequently attempted to clarify the test to be applied in cases where something less than a total loss of value has occurred. In *Reahard v. Lee County*, the court reversed a magistrate judge's finding that "there was a substantial deprivation of the value of Plaintiffs' property resulting in a taking"¹⁶⁰ and remanded for "a proper taking analysis" which would address the following questions:

- (1) the history of the property—when was it purchased? How much land was purchased? Where was the land located? What was the nature of title? What was the composition of the land and how was it initially used?;
- (2) 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? What roads were dedicated?;
- (3) the history of zoning and regulation—how and when was the land classified? How was use proscribed? What changes in classifications occurred?;
- (4) how did development change when title passed?;
- (5) what is the present nature and extent of the property?;
- (6) what were the reasonable expectations of the landowner under state common law?;
- (7) what were the reasonable expectations of the neighboring landowners under state common law?; and
- (8) perhaps most importantly, what was the diminution in the investment-backed expectations of the landowner, if any, after

¹⁵⁷ *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). As stated in *Connolly*, the analysis consists of: "(1) 'the economic impact of the regulation on the claimant'; (2) 'the extent to which the regulation has interfered with distinct investment-backed expectations'; and (3) 'the character of the governmental action.'" *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 225 (1986) (quoting *Penn Central*, 438 U.S. at 124).

¹⁵⁸ 112 S. Ct. at 2895, 2901.

¹⁵⁹ Responding to Justice Stevens' critique of the majority's "categorical" rule, Justice Scalia opined:

This analysis [by Justice Stevens in dissent] errs in its assumption that the landowner whose deprivation is one step short of complete is not entitled to compensation. Such an owner might not be able to claim the benefit of our categorical formulation, but, as we have acknowledged time and again, '[t]he economic impact of the regulation on the claimant and . . . the extent to which the regulation has interfered with distinct investment-backed expectations' are keenly relevant to takings analysis generally.

Id. at 2895 n.8 (citing *Penn Central*, 438 U.S. at 124).

¹⁶⁰ 968 F.2d 1131, 1136-37 (11th Cir. Aug. 14, 1992).

passage of the regulation?¹⁶¹

Again, few if any regulations deprive owners of the entire economic value of their land. Regulation might not eliminate all value of land for several reasons. First, the loss identified might not be the result of governmental action. Second, regulation may be limited in terms of scope, only prohibiting particular uses of land. Third, as Justice Stevens stated in his dissent in *First English Evangelical Lutheran Church v. County of Los Angeles*,¹⁶² "[r]egulations are three dimensional: they have depth, width, and length. . . . It is obvious that no one of these elements can be analyzed alone to evaluate the impact of a regulation, and hence to determine whether a taking has occurred."¹⁶³ The post-*Lucas* cases discussed below have rejected takings claims involving regulations that are limited in each dimension: For "depth," the limitation is vertical where, for example, the regulation only restricts air rights or surface support rights. For "width," the limitation is horizontal where the regulation applies to part of the acreage in a parcel of property. The "length" limit of a regulation is temporal, such as a two-year time frame for a development moratorium.

a. *The Government Action Requirement*

Since *Lucas*, federal and state courts have further interpreted the requirement that takings result only from government action. *Lucas* did not alter the prima facie elements required to state a takings claim: A plaintiff must establish that she was the owner of property and that such property was taken for public use by the government or as a direct consequence of government action. Post-*Lucas* courts have continued to reject claims for insufficient proof of the requisite causal link between government action and the harm claimed.

For example, in *B & F Trawlers, Inc. v. United States*, the Court of Federal Claims reasoned that "there was no Government action that

¹⁶¹ *Id.* at 1136. On December 8, 1992, the Eleventh Circuit supplemented its original decision, instructing the magistrate judge to revisit the ripeness issue, because "[a]ssuming that these claims could be satisfied through adequate state judicial procedures, the Reahards have not stated a ripe federal claim under *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 . . . (1985), and there is no subject matter jurisdiction." *Reahard v. Lee County*, 978 F.2d 1212, 1213 (11th Cir. Dec. 8, 1992). On remand, the magistrate judge held that the case was ripe for review and that a taking had occurred because the owners' investment-backed expectations had been "greatly diminished." *Reahard v. Lee County*, No. 89-227-CIV-FTM-10D (M.D. Fla. Apr. 22, 1993). Despite the detailed statement of facts, however, it does not appear that the magistrate applied the step-by-step analysis mandated by the court. See *id.*

¹⁶² 482 U.S. 304 (1987).

¹⁶³ *Id.* at 330.

rendered plaintiffs' property unproductive or unprofitable . . . given that the STAR TREK was almost worthless due to severe fire damage; and plaintiffs should have reasonably expected the Coast Guard to act as it did."¹⁶⁴ In *Wilson v. Commonwealth*,¹⁶⁵ the Supreme Judicial Court of Massachusetts rejected a claim that a taking was caused by lack of permission to build stone barriers for the protection of shoreline homes which were destroyed by a storm during the normal, reasonable course of administrative procedure regarding the permits. The court distinguished *Lucas* because, even assuming for purposes of the appeal that the destruction of the plaintiffs' houses by a storm had rendered their properties valueless, the property was lost due to natural forces during the pendency of administrative proceedings; "the governmental regulation did not by itself make the landowner's property valueless."¹⁶⁶

Other courts have also rejected post-*Lucas* takings claims for failure to establish the element of government action. For example, in *In re Save the Pine Bush, Inc. v. Common Council*,¹⁶⁷ the court rejected a claim that judicial nullification of zoning amendments effected a taking: "A regulatory takings challenge is not generally applicable to a court's interpretation of statutes or regulations, or to any burdens imposed as a result of the court's decision; rather, such a challenge is typically directed at statutes or regulations which restrict the use of property in some form."¹⁶⁸

In *White v. County of Newberry, South Carolina*,¹⁶⁹ the Fourth Circuit applied South Carolina law to reject the plaintiff's takings claim, which arose from the contamination of its ground and well water with TCE, for failing to establish any "affirmative, positive, aggressive act on the part of the government agency."¹⁷⁰ The court stated that the plaintiff's assertion of a "mere omission" on the part of the govern-

¹⁶⁴ 27 Fed. Cl. 299, 306 (Dec. 9, 1992).

¹⁶⁵ 597 N.E.2d 43 (Mass. Aug. 11, 1992).

¹⁶⁶ *Id.* at 46. An alternate claim that "if there had been no improper delays in the agency proceedings, authorization of the revetment would have been granted in time to prevent the total destruction of the plaintiffs' properties" was sufficient to survive a motion to dismiss. *Id.* at 45. The court held, however, that

[t]his theory requires proof, among other things, that the department ultimately would have granted permission for the revetment, that the revetment would have been built, that the delay was due to unreasonable agency action, and that a favorable department decision within a reasonable time would have resulted in saving the plaintiffs' properties from total destruction.

Id.

¹⁶⁷ 591 N.Y.S.2d 897 (N.Y. App. Div. Dec. 31, 1992).

¹⁶⁸ *Id.* at 899.

¹⁶⁹ 985 F.2d 168 (4th Cir. Feb. 5, 1993).

¹⁷⁰ *Id.* at 172.

ment did not satisfy the affirmative act test and thus did not "as a matter of law, represent inverse condemnation."¹⁷¹

Even where the government has affirmatively acted, post-*Lucas* courts have refused to find a taking if the action bears only an indirect relation to the property interest. For example, in *Richmond, Fredericksburg & Potomac Railroad v. United States*,¹⁷² the Court of Federal Claims (Judge Nettesheim) granted summary judgment against the plaintiffs, stating that the U.S. Park Service's mere public assertions of a restrictive covenant, "while potentially encumbering the parcel, [did] not constitute a sufficient interference with plaintiff's possessory interest in property to constitute a taking."¹⁷³ Judge Nettesheim indicated that only a more substantial, assertive and intentional government action that interfered with the plaintiff's property interest would rise to the level of a taking.¹⁷⁴

b. *Prohibition of Particular Land Uses*

The *Lucas* majority was careful to distinguish cases in which the government, through reasonable exercise of its police power, restricts particular uses of property.¹⁷⁵ In this regard, the Court cited with approval *Penn Central Transportation Co. v. New York City*:¹⁷⁶ Where a state "reasonably conclude[s] that 'the public health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land,' compensation need not accom-

¹⁷¹ *Id.* at 173; see also *Poorbaugh v. United States*, 27 Fed. Cl. 628, 629 (Feb. 9, 1993) ("[T]here must be an intent on the part of the defendant to take plaintiff's property, or an intention to do an act the natural consequence of which was to take their property."); *Garellick v. Sullivan*, 987 F.2d 913, 917-18 (2d Cir. Mar. 5, 1993) (finding no taking from price regulation because anesthesiologists could avoid treating Medicare patients by practicing on an out-patient basis (even though this might not be economically viable); professional ethical rules precluding refusal of treatment to Medicare patients outside the hospital are "self-imposed requirements [which] do not constitute the kind of governmental compulsion that may give rise to a taking").

¹⁷² 27 Fed. Cl. 275 (Nov. 24, 1992).

¹⁷³ *Id.* at 277.

¹⁷⁴ *Id.*; see also *Poorbaugh*, 27 Fed. Cl. at 636 ("Mere indication of ownership [by inadvertently illustrating two general recreational maps so that the plaintiff's property was the same color as the National Forest which surrounded it], without more, does not rise to the level of a taking. . . . [M]erely making property 'accessible to third parties' [by surrounding the plaintiff's property with National Forest land subject to grazing rights] does not rise to the level of a taking.") (citing *Brown v. United States*, 3 Cl. Ct. 31, 48 (1983), *aff'd*, 741 F.2d 1374 (Fed. Cir. 1984)).

¹⁷⁵ See 112 S. Ct. at 2897 ("[The] government may, consistent with the Takings Clause, affect property values by regulation without incurring an obligation to compensate — a reality we nowadays acknowledge explicitly with respect to the full scope of the State's police power.").

¹⁷⁶ 438 U.S. 104, 125 (1978).

pany [the] prohibition."¹⁷⁷

Since *Lucas*, courts have continued to hold that limitations on particular uses of property do not effect takings. In *Wilson v. Commonwealth*,¹⁷⁸ the Supreme Judicial Court of Massachusetts rejected a takings claim that was based in part on the hypothetical agency denial of the property owner's request to erect a protective revetment.¹⁷⁹ The court noted that the instant case, "far more than the *Lucas* case, involve[d] the question of whether the government may bar or limit a landowner from making a particular use of property that may adversely affect the interests of other property owners and of the Commonwealth."¹⁸⁰

In *State v. Homer Booker*,¹⁸¹ a Delaware court ruled that an ordinance prohibiting building in the 100-foot strip on either side of land condemned for a highway was not a regulatory taking of the "buffer zone." The plaintiffs failed to show that the ordinance had destroyed the value of their land, which had been and continued to be used as farmland.¹⁸²

Lucas's endorsement of the view that restrictions on particular uses of land do not effect takings calls into question the Federal Circuit decision in *Whitney Benefits, Inc. v. United States (Whitney II)*,¹⁸³ in which the court applied a narrower view of nuisance doctrine than

¹⁷⁷ 112 S. Ct. at 2897 (quoting *Penn Central*, 438 U.S. at 125).

¹⁷⁸ 597 N.E.2d 43 (Mass. Aug. 11, 1992).

¹⁷⁹ A storm destroyed the property before the administrative process was completed. *Id.* at 43; see *supra* notes 165-66 and accompanying text.

¹⁸⁰ 597 N.E.2d at 46. In a preceding footnote, the court stated that the agency could have denied permission to construct the revetment "for reasons that negate a taking." *Id.* at 45 n.4.

¹⁸¹ No. 90C-NO-31, 1992 WL 240386 (Del. Super. Ct. Sept. 2, 1992).

¹⁸² *Id.* at *8-*9. Accord *State v. Ellery*, No. 90C-NO-31, 1992 WL 245574 (Del. Super. Ct. Sept. 2, 1992); *State v. Donald Booker*, No. 90C-NO-31, 1992 WL 245576 (Del. Super. Ct. Sept. 2, 1992). See also *Powers v. Skagit County*, 835 P.2d 230 (Wash. Ct. App. Aug. 24, 1992), in which the court held that summary judgment had been entered inappropriately against the plaintiff's takings claim regarding a floodplain ordinance. While the plaintiff's claims "amount[ed] to bare conclusions without any supporting facts," the court found that the plaintiff must have the opportunity to demonstrate that the regulations at issue strip his property of all economically viable use. The State at this point will have the opportunity to rebut this claim with evidence that some economically viable use exists for the plaintiff's property. The State may further seek to show that plaintiff's use is proscribed by "existing rules and understandings" of this State's property and nuisance law.

Id. at 236 (citing *Lucas*, 60 U.S.L.W. at 4849).

¹⁸³ *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169 (Fed. Cir.) [hereinafter *Whitney II*] (finding that the plaintiff's right to mine coal was a property right and that enactment of the Surface Mining Control and Reclamation Act of 1977 effectuated a taking by totally destroying that right), *cert. denied*, 112 S. Ct. 406 (1991). *Whitney II* is currently pending appeal on jurisdictional grounds from the Court of Federal Claims. See *infra* note 255 and accompanying text.

Lucas, erroneously disregarded the possibility that a regulated parcel could be used for farming and found a taking.¹⁸⁴ Indeed, the Supreme Court of New Jersey specifically disagreed with the analysis employed by the *Whitney II* court in *Bernardsville Quarry, Inc. v. Borough of Bernardsville*,¹⁸⁵ a post-*Lucas* decision. The *Bernardsville* court rejected a takings challenge to an ordinance that had allegedly reduced the property's value by over ninety percent (from \$34 million to \$2.7 million) by imposing a licensing requirement for quarry operations and a limited depth below which property could not be quarried.¹⁸⁶ The court found that "[t]he prevention of damage to the environment constitute[d] a particularly strong justification for prohibiting inimical uses"¹⁸⁷ and concluded that "the interference with the property interests of the quarry owner effected by the regulation [was] not excessive or unreasonable, nor [did] it deprive the property of substantial value or prevent its use for other economically viable purposes."¹⁸⁸

Similarly, in *Town of Clarkston v. C & A Carbone, Inc.*, another post-*Lucas* decision, a New York appellate court also relied in part on health, safety and environmental concerns in rejecting a takings challenge to a local law restricting all solid waste processing or handling within the locality to a designated facility.¹⁸⁹ The court noted that there was no claim — and the record did not suggest — that the law deprived the appellants of all economically viable uses of their property. Summary judgment was proper

in light of the close relation of the local law to the promotion of health, safety and welfare of society, the acute public interest in the proper and safe management of solid wastes, the appellants' obvious knowledge that their business was and would be increasingly heavily regulated, and the appellants' heavy burden of overcoming the presumption of constitutionality which attaches to the local law.¹⁹⁰

¹⁸⁴ 926 F.2d at 1174, 1177.

¹⁸⁵ 608 A.2d 1377 (N.J. July 23, 1992).

¹⁸⁶ *Id.* at 1384-85 (citing, inter alia, *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) (upholding an ordinance prohibiting excavation within two feet of the groundwater level in order to protect public welfare) and the discussion of the "nuisance exception" in *Lucas*).

¹⁸⁷ *Id.* at 1385.

¹⁸⁸ *Id.* at 1389.

¹⁸⁹ *Town of Clarkston v. C & A Carbone, Inc.*, 587 N.Y.S.2d 681 (N.Y. App. Div. Sept. 8, 1992), cert. granted limited to Commerce Clause issue, 61 U.S.L.W. 3783 (U.S. May 24, 1993).

¹⁹⁰ *Id.* at 685.

c. *Regulating Part of the Rights in the Property as a Whole*

Probably the most controversial aspect of Justice Scalia's opinion in *Lucas* is the by-now famous (or infamous) footnote seven,¹⁹¹ which has served as the focus of the hopes, fears and much of the debate of the respective sides of this issue.¹⁹² Footnote seven raised but did not decide the potentially critical issue of how to define the "property interest" against which the loss of value is to be measured.

When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution of value of the tract as a whole.¹⁹³

Justice Scalia suggested in dicta that

[t]he answer to this difficult decision may lie in how the owner's reasonable expectations have been shaped by the State's law of property—i.e., whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value.¹⁹⁴

The Court had previously addressed this issue in *Keystone Bituminous Coal Ass'n v. DeBenedictis*,¹⁹⁵ however, and had rejected focusing on the support estate, which was separately recognized under state law.¹⁹⁶

¹⁹¹ 112 S. Ct. at 2894.

¹⁹² See Pollot, *supra* note 18, at 191-92 ("One of the most significant aspects of *Lucas* is the Court's signalling of its willingness [in footnote seven] to reconsider *Penn Central* [its impact on the property as-a-whole analysis]."). But see David Coursen, *Lucas v. South Carolina Coastal Council: Indirection in the Evolution of Takings Law*, 22 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 10,778, 10,783 (Dec. 1992) ("[Footnote 7] will enhance neither clarity nor predictability. . . . [The Court] identifies no principles that would limit its reasoning to cases where the burdened parcel is a *substantial portion* of the whole. The same reasoning that would find a total taking of a 90 percent area could also be used to find a taking if the burdened area were 5 percent.") (emphasis added).

¹⁹³ 112 S. Ct. at 1294 n.7. Justice Scalia indicated disapproval of the state court decision in *Penn Central*, which had focused on all land owned by the claimant in Manhattan. "For an extreme—and, we think, unsupportable—view of the relevant calculus, see *Penn Cent. Transportation Co. v. New York City*, [366 N.E.2d 1271, 1276-77 (1977), *aff'd on other grounds*, 438 U.S. 104 (1978)], where the state court examined the diminution in a particular parcel's value produced by a municipal ordinance in light of the total value of the taking claimant's other holdings in the vicinity." 112 S. Ct. at 2894 n.7.

¹⁹⁴ 112 S. Ct. at 2894 n.7.

¹⁹⁵ 480 U.S. 470 (1987).

¹⁹⁶ *Id.* at 498-501.

Justice Blackmun responded to Justice Scalia's discussion of the "deprivation fraction" in footnote seven by stressing that

there is no "objective" way to define what that denominator [the property interest against which diminution in value is to be measured] should be. "We have long understood that any land-use regulation can be characterized as the 'total' deprivation of an aptly defined entitlement . . . [or] a mere 'partial' withdrawal from full, unencumbered ownership of the landholding affected by the regulation."¹⁹⁷

Justice Stevens predicted that the Court's

categorical rule will likely have one of two effects: Either courts will alter the definition of the "denominator" in the takings "fraction," rendering the Court's categorical rule meaningless, or investors will manipulate the relevant property interests, giving the Court's rule sweeping effect. To my mind, neither of these results is desirable or appropriate, and both are distortions of our takings jurisprudence.¹⁹⁸

Despite Justice Scalia's apparent inclination to revisit this issue, established Supreme Court and Federal Circuit precedent requires that regulatory takings analysis be applied to the parcel as a whole, whether measured in terms of depth (vertically) or in terms of width (horizontally).

The Supreme Court has repeatedly held that takings analysis must examine all rights in the parcel as measured "vertically," e.g., the air rights and surface support rights in a particular acre of land. In *Penn Central Transportation Co. v. New York City*,¹⁹⁹ the Supreme Court rejected the claim that the extremely valuable prime Manhattan airspace above Grand Central Terminal was in itself a separate property right that had been completely taken by the city. The Court held that "'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."²⁰⁰ In *Keystone Bituminous Coal Ass'n v. DeBenedictis*, the Supreme Court rejected a facial takings claim because the Pennsylvania Subsidence Act did not diminish the value of "reasonable investment-backed expectations" in parcels of

¹⁹⁷ *Id.* at 2913 (dissenting opinion) (citing Frank Michelman, *Takings*, 1987, 88 Colum. L. Rev. 1600, 1614 (1988) (footnote and ellipses omitted).

¹⁹⁸ 112 S. Ct. at 2920 (dissenting opinion). It is important to note that, in light of the fact that *Lucas* was decided on the last day of the 1991-1992 term, there may not have been a clear majority for the finer nuances of footnote seven when it was written. There almost certainly will not be a majority after Justice White retires at the end of the 1992-1993 term.

¹⁹⁹ 438 U.S. 104 (1978).

²⁰⁰ *Id.* at 130.

property as a whole.²⁰¹ The tons of coal that the law required to be left in place to support protected structures did "not constitute a separate segment of property for takings law purposes,"²⁰² and the companies did not show that they were denied all economically viable use of their property.²⁰³

Many years ago, the Supreme Court upheld "setback" or "buffer zone" regulations prohibiting development in specified areas — "horizontal" restrictions on the use of property, applying only to part of the acreage in a particular parcel.²⁰⁴ The Supreme Court specifically relied upon this "horizontal" property-as-a-whole analysis in defining the property in *Keystone*.²⁰⁵ Prior to *Lucas*, the Claims Court in *Ciampitti v. United States*²⁰⁶ analogized to buffer zones in rejecting a takings claim where an applicant prohibited from developing wetlands could nevertheless develop the uplands that were purchased as a single parcel with the wetlands:

In the case of a landowner who owns both wetlands and adjacent uplands, it would clearly be unrealistic to focus exclusively on the wetlands, and ignore whatever rights might remain in the uplands. If a governmental entity required a buffer, for example, around a housing development, a court would not entertain a separate claim for the land dedicated to the buffer.²⁰⁷

This result is consistent with pre-*Lucas* state court decisions.²⁰⁸

²⁰¹ 480 U.S. at 471.

²⁰² *Id.* at 498.

²⁰³ *Id.* at 499.

²⁰⁴ *Gorieb v. Fox*, 274 U.S. 603 (1927).

²⁰⁵ 480 U.S. at 498 ("Many zoning ordinances place limits on the property owner's right to make profitable use of some segments of his property. A requirement that a building occupy no more than a specified percentage of the lot on which it is located could be characterized as a taking of the vacant area as readily as the requirement that coal pillars be left in place. Similarly, under petitioners' theory one could always argue that a setback ordinance requiring that no structure be built within a certain distance from the property line constitutes a taking because the footage represents a distinct segment of property for takings law purposes. Cf. *Gorieb v. Fox*." (citation omitted).

²⁰⁶ 22 Cl. Ct. 310 (1991).

²⁰⁷ *Id.* at 318.

²⁰⁸ In *American Dredging Co. v. State Dep't of Env'tl. Protection*, 391 A.2d 1265 (N.J. Super. Ct. Ch. Div. 1978), *aff'd*, 404 A.2d 42 (N.J. Super. Ct. App. Div. 1979), the court considered the entirety of the plaintiff's 2500 acres of land in ruling that prohibiting the deposit of dredge spoils on 80 acres of wetlands was not a taking, for "[e]ach segment is not to be viewed microscopically." 391 A.2d at 1270. In *Fox v. Treasure Coast Regional Planning Council*, 442 So. 2d 221 (Fla. Dist. Ct. App. 1983), the court focused "on the nature and extent of the interference with the landowner's rights in the parcel as a whole [a 1705-acre tract of wetlands] in determining whether a taking of private property has occurred. Prohibition of development on certain portions of the tract does not in itself effect an unconstitutional tak-

In a case currently on appeal, *Loveladies Harbor, Inc. v. United States*,²⁰⁹ Claims Court Chief Judge Smith focused solely on the 12.5 acres of wetlands for which the plaintiffs had been denied a Clean Water Act section 404 permit, disregarding the rest of the 250-acre parcel that the plaintiffs had purchased in 1956 for \$300,000. The plaintiffs had filled acreage, constructed and sold hundreds of houses on 199 acres of the 250-acre parcel and still held extremely valuable upland acreage.²¹⁰

Subsequently, in an important post-*Lucas* wetlands decision, *Tabb Lakes, Inc. v. United States*,²¹¹ Claims Court Judge Nettlesheim recognized that Chief Judge Smith's trial-level ruling in *Loveladies Harbor* on the "property as a whole" was inconsistent with binding appellate precedent: "[The appellate] Court of Claims has resolved other section 404 takings cases by analyzing the economic impact on the plaintiffs in the context of returns from sales and development activity of the property as a whole prior to the denial of a permit."²¹²

Judge Nettlesheim specifically stated that the

[p]laintiff [had] relied substantially on *Loveladies* . . . to support its theory on what constitutes the parcel as a whole. *Loveladies*, currently on appeal to the Federal Circuit, runs contrary to the established precedents of *Deltona* and *Jentgen*. In *Loveladies*, although the Claims Court denied summary judgment to the plaintiffs, it ruled on what constituted the parcel as a whole, excluding from its analysis all but 11.5 acres of the property originally purchased for development, because this originally purchased property was not in plaintiffs' posses-

ing." *Id.* at 225. Similarly, the Supreme Court of Connecticut ruled that a landowner who was denied a permit to fill 5.3 acres of wetlands on his 20.6-acre lot (17.5 of which were tidal wetlands) could still apply to fill a lesser portion of the wetlands, to be used in conjunction with the 3.1 acres of land not classified as a wetlands, and thus there was no compensable taking. *Brecciaroli v. Connecticut Comm'r of Env'tl. Protection*, 362 A.2d 948, 952-53 (Conn. 1975). In *Smith v. Williams*, 560 N.Y.S.2d 816 (N.Y. App. Div. 1990), the court ruled that denial of a permit to build homes on wetlands was not a taking where economic value in the property as a whole remained. The owner had purchased seven parcels, sold two, then applied for permits to build on three which were classified as wetlands. The owner only presented evidence on the value of the individual parcels — not on the value of his entire property — "including the unrestricted lots" which, if they were subdivided, would be valued at more than \$230,000. The owner had purchased all of the land for \$6000. *Id.* at 817.

²⁰⁹ 15 Cl. Ct. 381 (1988) (denying motions for summary judgment), 21 Cl. Ct. 153 (1990) (awarding a \$2,658,000 takings judgment plus interest), *appeal pending*.

²¹⁰ 15 Cl. Ct. at 383, 391-93, 21 Cl. Ct. at 161.

²¹¹ 26 Cl. Ct. 1334 (Oct. 2, 1992), *appeal argued* (Fed. Cir. May 7, 1993).

²¹² *Id.* at 1345-46 (citing *Deltona Corp. v. United States*, 657 F.2d 1184, 1192 (Cl. Ct. 1981), *cert. denied*, 455 U.S. 1017 (1982), and *Jentgen v. United States*, 657 F.2d 1210, 1213 (Cl. Ct. 1981), *cert. denied*, 455 U.S. 1017 (1982)).

sion at the time the complaint was filed.²¹³

Decisions of the Court of Claims, including *Deltona* and *Jentgen*, are binding on both the Court of Appeals for the Federal Circuit and the Court of Federal Claims.²¹⁴

In *Tabb Lakes*, Judge Nettlesheim concluded:

Because of the substantial economic activity reflected in plaintiff's lot sales, even if the court found that the parcel as a whole were sections 3, 4, and 5, and the absence of any extraordinary delay in the governmental permitting process, defendant is entitled to summary judgment. Under either the categorical analysis of *Lucas* or the *ad-hoc* factual inquiry of *Penn Central*, plaintiff has failed to demonstrate that it is due just compensation under the fifth amendment.²¹⁵

In another post-*Lucas* decision, *Naegle Outdoor Advertising, Inc. v. City of Durham*,²¹⁶ a federal district court granted summary judgment

²¹³ *Id.* at 1346 n.17 (emphasis added). In *Jentgen*, the court rejected a wetlands takings claim based on the remaining value of the property as a whole where the plaintiff was offered, but refused, "permits to develop over 20 acres of the 80 acres covered by his applications . . . [and where] the tract contain[ed] approximately 20 additional acres of developable uplands which [could have been] developed without first obtaining Corps permits." 657 F.2d at 1213. In *Deltona*, the plaintiff purchased a 10,000-acre parcel and then developed and sold substantial portions until two § 404 permits were denied. 657 F.2d at 1188-89. In finding that *Deltona* was not deprived of the economically viable use of its land, the court relied on the value and use of the parcel as a whole, including areas that had been developed, those approved for development and uplands whose market value was twice what *Deltona* paid for the entire restricted sections. *Id.* at 1192.

²¹⁴ See *South Corp. v. United States*, 690 F.2d 1368, 1370 (Fed. Cir. 1982); *United States Claims Court General Order No. 1*, 1 Cl. Ct. xxi (1982).

Two recent commentaries recognize the inconsistency between *Loveladies Harbor* and *Deltona*, but apparently fail to understand or insufficiently appreciate the difference between the trial-level Claims Court decision in *Loveladies* and the binding appellate Court of Claims decision in *Deltona*. Patrick Kennedy, Comment, *The United States Claims Court: A Safe "Harbor" from Government Regulation of Privately Owned Wetlands*, 9 Pace Envtl. L. Rev. 723, 744-45 (1992) ("The Claims Court set aside its own decision in *Deltona* . . ."); Hartman, *supra* note 69, at 10,005 ("In *Deltona Corp. v. United States*, the U.S. Claims Court [sic] found that no taking had occurred, yet in *Loveladies Harbor, Inc. v. United States*, on nearly identical facts, the Claims Court found a taking.") (citations omitted). Hartman notes that "[t]he Claims Court [sic] in *Deltona* was a federal appellate panel with jurisdiction prior to the enactment of the Tucker Act, 28 U.S.C. § 1491 (1982), and that *Loveladies* was not an appellate decision," *id.* at 10,005 n.15, but fails to state that *Deltona* was binding on the *Loveladies* court. This oversight also was evident in comments immediately following the *Loveladies* decision. See Lee R. Epstein, *Takings and Wetlands in the Claims Court: Florida Rock and Loveladies Harbor*, 20 Envtl. L. Rep. (Envtl. L. Inst.) 10,517, 10,521 (1990) ("Whether the Claims Court in *Loveladies Harbor IV* and *Florida Rock III* should have adhered to its earlier approach in *Deltona* will likely be an issue for appellate review."). See also *supra* note 132 (noting that a 1992 act changed the court's name from the Claims Court to the Court of Federal Claims).

²¹⁵ 26 Cl. Ct. at 1357.

²¹⁶ 803 F. Supp. 1068 (M.D.N.C. Aug. 24, 1992), *appeal pending*, No. 92-2321 (4th Cir.).

to the city because an ordinance prohibiting all commercial, off-premises advertising signs except those along interstates and federally aided primary highways after a five-and-a-half-year grace period "did not deny Naegele all economically viable use of its property and thus [did] not constitute a taking."²¹⁷ The court stated that Naegele retained use of fifty-four percent of its signs in the Durham metro market and that that use would be unquestionably valuable:

Naegele has not contended that its outdoor advertising business in the Durham metro market will no longer be viable after the ordinance requires removal of the affected signs. Naegele has recovered nearly twice the fair market value of the disputed signs during the amortization period, and there is no evidence that Naegele will not be able to realize a reasonable return on its remaining signs.²¹⁸

The court found that "since the reality of Naegele's business [was] that Naegele combine[d] the leasehold interests in its signs into a unit in selling outdoor advertising in the Durham area, it follow[ed] that the unit of property to be considered for takings purposes [was] the combined group of Durham metro area signs."²¹⁹

Finally, interpreting *Lucas in Fitzgarrald v. City of Iowa City*,²²⁰ the Supreme Court of Iowa recently held that there was no taking because the plaintiffs still had an economically viable use of their home and mobile home park property "even though its market value [had] to some extent been diminished as result of the airport zoning ordinances" which affected land use and the height of structures on the property where the plaintiffs hoped to build a motel.²²¹

The *Fitzgarrald* court considered whether footnote seven of *Lucas* supported a takings claim in cases where less than the entire acreage was deprived of economically beneficial value. The court noted that *Lucas* "suggests that this question turns on how the interest is viewed under state property law," which in Iowa is whether "the owner has

²¹⁷ *Id.* at 1080.

²¹⁸ *Id.* at 1079.

²¹⁹ *Id.* at 1074. The court noted in dicta that it was "not unmindful of the significance of its determination that each individual sign [did] not constitute a separate unit of property. If it did, the *Lucas* inquiry into the nature of Naegele's title could be determinative. See *Lucas*, 112 S. Ct. at 2894." 803 F. Supp. at 1080 n.7. Unlike the *Burns Harbor* and *In re the Plan* decisions discussed *supra* notes 107-08, however, this statement does not recognize the critical distinction that *Lucas* made between real property and the personal property (billboards and leaseholds) that was at issue in *Naegele*.

²²⁰ 492 N.W.2d 659 (Iowa Nov. 25, 1992), *cert. denied*; 61 U.S.L.W. 3761 (U.S. May 17, 1993).

²²¹ *Id.* at 666.

suffered a diminution in value of the tract as a whole."²²² *Fitzgarrald* is in accord with other post-*Lucas* decisions²²³ in reaffirming the Supreme Court's ruling in *Penn Central* that "[t]aking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."²²⁴

d. Temporally Limited Prohibitions

In *Woodbury Place Partners v. City of Woodbury*,²²⁵ the Minnesota Court of Appeals, distinguishing *Lucas*, held that a moratorium's limited two-year denial of all economically viable use was not a per se taking:

We interpret the phrase "all economically viable use for two years" as significantly different from "all economically viable use" as applied in *Lucas*. The two-year deprivation of economic use is qualified by its defined duration. . . .

We acknowledge that no case has specifically addressed the dimension of length of time as it applies to the totality of a taking. Nonetheless the Supreme Court's inclination to measure the economic burden against the value of the property as whole, rather than against discrete segments, compels us to reject the partnership's argument²²⁶

Woodbury also distinguished the Supreme Court's decision in *First English Evangelical Lutheran Church v. County of Los Angeles*,²²⁷

²²² *Id.* (citing *Lucas*, 112 S. Ct. at 2894).

²²³ See *View Ridge Park Assoc. v. Mountlake Terrace*, 839 P.2d 343, 349 (Wash. App. Div. Oct. 19, 1992) ("In evaluating a takings claim, the parcel of regulated property must be viewed in its entirety."), *review denied*, 121 Wash. 2d 1016 (Wash. Apr. 28, 1993); *State Dep't of Env'tl. Regulation v. Schindler*, 604 So. 2d 565, 567-68 (Fla. Dist. Ct. App. Aug. 28, 1992) (stating that in deciding whether there has been a taking, the court should consider the entire parcel as a whole, including both uplands and wetlands, and that prohibition of development of certain portions of the tract does not in itself effect a taking), *review denied*, 613 So. 2d 8 (Fla. Dec. 30, 1992).

²²⁴ 438 U.S. 104, 130 (1978). The Supreme Court recently decided *Concrete Pipe & Prods., Inc. v. Construction Laborers Pension Trust*, 61 U.S.L.W. 4611 (U.S. June 14, 1993). In that case the Court unanimously affirmed the Ninth Circuit's rejection of a takings claim. The Court also implicitly rejected Justice Scalia's suggestion in footnote 7 of *Lucas* that the "parcel as a whole" issue might be revisited by the Court. Instead, the Court stated that "a claimant's parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable." *Id.* at 4623.

²²⁵ 492 N.W.2d 258 (Minn. Ct. App. Nov. 17, 1992), *cert. denied*, 61 U.S.L.W. 3815 (U.S. June 8, 1993).

²²⁶ *Id.* at 260-61.

²²⁷ 482 U.S. 304 (1987).

which recognized the concept of a "temporary taking." *Woodbury* noted that the Supreme Court had expressly declined to decide whether the ordinance amounted to a taking and that, on remand, the lower California court had held that because the total moratorium ordinance was specifically intended to be a purely temporary measure, it did not amount to a compensable taking.²²⁸ The *First English* case focused on the appropriate remedy once a compensable taking had been recognized but did not in any sense create a new liability standard for determining when a temporary taking would occur. The *Woodbury* court interpreted *First English* to "presuppose that 'temporary regulatory takings' means 'regulatory takings which are ultimately invalidated by the courts.'" ²²⁹ Thus, the court reasoned, *First English's* reach is limited to takings that are retrospectively temporary due to subsequent invalidation or rescission. It does not address regulations that are prospectively recognized as temporary, as is the case with the *Woodbury* moratorium.²³⁰

D. Limited Impact on Major Categories of Regulations

Wetlands, mining and endangered species laws, like the New York City ordinance in *Penn Central*, do not prohibit all use of parcels of property. The fact that they may abrogate certain potentially valuable development on affected parcels is no more relevant to takings law than the denial of any right to develop the airspace in *Penn Central*. *Lucas* did not result in any expansion of available takings claims in these major categories of regulation.

²²⁸ 492 N.W.2d at 260-61 (citing *First English*, 210 Cal. App. 3d 1353, 1372-73, 258 Cal. Rptr. 893 (1989), cert. denied, 493 U.S. 1056 (1990)).

²²⁹ *Id.* (citing *First English*, 482 U.S. at 310).

²³⁰ *Id.* at 262. On this point the court noted that "Harvard Law Professor Frank Michelman has interpreted 'the First English decision [as] not reach[ing] regulatory enactments, even totally restrictive ones, that are expressly designed by their enactors to be temporary.'" *Id.* at 262 n.3 (citing Frank Michelman, *Takings*, 1987, 88 Colum. L. Rev. 1600, 1621 (1988)); see *First English*, 482 U.S. at 321 ("We merely hold that where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective."). The *Woodbury* court's analysis is also supported by the Federal Circuit's holding discussed herein that even land under a "permanent" prohibition might have market value to a willing buyer who might bet that the prohibition "would some day be lifted." *Florida Rock Indus. v. United States*, 791 F.2d 893, 902-03 (Fed. Cir. 1986), cert. denied, 479 U.S. 1053 (1987); see *City of Northglenn v. Grynberg*, 846 P.2d 175, 178, 180 n.5, 182 & n.9 (Colo. Mar. 8, 1993) (citing *Lucas* and finding no taking from the drilling of a core hole, and distinguishing *Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991) (physical invasion taking)), petition for cert. pending, 61 U.S.L.W. 3790 (U.S. May 14, 1993); see also Philip Weinberg, *Hendler v. United States: "I'll Let You Save Me—If You Pay Me for the Privilege."* 17 Colum. J. Envtl. L. 233 (1992).

1. Lucas and Wetlands

According to the *Lucas* Court, "the owner of a lake bed, . . . would not be entitled to compensation when he is denied the requisite permit to engage in a landfilling operation that would have the effect of flooding others' land."²³¹ This is a clear reference to the permitting program for lake beds and other wetlands under section 404 of the Clean Water Act.²³²

In the landmark case *Village of Euclid v. Ambler Realty Co.*,²³³ the Supreme Court rejected a claim that downzoning which reduced the value of the affected property by seventy-five percent required compensation under the Constitution.

[T]he question whether the power exists to forbid . . . a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or the thing considered apart, but by considering it in connection with the circumstances and locality. A nuisance may be merely a right thing in the wrong place, like a pig in a parlor instead of the barnyard.²³⁴

This classic statement of nuisance doctrine applies particularly well to the specifically limited and defined areas that Congress protected in section 404 in order to prevent what the *Lucas* Court saw as elements of nuisances: numerous harms "to public lands and resources, or adjacent private property, posed by the claimant's proposed activities."²³⁵ Section 404 operates to lessen and avoid harms by preserving the wetlands that provide for flood conveyance, storm surge abatement, cleansing polluted runoff, controlling sediment, providing groundwater recharge and discharge, and preventing loss of rare and endangered species, waterfowl and other wildlife.²³⁶

²³¹ 112 S. Ct. at 2900.

²³² 33 U.S.C. § 1344 (1988).

²³³ 272 U.S. 365 (1926).

²³⁴ *Id.* at 388 (citation omitted).

²³⁵ 112 S. Ct. at 2901.

²³⁶ The Supreme Court has recited the Army Corps of Engineers' technical findings on the importance of wetlands in unanimously upholding the Corps' expansion of jurisdiction over wetlands:

The Corps has concluded that wetlands may affect the water quality of adjacent lakes, rivers, and streams even when the waters of those bodies do not actually inundate the wetlands. For example, wetlands that are not flooded by adjacent waters may still tend to drain into those waters. In such circumstances, the Corps has concluded that wetlands may serve to filter and purify water draining into adjacent bodies of water, see 33 CFR § 320.4(b)(2)(vii) (1985), and to slow the flow of surface runoff into lakes, rivers, and streams and thus prevent flooding and erosion, see §§ 320.4(b)(2)(iv) and (v). In addition, adjacent wetlands

In *United States v. Riverside Bayview Homes, Inc.*, the Supreme Court unanimously held that the simple assertion of regulatory jurisdiction by a government agency did not in itself constitute a regulatory taking.²³⁷ The Court explained that the

requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself "take" the property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired. Moreover, *even if the permit is denied, there may be other viable uses available to the owner. Only when a permit is denied and the effect of the denial is to prevent "economically viable" use of the land in question can it be said that a taking has occurred.*²³⁸

Thus the Court recognized that denial of a permit did not impact those uses of wetlands that do not require permits.²³⁹ The section 404 program, therefore, generally does not implicate *Lucas*, which is limited to denial of all uses of an entire tract of land. In addition, although, as discussed above, footnote seven in *Lucas* suggests that the issue might be revisited, under current law denial of a section 404 permit is usually not a taking for another reason: Section 404 impacts neither the uses remaining in uplands nor *developable* wetlands within the property as a whole.

Permit statistics from the Army Corps of Engineers show that in 1992 only 487 (3.2%) of 15,064 individual permit applications were denied. The Corps has verified that approximately 42,000 additional activities were approved under general permits — 15,930 under regional permits and 26,054 under nationwide permits. Furthermore,

may "serve significant natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing and resting sites for aquatic . . . species." § 320.4(b)(2)(i). In short, the Corps has concluded that wetlands adjacent to lakes, rivers, streams, and other bodies of water may function as integral parts of the aquatic environment even when the moisture creating the wetlands does not find its source in the adjacent bodies of water.

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 134-35 (1985).

²³⁷ *Id.* at 126 (citing *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 293-97 (1981)).

²³⁸ *Id.* at 126-27 (emphasis added).

²³⁹ See, e.g., *United States v. 2,175.86 Acres of Land, Etc.*, 687 F. Supp. 1079, 1088 (E.D. Tex. 1988) ("A Corps of Engineers '404' permit would not be required in order to conduct normal silvicultural activities on . . . 'wetlands.'"). Courts recognize that wetlands have an economic, market value for uses that do not require permits. For example, when the government exercised its eminent domain power to condemn a wetlands area to establish a National Park Preserve, the *2,175.86 Acres of Land* court awarded fair market value compensation of nearly \$1000 an acre based on potential timber production. *Id.* at 1087-88 (using estimates from 1979, the year of the taking).

the Corps has estimated that because its verification process accounts for only one half of all activities approved under general permits, total approvals approach roughly 80,000. Permit denials thus represent approximately 0.6% of all activities regulated by the Corps.²⁴⁰ These data clearly show that the Corps is largely accommodating property owners. In the vast majority of cases, permit applicants are allowed to fill some portion of their wetlands and to develop any adjacent uplands they might own (and over which the Corps lacks jurisdiction).²⁴¹

Much of the current controversy regarding wetland takings claims revolves around *Florida Rock Industries v. United States*²⁴² and *Loveladies Harbor, Inc. v. United States*,²⁴³ two opinions by Claims Court Chief Judge Smith that are currently awaiting decision on appeal by the Federal Circuit following oral argument.²⁴⁴ Both decisions are inconsistent with binding Federal Circuit and Supreme Court precedent. In *Florida Rock*, Chief Judge Smith improperly discounted the existence of an actual post-permit-denial market for nearby wetlands in finding that a taking had occurred. In addition, his decision did not properly account for the binding effect of a state supreme court ruling in a case brought by the same plaintiff that the property had substantial value.²⁴⁵ Proof of post-denial value together with the state supreme court's ruling should defeat any assertion that *Florida Rock* is a *Lucas* case. Finally, Chief Judge Smith's definition of nuisance²⁴⁶ is narrower than the definition set out in the Restatement (Second) of Torts on which the *Lucas* Court relied to define nuisance law.²⁴⁷

Similarly, Chief Judge Smith's opinions in *Loveladies Harbor* con-

²⁴⁰ Telephone Interview with Michael Davis, Office of the Assistant Secretary of the Army for Civil Works (Apr. 23, 1993).

²⁴¹ See, e.g., *Jentgen v. United States*, 657 F.2d 1210, 1213 (Cl. Ct. 1981), *cert. denied*, 455 U.S. 1017 (1982).

²⁴² 21 Cl. Ct. 161 (1990), *appeal pending*. A previous appeal of an interim trial-level Claims Court decision was reported at *Florida Rock Indus. v. United States*, 791 F.2d 893, 904 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987).

²⁴³ 15 Cl. Ct. 381 (1988) (denying motions for summary judgment); 21 Cl. Ct. 153 (1990) (awarding a \$2,658,000 takings judgment plus interest), *appeal pending*.

²⁴⁴ E.g., Thomas Hanley, *A Developer's Dream: The United States Claims Court's Analysis of Section 404 Takings Challenges*, 19 B.C. Envtl. Aff. L. Rev. 317, 337-49 (1991); Bernard F. Meroney, "Taking" on the Environment: *The Takings Clause and Environmental Law—Some Observations*, 36 Loy. L. Rev. 1083, 1100-08 (1991); Epstein, *supra* note 214, at 10,521. For a pre-*Loveladies* and *Florida Rock* survey of the law, see Simeon D. Rapoport, *The Taking of Wetlands Under Section 404 of the Clean Water Act*, 17 Envtl. L. 111 (1986).

²⁴⁵ *Florida Rock Indus. v. Bystrom*, 485 So. 2d 442 (Fla. 1986) (noting that a property appraiser's assessment based on a comparable sale met the constitutional mandate of 'just value' assessment).

²⁴⁶ See 21 Cl. Ct. at 166-68.

²⁴⁷ See 112 S. Ct. at 2901.

tain several independently fatal flaws.²⁴⁸ First, as discussed above, the opinions focused solely on the 12.5 acres of wetlands for which the plaintiffs had been denied a section 404 permit.²⁴⁹ Second, they misinterpreted the Federal Circuit's non-binding dicta in a previous appeal of an interim trial-level Claims Court decision in *Florida Rock*.²⁵⁰ In that case, the Federal Circuit had expressed what it viewed as the lack of evidence of serious harm from filling the particular acreage at issue. Chief Judge Smith considered this to be a repudiation of what he viewed as the otherwise "binding precedent" that "the governmental interest in preserving wetlands under section 404 of the Clean Water Act [outweighs] the value of plaintiffs' land."²⁵¹ Finally, the *Loveladies Harbor* opinions may be procedurally invalid: The United States filed a motion with the Federal Circuit on May 5, 1992, asking that the Claims Court judgment be vacated and the complaint dismissed for lack of jurisdiction because the plaintiff's same claim was pending in federal district court at the time it filed the complaint in the Claims Court.²⁵² This motion by the United States is based on the Federal Circuit's April 23, 1992, en banc decision in *UNR Industries v. United States*,²⁵³ which interpreted a federal statute²⁵⁴ as barring Claims Court jurisdiction and requiring dismissal under these circumstances.²⁵⁵

A Pennsylvania state court has expressly repudiated both *Lovela-*

²⁴⁸ See Seth E. Zuckerman, *Loveladies Harbor, Inc. v. United States: The Claims Court Takes a Wrong Turn—Toward a Higher Standard of Review*, 40 Cath. U. L. Rev. 753 (1990).

²⁴⁹ 15 Cl. Ct. at 383, 391-93; 21 Cl. Ct. at 161; see *supra* notes 209-15 and accompanying text.

²⁵⁰ 791 F.2d 893, 904 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987). See 15 Cl. Ct. at 388-89.

²⁵¹ 15 Cl. Ct. at 388-89 (citing *Deltona Corp. v. United States*, 657 F.2d 1184, 1192 (Cl. Ct. 1981), *cert. denied*, 455 U.S. 1017 (1982)); see discussion of *Loveladies* and *Deltona* *supra* part III.C.2.c.

²⁵² United States' Motion Suggesting Lack of Jurisdiction in the Claims Court, *Loveladies Harbor, Inc. v. United States*, No. 91-5050 (Fed. Cir. filed May 5, 1992).

²⁵³ 962 F.2d 1013 (Fed. Cir. 1992), *aff'd sub nom. Keene Corp. v. United States*, 113 S. Ct. 2035 (U.S. May 24, 1993).

²⁵⁴ 28 U.S.C. § 1500 (1988).

²⁵⁵ 962 F.2d at 1021. The United States also filed a similar motion in *Whitney Benefits, Inc. v. United States*, No. 499-83L (Cl. Ct. 1992) (*Whitney III*) (Surface Mining Control and Reclamation Act takings case). An appeal is expected after Chief Judge Smith issues a written decision following his August 12, 1992, oral bench ruling denying this motion and another major motion by the United States for a new trial on valuation, which was based on arguments that the plaintiffs' admissions regarding allocation of the judgment discredited their own claims and demonstrated that they prosecuted their claim in violation of the Anti-Assignment Act. The prior ruling of the Federal Circuit in *Whitney II*, 926 F.2d 1169, *cert. denied*, 112 S. Ct. 406 (1991), is also called into question in light of *Lucas* because of the Federal Circuit's narrower view of nuisance and its disregard of possible farming use of the parcel in question. See 926 F.2d at 1174, 1177.

dies Harbor and *Formanek v. United States*,²⁵⁶ another wetlands decision that found a taking and awarded compensation based on the most profitable use of the property, in finding that a wetlands permit denial was not a taking.²⁵⁷ The court stated:

The method of comparing the fair market value of the most profitable use of the property to its market value as a completely undeveloped tract, used in *Loveladies* and *Formanek*, has not been adopted by the United States Supreme Court, and we decline to adopt it here. . . . [W]e are convinced that the method used by the Claims Court to calculate diminution in property value is in error.²⁵⁸

An extensive review of wetland takings cases that was written after Chief Judge Smith's decisions in *Loveladies Harbor* and *Florida Rock*, but before the Supreme Court's *Lucas* decision, concluded:

In the last three decades, there have been approximately 400 reported wetland regulatory cases. The takings issue has been raised in more than one-half of them. Wetland regulations have been held to be a taking on the facts in only about a dozen of these cases. Importantly, most of the successful taking cases are ten or more years old; virtually all federal and state courts have upheld wetland regulations in the last decade.²⁵⁹

Over the next decade, wetland taking cases should follow the same trend. The holding and analysis of *Lucas* do not alter the reasons why such cases have been unsuccessful. Regulation of wetlands is consistent with well-established nuisance and property law doctrines. Moreover, it does not disturb those remaining uses of wetlands that do not require permits or the use of any uplands and developable wetlands within the property as a whole.

2. Lucas and Mining

Lucas is compatible with prior holdings that certain restrictions on mining do not effect a taking. In *Hodel v. Virginia Surface Mining & Reclamation Ass'n*,²⁶⁰ the Supreme Court found that section 522(e) of the Surface Mining Control and Reclamation Act did not, "on its face, deprive owners of land within its reach of economically viable

²⁵⁶ 26 Cl. Ct. 332 (May 14, 1992).

²⁵⁷ *Mock v. Department of Env'tl. Resources*, No. 1153 C.D. 1992 (Pa. Commw. Ct. Mar. 25, 1993).

²⁵⁸ *Id.*, slip op. at 25.

²⁵⁹ Jon Kusler & Erik J. Meyers, *Takings: Is the Claims Court All Wet?*, Nat'l Wetlands Newsl. (Env'tl. L. Inst.), Nov./Dec. 1990, at 6.

²⁶⁰ 452 U.S. 264 (1981).

use of their land since it [did] not proscribe nonmining uses of such land."²⁶¹ In a related case, *Hodel v. Indiana*,²⁶² the Court found that "Section 522(e)'s prohibition against mining near churches, schools, parks, public buildings, and occupied dwellings [was] plainly directed toward ensuring that surface coal mining does not endanger life and property in coal mining communities."²⁶³ In *Keystone Bituminous Coal Ass'n v. DeBenedictis*,²⁶⁴ the Supreme Court rejected a claim that a Pennsylvania law requiring underground coal operators to leave fifty percent of the coal in place beneath protected structures in order to prevent subsidence damage effected a taking. The Court held that Pennsylvania had acted "to protect the public interest in health, the environment, and the fiscal integrity of the area"²⁶⁵ and that the operators' contract rights to the coal could not prevent "the Commonwealth from exercising its police power to abate activity *akin to a public nuisance*."²⁶⁶ The *Hodel* cases and *Keystone* demonstrated that statutes which do not deny all economically viable use of land and which abate an activity akin to a nuisance do not implicate the Takings Clause, results later echoed in *Lucas*.²⁶⁷

²⁶¹ *Id.* at 296 n.37.

²⁶² 452 U.S. 314 (1981).

²⁶³ *Id.* at 329.

²⁶⁴ 480 U.S. 470 (1987).

²⁶⁵ *Id.* at 488.

²⁶⁶ *Id.* (emphasis added).

²⁶⁷ See also *Iowa Coal Mining Co. v. Monroe County*, 494 N.W.2d 664 (Iowa Jan. 20, 1993) (rejecting a takings claim by a coal company regarding a zoning ordinance which blocked an attempt to increase the company's profitability by merging its strip mining operation with a solid waste landfill and holding that there was not a "total taking," as the lease for the land was acquired in anticipation of strip mining, not solid waste disposal, and the waste disposal restriction diminished, but did not destroy, the economic viability of mining), *cert. denied*, 61 U.S.L.W. 3785 (U.S. May 24, 1993); *City of Northglenn v. Grynberg*, 846 P.2d 175, 181 (Colo. Mar. 8, 1993) (holding that an owner of a coal lease "lost nothing that he had had previously" when the city acquired an overlying surface estate and constructed a wastewater reservoir, where the prior owners had severed the surface and mineral estates, and the city had acquired a pre-existing right to demand subjacent support), *petition for cert. pending*, 61 U.S.L.W. 3790 (U.S. May 14, 1993); discussion of *Whitney III supra* note 255.

Furthermore, in an apparent reference to the *Hodel* cases and *Keystone*, Justice O'Connor's opinion for the seven-member majority in *Yee v. City of Escondido*, 112 S. Ct. 1522 (Apr. 1, 1992), issued earlier in the 1991-1992 term with *Lucas*, mentioned a ban on coal mining as an example of traditional zoning regulations: "Traditional zoning regulations can transfer wealth from those whose activities are prohibited to their neighbors; when a property owner is barred from mining coal on his land, for example, the value of his property may decline but the value of his neighbor's property may rise." *Id.* at 1529. Traditional zoning regulations typically do not constitute takings under the Fifth Amendment. See *Agins v. Tiburon*, 447 U.S. 255 (1980); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

3. Lucas and Species Protection

Courts have repeatedly rejected claims that government protection of certain species or habitats involves Fifth Amendment takings.²⁶⁸ Nothing in *Lucas* suggests a different result in the future.

The only reported Fifth Amendment takings cases under the Endangered Species Act (ESA)²⁶⁹ ruled in favor of the U.S. Government that no taking had occurred. In *Christy v. Hodel*, the Ninth Circuit rejected a takings challenge to the ESA by a rancher who had been fined for killing a grizzly bear (a threatened species) that had allegedly been destroying his sheep. The court followed the “[n]umerous cases [that had] considered, and rejected, the argument that destruction of private property by protected wildlife constitute[d] a governmental taking.”²⁷⁰

In the only other takings case decided under the federal ESA, *United States v. Kepler*,²⁷¹ the Sixth Circuit held that no taking resulted from the ESA’s ban on interstate or foreign transport of an endangered species, where the animal was allegedly held lawfully as of the date of ESA’s enactment. More significantly, in *Andrus v. Allard*,²⁷² the Supreme Court held that prohibitions on the sale of bird parts under the federal Eagle Protection Act and Migratory Bird Protection Act did not effect a taking. Although the statutes foreclosed the most profitable use of the plaintiff’s property — eagle feathers which were lawfully acquired before the date of enactment — they did not deprive the owner of all value. This landmark decision, the Supreme Court’s only takings case in the wildlife protection area, was cited with approval in *Lucas* not only by Justice Scalia²⁷³ but also by Justice Stevens in dissent²⁷⁴ and Justice Souter in his statement.²⁷⁵

Courts have also rejected takings claims brought by landowners impacted by other federal and state species and habitat protection laws.²⁷⁶ Post-*Lucas* cases in this area will likely yield similar results,

²⁶⁸ For a detailed review of this subject, see Meltz, *supra* note 114.

²⁶⁹ 16 U.S.C. §§ 1531-1544 (1988).

²⁷⁰ 857 F.2d at 1334.

²⁷¹ 531 F.2d 796 (6th Cir. 1976).

²⁷² 444 U.S. 51 (1979).

²⁷³ 112 S. Ct. at 2899-2900 (citing *Allard* as authority for distinguishing personal property takings claims from the real property holding of the majority).

²⁷⁴ *Id.* at 2921 (citing *Allard* as authority for the view that legislatures, motivated in this instance by “[n]ew appreciation of the significance of endangered species,” may revise common-law property rights).

²⁷⁵ *Id.* at 2925 (voting to dismiss the writ) (citing *Allard* as authority for his belief that the *Lucas* trial court’s conclusion that the state by regulation had deprived the owner of his entire interest in the subject property was “highly questionable”).

²⁷⁶ See, e.g., *Mountain States Legal Found. v. Hodel*, 799 F.2d 1423 (10th Cir. 1986) (en

for at least four reasons. First, in cases where protected animals destroy property, as in *Christy v. Hodel*, no governmental action has taken place.

Second, like wetlands and mining laws, species protection laws typically do not prohibit all use of land and thus are not called into question by *Lucas*. For example, even where the owner's entire parcel is designated as critical habitat for a protected species, hunting and fishing for animals *other* than the protected species is not automatically prohibited; other important rights such as the right to possess, the right to exclude others — including, to a limited extent, the species in question — and the right to sell or devise the land to others remain intact and preclude a finding that the owner has been deprived of all value.²⁷⁷ Where less than the entire parcel is designated as habitat, or where there is no habitat designation but the property owner is prohibited from using the parcel in such a manner as to harm individual members of a protected species, the possibility of a Fifth Amendment taking is even more remote.

Third, even in the unlikely event that a landowner proves that a species protection law has effected a near-total reduction in the value of the property as a whole, Justice Scalia acknowledged in *Lucas* that there still may be no taking.²⁷⁸

Fourth, the federal ESA and other federal and state species and habitat protection statutes and regulations typically contain provisions ensuring a certain degree of case-by-case flexibility in the administrative process — for example, variances, approvals on less ambitious development projects, or permits authorizing “incidental takes” of species as part of otherwise lawful activities. Affected property owners who successfully apply for such administrative remedies are, as a result, unable to maintain that they have been deprived of all

banc) (rejecting a takings claim, under the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. §§ 1331-1340, that the Interior Secretary's alleged failure to manage grazing wild horses on the owners' land had damaged and diminished its value), *cert. denied*, 480 U.S. 951 (1987); *Southview Assocs., Ltd. v. Bongartz*, 980 F.2d 84 (2d Cir. Oct. 30, 1992) (finding no physical taking from a state deeryard protection statute, and that the regulatory takings claim was not ripe), *cert. denied*, 61 U.S.L.W. 3649 (U.S. Mar. 23, 1993); *State v. Lake Lawrence Pub. Lands Protection Ass'n*, 601 P.2d 494, 500-01 (Wash. 1979) (en banc) (finding no physical intrusion or regulatory taking from a denial of plat approval, under the State Environmental Policy Act, to protect a bald eagle perching and feeding area).

²⁷⁷ See *Southview*, 980 F.2d at 84 (holding that no physical taking claim can be made out where a developer did not lose the right to possess the allegedly occupied land that formed part of a protected deeryard and developer retained substantial power to control use of the property or to sell it); *cf.* *Hodel v. Irving*, 481 U.S. 704 (1987) (holding that “the right to pass on valuable property to one's heirs is itself a valuable right”).

²⁷⁸ See *supra* note 114 and accompanying text.

economic value. Alternatively, those who do not exhaust those administrative remedies cannot state a takings claim for lack of ripeness.²⁷⁹

In sum, the hurdles a takings claimant must clear in challenging government protection of species and habitat are considerable, and they remain undiminished in the wake of *Lucas*.

IV. THE *LUCAS* DECISION IN CONTEXT

A. *Why Claimants Like David Lucas Might Nevertheless Fail*

There is a serious question whether anyone, including David Lucas himself, actually falls within the extraordinary test articulated by Justice Scalia in the *Lucas* case. On remand, under the terms of the Supreme Court's decision, Lucas could have lost on several independent grounds. Indeed, two post-*Lucas* decisions rejected on different grounds claims that restrictions on shoreline development constituted takings.²⁸⁰

First, the state court could have ruled against Lucas because, as a question of state law, there are identifiable "background principles of nuisance and property law that prohibit the uses he now intends in the circumstances in which the property is presently found."²⁸¹ In making this determination, courts can consider whether "[c]hanged circumstances or new knowledge [have made] what was previously permissible no longer so."²⁸² This should have included consideration of the proposed use of the property in light of both the detailed Blue Ribbon Committee on Beachfront Management's coastal study, which documented the severe threats to neighboring property and the environment from development and resulted in the legislation at

²⁷⁹ See *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 191 (1985) (holding that takings claims "simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question").

²⁸⁰ See *Stevens v. City of Cannon Beach*, 835 P.2d 940, 942 (Or. Ct. App. Aug. 5, 1992), review granted, 844 P.2d 206 (Or. Dec. 22, 1992) (holding that the "purportedly taken property interest was not part of plaintiff's estate to begin with"); *Wilson v. Commonwealth*, 597 N.E.2d 43 (Mass. Aug. 11, 1992) (dealing with beachfront property destroyed by a storm during pendency of an agency decision on building a protective revetment). *Wilson* stated that

[t]he case before us, far more than the *Lucas* case, involves the question whether the government may bar or limit a landowner from making a particular use of property that may adversely affect the interests of other property owners and the Commonwealth. Moreover, here, unlike the *Lucas* case, the governmental regulation did not by itself make the landowner's property valueless.

Id. at 46.

²⁸¹ *Lucas*, 112 S. Ct. at 2901-02.

²⁸² *Id.* at 2901.

issue,²⁸³ as well as the specific circumstances in the *Lucas* case: "The area is notoriously unstable. In roughly half of the last 40 years, all or part of petitioner's property was part of the beach or flooded twice daily by the ebb and flow of the tide."²⁸⁴

Second, as discussed above, the Supreme Court did not determine whether the Beachfront Management Act had eliminated all of the value of Lucas's property.²⁸⁵ On remand, the South Carolina Supreme Court could have agreed with the doubts and conclusions of those four Justices who discussed the merits of this issue and found that all of the value of Lucas's property has in fact *not* been eliminated. As Justice Blackmun stated,

the trial court's finding that the property had lost all economic value . . . is almost certainly erroneous. Petitioner still can enjoy other attributes of ownership, such as the right to exclude others, "one of the most essential sticks in the bundle of rights that are commonly characterized as property." Petitioner can picnic, swim, camp in a tent, or live on the property in a movable trailer. State courts frequently have recognized that land has economic value where the only residual economic uses are recreation and camping. Petitioner also retains the right to alienate the land, which would have value for neighbors and for those prepared to enjoy proximity to the ocean without a house.²⁸⁶

In addition, speculators will pay for such land on the chance that the facts or the laws will change.²⁸⁷ Indeed, the South Carolina Beach-

²⁸³ See *id.* at 2905 (Blackmun, J., dissenting).

²⁸⁴ *Id.*; see also Cornelia Dean, *When a Shoreline Home May Be a Public Nuisance*, N.Y. Times, July 4, 1992, at 6 ("Some buildings can cause problems when coastal storms reduce them to debris and send the fragments into nearby buildings. Also, a building too close to the ocean can damage the fragile dune structure that protects property behind it."); *Matthew 7:26-27* ("And every one who hears these words of mine and does not do them will be like a foolish man who built his house upon the sand; and the rain fell, and the floods came, and the winds blew and beat against that house, and great was the fall of it."); Dennis J. Hwang, *Shoreline Setback Regulations and the Takings Analysis*, 13 U. Haw. L. Rev. 1, 2-3, 36-38 (1991) (discussing the dangers of coastal erosion).

²⁸⁵ See 112 S. Ct. at 2896 n.9.

²⁸⁶ *Id.* at 2908 (dissenting opinion) (footnote and citations omitted); see *id.* at 2902 (Kennedy, J., concurring) ("I share the reservations of [Justices Blackmun, Stevens and Souter] about a finding that a beachfront lot loses all value because of a development restriction."); *id.* at 2919 n.3 (Stevens, J., dissenting); *id.* at 2925 (statement of Souter, J.) ("Lucas may put his land to 'other uses' — fishing or camping, for example — or may sell his land to his neighbors as a buffer. In *either* event, his land is far from 'valueless.'") (emphasis added); cf. *Hall v. Board of Env'tl. Protection*, 528 A.2d 453 (Me. 1987) (holding that the denial of a permit to build on an ocean dune is not a taking where the owner was permitted to place a motorized trailer on the property).

²⁸⁷ Holding land for investment, speculation or resale is an economic use of the land. See

front Management Act was amended after only two years to allow for possible variances.²⁸⁸

Third, the state court could have decided that Lucas could not survive a motion for summary judgment for lack of standing. Justice Scalia attempted to reconcile the majority's decision to find Article III standing in *Lucas* in the face of having denied standing a few days before in *Lujan v. Defenders of Wildlife*.²⁸⁹

[I]t is appropriate for us to address [the pre-1990] component of *Lucas*' taking claim as if the case were here on the pleadings alone. Lucas properly alleged injury-in-fact in his complaint . . . *Lujan*, since it involved the establishment of injury-in-fact at the *summary judgment stage*, required specific facts to be adduced by sworn testimony.²⁹⁰

Yet prior to the U.S. Supreme Court decision, Lucas never applied for a variance under the 1990 amended law. Therefore, he should have been required to demonstrate injury by "specific facts to be adduced by sworn testimony" for what was at most a temporary takings claim for the period from 1988, when the Beachfront Management Act was enacted, until 1990, when it was amended to allow for variances. Justice Kennedy stated that

[a]mong the matters to be considered on remand must be whether petitioner had the intent and capacity to develop the property and failed to do so in the interim period because the State prevented him. Any failure by petitioner to comply with relevant administrative requirements will be part of that analysis.²⁹¹

As Justice Blackmun noted, "[a]t trial, Lucas testified that he had house plans drawn up, but that he was 'in no hurry' to build 'because

Florida Rock Indus. v. United States, 791 F.2d 893, 902-03 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987). Therefore, Justice Scalia's opinion apparently is limited to cases where an entire tract of land has no resale value. See *Lucas*, 112 S. Ct. at 2899-900 (distinguishing personal property, where "new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale)," from land, where there is no "implied limitation" that the State may subsequently eliminate all economically valuable use"); see also *id.* at 2903 (Kennedy, J., concurring) (noting that the trial court finding "that petitioner's real property has been rendered valueless . . . appears to presume that the property has no significant market value or resale potential").

²⁸⁸ See 112 S. Ct. at 2890-91.

²⁸⁹ 112 S. Ct. 2130 (June 12, 1992); see Karin P. Sheldon, *Lujan v. Defenders of Wildlife: The Supreme Court's Slash and Burn Approach to Environmental Standing*, 23 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,031 (1993); Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 *Mich. L. Rev.* 163 (1992).

²⁹⁰ *Lucas*, 112 S. Ct. at 2892 n.3 (emphasis added).

²⁹¹ *Id.* at 2902-03 (concurring opinion).

the lot was appreciating in value.' The trial court made no findings of fact that Lucas had any plans to use the property from 1988 to 1990."²⁹² Similarly, Justice Stevens stated that

[w]e cannot be sure, . . . that that delay caused petitioner any harm because the record does not tell us whether his building plans were even temporarily frustrated by the enactment of the statute. In this regard, it is noteworthy that petitioner acquired the lot about 18 months before the statute was passed; there is no evidence that he ever sought a building permit from the local authorities.²⁹³

B. Lucas on Remand

On November 20, 1992, the South Carolina Supreme Court issued a unanimous order²⁹⁴ addressing the *Lucas* takings claim in light of the U.S. Supreme Court's opinion. First, the court held that the Coastal Council had not demonstrated any common law nuisance or state property law basis by which it could restrain Lucas's desired use of his land.²⁹⁵ Second, the court held that the sole issue on remand to the trial court was a "determination of the actual damages Lucas [had] sustained as the result of his being temporarily deprived of the use of his property."²⁹⁶ Because of changes in property values and other factors, Lucas might not have suffered any actual damages. The court then allowed both parties to amend their pleadings and to introduce new evidence and, further, did not limit the trial court to any specific method of calculating such damages.²⁹⁷

Third, the court held that Lucas had "suffered a temporary taking deserving of compensation commencing with the enactment of the 1988 Act and continuing through the date of this Order."²⁹⁸ The court did not use the 1990 date on which the law was amended to allow applications for special use permits as the ending date because it found that "Lucas [had been] unable to assert a temporary taking claim until the United States Supreme Court overturned [its] prior

²⁹² *Id.* at 2908 n.5 (dissenting opinion) (citation omitted).

²⁹³ *Id.* at 2917 n.1 (dissenting opinion).

²⁹⁴ *Lucas v. South Carolina Coastal Council*, 424 S.E.2d 484 (S.C. Nov. 20, 1992). While this order was unanimous, the result may be explicable, at least in part, in light of the retirement of one of the members of the one-vote majority in the original state supreme court *Lucas* decision.

²⁹⁵ *Id.* at 486.

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ *Id.*

disposition of the case."²⁹⁹ The court concluded that Lucas could assert a permanent taking claim if his application for a special use permit were denied or granted with restrictions.³⁰⁰

Finally, although the court held that a temporary taking had occurred, it did not address the issue of whether Lucas had been denied all beneficial use and value of the property.³⁰¹ As discussed above, the trial court had previously found such a total loss, but all four U.S. Supreme Court Justices who discussed this ruling doubted that the property was valueless and invited the South Carolina Supreme Court to re-examine this issue.

Although the South Carolina Supreme Court's decision might influence other courts, it is only binding in South Carolina. This basic fact is particularly applicable to the court's holding on state common law — background principles of property and nuisance law — which vary from state to state. In addition, the court's use of actual damages is quite limiting and rejects Lucas's argument that temporary damages are "the interest on the value of the property."³⁰² Finally, the state court failed to address whether the property had any remaining value. Thus both the U.S. Supreme Court and state supreme court rulings are confined to 100% losses, which are extremely rare if, in fact, they occur at all.

C. Lucas in the Context of Other 1991-1992 Supreme Court Actions

Lucas should be viewed in the context of the U.S. Supreme Court's other property rights decisions during the 1991-1992 term. None of these cases resulted in a major change in takings law or overruled any prior case, despite pre-decision concern about the effect of then-recent additions to the Court.³⁰³

²⁹⁹ *Id.*

³⁰⁰ *Id.* On April 5, 1993, the South Carolina Coastal Council issued David Lucas a permit to build on his beach property. Although Lucas has reportedly described the "special" permit, which contains several restrictive conditions, as "clearly unconstitutional," it is unclear whether he will bring yet another action against the State. Mike Livingston, *Man Who Sued State Gets Special Beach Building Permit*, Columbia (S.C.) State, April 6, 1993, at B1.

³⁰¹ 424 S.E.2d at 486.

³⁰² Respondent David H. Lucas's Motion on Remand at 12 (No. 90-38). Temporary damages will equal the interest on the value of the property only if Lucas can show that he would have sold the tracts the day after the 1988 law was enacted for the same amount as he could now.

³⁰³ See, e.g., Natasha Zalkin, *Shifting Sands and Shifting Doctrines: The Supreme Court's Changing Takings Doctrine and South Carolina's Coastal Statute*, 79 Cal. L. Rev. 207, 233-35 (1991).

In *PFZ Properties, Inc. v. Rodriguez*,³⁰⁴ the lower court had rejected a claim that an agency violated substantive due process when it "arbitrarily or capriciously refused to process [a company's] construction drawings."³⁰⁵ The fate of *PFZ Properties* was probably decided when, immediately before its February 26, 1992, oral argument, Justice Stevens announced his opinion for a unanimous Court in *Collins v. City of Harker Heights, Texas*.³⁰⁶ In *Collins*, the Court affirmed the Fifth Circuit's rejection of a substantive due process claim by the widow of a city worker who alleged that the city's failure to train or warn her late husband resulted in his death. The Court's opinion stated:

As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended. The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.³⁰⁷

Shortly after oral argument in *PFZ Properties*, the Court avoided the necessity of comparing the *PFZ Properties* delay of a permit claim with the *Collins* wrongful death claim by taking the unusual step of unanimously issuing a per curiam order dismissing *PFZ Properties* because certiorari had been "improvidently granted."³⁰⁸

One month later, in *Yee v. City of Escondido*, the Supreme Court unanimously rejected a claim that a mobile home rent control law authorized a physical occupation taking by the tenant of the landlord's property.³⁰⁹ The Court ruled, contrary to two circuit

³⁰⁴ 928 F.2d 28 (1st Cir. 1991), cert. dismissed, 112 S. Ct. 1151 (Mar. 9, 1992).

³⁰⁵ 928 F.2d at 31.

³⁰⁶ 112 S. Ct. 1061 (Feb. 26, 1992).

³⁰⁷ *Id.* at 1068 (citation omitted).

³⁰⁸ 112 S. Ct. 1151 (Mar. 9, 1992), reh'g denied, 112 S. Ct. 2001 (May 18, 1992). On May 3, 1993, the Court (White, J.) reversed unanimously a Ninth Circuit decision which had found that a federal statute authorizing the Department of Housing and Urban Development to adjust rents based on rent comparability studies had violated developers' substantive due process contractual rights to have adjustments based on automatic annual adjustment factors. *Alpine Ridge Group v. Kemp*, 955 F.2d 1382 (9th Cir. Feb. 7, 1992), rev'd sub nom *Cisneros v. Alpine Ridge Group*, 61 U.S.L.W. 4440 (U.S. May 3, 1993).

³⁰⁹ 112 S. Ct. 1522 (Apr. 1, 1992). In the author's view, any doubt about the outcome of the *Yee* case was dispelled at oral argument, when the plaintiff's attorney: (1) claimed that the landlord's loss of control over the identity of the tenants effected a physical taking; and (2) then tried to distinguish civil rights cases on the basis of the relative importance of the state interests involved. Chief Justice Rehnquist responded that the state interest was irrelevant in physical takings cases. Thus, faced with the prospect that expanding the scope of physical takings would require building in a balancing test to the one area of takings law that had been relatively clear, the Court united behind Justice O'Connor's rejection of the physical takings claim in an opinion that twice cited the landmark civil rights case *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

courts,³¹⁰ that a mobile home rent control law did not physically take the landowner's property.³¹¹

The Court's disposition of the property rights cases for which it granted certiorari in its 1991-1992 term — the *PFZ Properties* post-oral argument dismissal of certiorari, the unanimous *Yee* decision rejecting a physical occupation taking, and *Lucas*, the only case other than *Planned Parenthood v. Casey*³¹² in which the decision was held until the last day of the term — should warn pro-takings members of the Court to be more selective in future grants of certiorari. The Court splintered among five separate opinions in *Lucas*, and the opinion by Justice Scalia reads as if the holding were stripped down to a minimum in order to hold a bare majority, which will no longer exist after the retirement of Justice White.³¹³

D. Other Judicial Developments Since Lucas

1. Post-Lucas Supreme Court Developments

However difficult it is to predict the Supreme Court's inclination to review additional takings cases on the merits in the near future, the Court's rejection of plaintiffs' certiorari petitions is suggestive. In the 1992-1993 term, the Supreme Court has declined to review many

³¹⁰ See 112 S. Ct. at 1527 (discussing the grant of certiorari in light of the conflict between the state court decision below and those of two federal circuit courts in *Pinewood Estates v. Barnegat Township Leveling Board*, 898 F.2d 347 (3d Cir. 1990) and *Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1987) (Kozinski, J.), *cert. denied*, 485 U.S. 940 (1988)).

³¹¹ *Id.* at 1528, 1534. The Court refused on procedural grounds to address the issue of whether the law might be a regulatory taking. *Id.* at 1532-34. Justices Blackmun and Souter filed separate opinions objecting to any discussion of the possible relevance of arguments regarding a regulatory takings claim. *Id.* at 1534-35; see *Richardson v. City and County of Honolulu*, 802 F. Supp. 326 (D. Haw. Sept. 16, 1992) (holding that a ceiling on renegotiated lease rents for ground leases of owner-occupied residential condominiums, allowing owner-occupants with below-market-rate renegotiated leases to sell condos and receive monetary premiums for the below-market-rate rents at the expense of the lessor, was not a physical taking as the case was "entirely analogous" to *Yee*, but that there was a regulatory taking, because there was no provision for consideration of individual factors that may have affected the value of the particular parcel at the time of lease negotiation, and there was no meaningful mechanism for relief when the lease rent formula resulted in a confiscatory rate); *Sandpiper Mobile Village v. City of Carpinteria*, 12 Cal. Rptr. 2d 623 (Cal. Ct. App. Oct. 15, 1992) (finding a challenge to a city mobilehome park rent stabilization ordinance not ripe, and that the ordinance substantially advanced a legitimate state interest), *cert. denied*, 61 U.S.L.W. 3714 (U.S. Apr. 19, 1993); *Colony Cove Ass'n v. City of Carson*, 14 Cal. Rptr. 2d 849 (Cal. Ct. App. Nov. 19, 1992) (holding that a complaint challenging a mobile home park rent control ordinance alleged facts that could prove a regulatory taking if proved at trial).

³¹² 112 S. Ct. 2791 (June 29, 1992).

³¹³ Professor Richard Epstein has bemoaned the results in these cases, along with the result in *Nordlinger v. Hahn*, 112 S. Ct. 2326 (1992), that "resulted in a clean victory for the State of California with its 'welcome stranger' system of real estate taxation." See Epstein, *supra* note 111, at 4.

lower court decisions that rejected takings claims.³¹⁴ In *Tull v. Virginia*,³¹⁵ an unsuccessful petition for certiorari specifically raised the *Lucas* footnote seven "tract as a whole" question.³¹⁶ At issue was the denial of a permit to fill approximately two acres of wetlands that are part of a forty-three-acre site that was to be subdivided for mobile home sites. The plaintiff had sought review of a November 4, 1991, Accomack County, Virginia, Circuit Court ruling that because the permit denial did not deprive the owners of all economically viable use of their property, there had been no taking.³¹⁷

Despite contemporaneous predictions of the broad scope of the Supreme Court's 1987 California coastal development decision in *Nollan v. California Coastal Commission*,³¹⁸ that opinion has not served as the basis for finding a taking beyond its rather unique facts.

³¹⁴ In addition to the cases discussed in the text, see *Woodbury Place Partners v. City of Woodbury*, 492 N.W.2d 258 (Minn. Ct. App. Nov. 17, 1992), *cert. denied*, 61 U.S.L.W. 3815 (U.S. June 8, 1993); *Iowa Coal Co. v. Monroe County*, 494 N.W.2d 664 (Iowa Jan. 20, 1993), *cert. denied*, 61 U.S.L.W. 3785 (U.S. May 24, 1993); *Steinbergh v. City of Cambridge*, 604 N.E.2d 1269 (Mass. Dec. 10, 1992), *cert. denied*, 61 U.S.L.W. 3761 (U.S. May 17, 1993); *Fitzgarrald v. Iowa City*, Iowa, 492 N.W.2d 659 (Iowa Nov. 25, 1992), *cert. denied*, 61 U.S.L.W. 3761 (U.S. May 17, 1993); *Sandpiper Mobil Village v. City of Carpinteria*, 12 Cal. Rptr. 2d 623 (Cal. Ct. App. Oct. 15, 1992), *cert. denied*, 61 U.S.L.W. 3714 (U.S. Apr. 19, 1993); *Antoine v. California Coastal Comm'n* (unpublished opinion) (Cal. Ct. App. July 31, 1992), *cert. denied*, 61 U.S.L.W. 3682 (U.S. Apr. 5, 1993); *Sasser v. United States*, 9678 F.2d 993 (4th Cir. June 23, 1992), *cert. denied*, 61 U.S.L.W. 3667 (U.S. Mar. 29, 1993); *Southview Assocs., Ltd. v. Bongartz*, 980 F.2d 84 (2d Cir. Oct. 30, 1992), *cert. denied*, 61 U.S.L.W. 3651 (U.S. Mar. 22, 1993); *Hirt v. Strongville* (unpublished opinion) (Ohio Ct. App. May 7, 1992), *cert. denied*, 61 U.S.L.W. 3651 (U.S. Mar. 22, 1993); *Pelfresne v. Village of Williams Bay*, 965 F.2d 538 (7th Cir. June 24, 1992), *cert. denied*, 113 S. Ct. 493 (Nov. 16, 1992); *Lundberg v. Oregon*, 825 P.2d 641 (Or. Jan. 30, 1992), *cert. denied*, 113 S. Ct. 467 (Nov. 10, 1992); *Brown v. Baldwin City, Kansas* (unpublished opinion), *aff'd*, 827 P.2d 1236 (Kan. Ct. App. Mar. 20, 1992), *cert. denied*, 113 S. Ct. 409 (Nov. 3, 1992); *Kreiter v. Chiles*, 595 So. 2d 111 (Fla. Dist. Ct. App. Feb. 11, 1992), *review denied*, 601 So. 2d 552 (Fla. June 24, 1992), *cert. denied*, 113 S. Ct. 325 (Oct. 13, 1992). *But see* *Lopes v. Peabody*, Mass. (unpublished opinion) (Mass. Ct. App. July 7, 1992), *vacated*, 61 U.S.L.W. 3650 (U.S. Mar. 22, 1993) (remanding the case for further consideration in light of *Lucas*); *Henry v. City of Rock Hill*, 376 U.S. 776, 777 (1964) (holding that a summary reconsideration order (similar to the one issued in *Lopes*) did "not amount to a final determination on the merits"). See generally Robert L. Stern et al., *Supreme Court Practice* 279-80 (6th ed. 1986).

On June 29, 1992, the last day of the 1991-92 term, the Supreme Court not only decided *Lucas* but also denied certiorari in *Esposito v. South Carolina Coastal Council*, 939 F.2d 165 (4th Cir. 1991), 112 S. Ct. 3027 (1992). *Esposito* rejected a facial challenge to the enactment of the same law, the 1988 South Carolina Beachfront Management Act, that was at issue in the *Lucas* "as applied" challenge. See *Lucas*, 112 S. Ct. at 2892 n.4; *id.* at 2907 n.4 (Blackmun, J., dissenting); see also *Sangre de Cristo Dev. Co. v. United States*, 932 F.2d 891 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 1760 (Apr. 27, 1992).

³¹⁵ *Cert. denied*, 113 S. Ct. 191 (1992).

³¹⁶ See *supra* part III.C.2.c.

³¹⁷ 61 U.S.L.W. 3226 (Oct. 6, 1992).

³¹⁸ 483 U.S. 825 (1987).

Indeed, the Supreme Court in 1992 denied certiorari to a state case and a federal case that had interpreted *Nollan* narrowly³¹⁹ and, in 1993, denied certiorari to a California beachfront access case that had found no taking.³²⁰

The Supreme Court also denied certiorari in *McGovern v. Yorktown*.³²¹ In this case, the lower court had rejected takings challenges, among others, to downzoning which increased the minimum lot size from one-half acre to four acres roughly one year after the plaintiff purchased the property.³²² Subsequently, the Supreme Court denied certiorari in *California Housing Securities, Inc. v. United States*.³²³ In that case, the Federal Circuit affirmed Claims Court Judge Andewelt's ruling that the appointment of the Resolution Trust Corporation as conservator and receiver of the federally insured Saratoga Savings and Loan Association and the transfer of the assets to a new association did not constitute a taking of property by physical occupation. Although both the Claims Court and the Federal Circuit decisions preceded *Lucas*, they relied upon the fact that Saratoga "lacked any historically rooted expectation of compensation for the regulatory action taken."³²⁴

³¹⁹ *Blue Jeans Equities West v. San Francisco*, 4 Cal. Rptr. 2d 114, 116 (Cal. Ct. App. Jan. 31, 1992) (finding that the heightened scrutiny test alluded to in *Nollan* applied only to "possessory takings," not "regulatory takings," and thus was inapplicable to the city's transit impact development fee), *cert. denied*, 113 S. Ct. 191 (Oct. 5, 1992); *Commercial Builders v. Sacramento*, 941 F.2d 872, 874 (9th Cir. 1991) (rejecting the argument that *Nollan* materially changed the level of scrutiny, stating that no Circuit Court of Appeals has interpreted *Nollan* "as changing the level of scrutiny to be applied to regulations that do not constitute a physical encroachment on land"), *cert. denied*, 112 S. Ct. 1997 (May 18, 1992).

³²⁰ *Antoine v. California Coastal Comm'n* (unpublished opinion) (Cal. Ct. App. July 31, 1992) (finding that the Commission's grant of a permit to construct a seawall conditioned on the dedication of an easement for lateral public access was not a taking where the applicant failed to show that its seawall would not encroach partially onto state-owned tidelands), *cert. denied*, 61 U.S.L.W. 3682 (U.S. Apr. 6, 1993).

³²¹ 570 N.Y.S.2d 946 (N.Y. App. Div. 1991), *motion for leave to amend denied*, 588 N.E.2d 97 (N.Y. Jan. 16, 1992), *cert. denied*, 113 S. Ct. 64 (Oct. 5, 1992).

³²² 61 U.S.L.W. 3002 (July 7, 1992); *see also* *Columbia Gorge United v. Madigan*, 960 F.2d 110 (9th Cir. 1992) (upholding the constitutionality of a statute requiring consistency between land use and a commission-approved management plan), *cert. denied*, 113 S. Ct. 184 (Oct. 5, 1992).

³²³ 959 F.2d 955 (Fed. Cir. Mar. 24, 1992), *cert. denied*, 113 S. Ct. 324 (Oct. 12, 1992).

³²⁴ 959 F.2d at 957. The Federal Circuit found that

Saratoga lacked the fundamental right to exclude the government from its property at those times when the government could legally impose a conservatorship or receivership on Saratoga. As a consequence of the regulated environment in which Saratoga voluntarily operated, Saratoga . . . held less than the full bundle of property rights on which a *Loretto* [*v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)] expectation of compensation is founded.

Id. at 958.

In *Sasser v. United States*,³²⁵ the Supreme Court denied certiorari to a federal case rejecting a takings claim arising from an order by the Army Corps of Engineers to remove barriers blocking access to streams on the landowner's property. Although the Fourth Circuit's decision was issued the week before *Lucas*, it was consistent with Justice Scalia's views on "background principles" of property law: The court emphasized that under the state's common law of property, old rice plantation canals such as those in question had been established to be public waters subject to public use, and thus the Army Corps of Engineers could order the barriers removed without effecting a taking.³²⁶

A jurisdictional issue raised in one non-takings Supreme Court case in the 1992-1993 term did have significant practical implications for the timing and forums in which takings cases may arise as well as for the continued viability of two significant lower court takings precedents. As discussed above, the Federal Circuit's April 23, 1992, en banc split decision in *UNR Industries v. United States*³²⁷ interpreted 28 U.S.C. § 1500 as barring Claims Court jurisdiction and requiring dismissal when the plaintiff at any point in time had the same claim pending in federal district court and in the Claims Court.³²⁸ On May 24, 1993, the Supreme Court affirmed the Federal Circuit's decision.³²⁹

2. Continuing Judicial Rejection of Takings Claims

In the wake of *Lucas*, those who might be overly encouraged by publicity surrounding this issue should be aware that courts have continued to reject creative and premature takings claims. This includes the Court of Federal Claims, which has been the subject of recent misguided commentary identifying a pro-takings trend based upon

³²⁵ 967 F.2d 993 (4th Cir. June 23, 1992), *cert. denied*, 61 U.S.L.W. 3667 (U.S. Mar. 30, 1993).

³²⁶ 967 F.2d at 998.

³²⁷ 962 F.2d 1013 (Fed. Cir. Apr. 23, 1992), *aff'd sub nom. Keene Corp. v. United States*, 61 U.S.L.W. 4495 (U.S. May 24, 1993). A motion to dismiss relying on *UNR Indus.* was granted by Claims Court Judge Robinson in *Hardwick Bros. v. United States*, No. 702-88-C (Cl. Ct. Sept. 4, 1992).

³²⁸ 962 F.2d at 1021.

³²⁹ 113 S. Ct. 2035 (affirming *UNR Industries sub nom. Keene Corp. v. United States*); see also discussion of *Concrete Pipe*, *supra* notes 54, 148 & 224.

three decisions of a single judge,³³⁰ all of which are under appeal.³³¹

In *Minority Media, Inc. v. United States*,³³² for example, Federal Claims Judge Bruggink dismissed a claim where there had been no final agency action. According to the court, if the Forest Service were to rightfully revoke the plaintiff's right-of-way grant — the subject of a pending administrative appeal — a liability determination would be a charade. In *Board of County Supervisors v. United States*,³³³ Federal Claims Judge Tidwell held that no compensation could be recovered for a taking of county land that had been dedicated for streets where

it was not reasonably probable that the County's property could have been used for any purpose other than a public street serving the future landowners in the Williams Center tract absent the taking by the government [of that tract to enlarge Manassas Battlefield National Park]. A landowner is not entitled to compensation for any value which results only because of the taking.³³⁴

In *Transpace Carriers, Inc. v. United States*,³³⁵ Federal Claims Judge Margolis granted summary judgment to the defendant because of the nature of the government action. He reasoned that, where NASA acted in a proprietary capacity, "the rights of the parties are governed by contract, [and] recovery based on a taking theory is precluded."³³⁶ Other federal and state courts have also continued to reject misguided, unripe and untimely takings challenges.³³⁷

³³⁰ See discussion of Chief Judge Smith's *Loveladies, Florida Rock* and *Whitney Benefits* decisions *supra* notes 242-55 and accompanying text. For further discussion of Chief Judge Smith's takings decisions, see W. John Moore, "Just Compensation," *Nat'l J.*, June 13, 1992, at 1404; Tom Castleton, *Claims Court Crusader, Chief Judge Smith Puts Property Rights up Front*, *Legal Times*, Aug. 17, 1992, at 1.

³³¹ Barry M. Hartman, *supra* note 69, at 10,006; see *Activities of the House Committee on Government Operations*, H.R. Rep. No. 1086, 102d Cong., 1st & 2d Sess. 62 (1992) ("[S]ince January 1, 1988, DOJ has closed 106 cases involving an alleged regulatory taking. In only 27 of these closed cases (or 25%) was money paid to the property owner, and the total amount of money awarded over this 3 1/2 year period in these 27 takings cases was only about \$28 million (excluding interest), or less than \$9 million a year."); Robert Meltz, *Congressional Research Serv.*, CRS Report for Congress No. 92-337 A, *Court Rulings During 1991 on Constitutional Taking Claims Against the United States 1* (1992).

³³² 27 Fed. Cl. 379 (Dec. 28, 1992).

³³³ 27 Fed. Cl. 339 (Dec. 18, 1992).

³³⁴ *Id.* at 346.

³³⁵ 27 Fed. Cl. 269 (Dec. 7, 1992).

³³⁶ *Id.* at 274.

³³⁷ See, e.g., *Slagle v. United States*, 809 F. Supp. 704, 711 (D. Minn. Sept. 23, 1992) ("[I]n a suit challenging the Corps' enforcement powers [over wetlands], the taking defense is inappropriate."); *Sugrue v. Derwinski*, 808 F. Supp. 946 (E.D.N.Y. Dec. 18, 1992) (rejecting a regulatory takings claim involving reduced veteran's benefits); *Maine Beer & Wine Wholesalers Assoc. v. State of Maine*, 619 A.2d 94 (Me. Jan. 5, 1993) (rejecting physical and regulatory

V. CONCLUSION

While the Supreme Court has declined opportunities to expand on the substantive law of regulatory takings, other federal and state courts have begun to interpret and apply *Lucas* in a way that recognizes the decision as very limited. *Lucas* may have altered the theoretical structure of certain types of regulatory takings analysis. The decision does not, however, offer any practical encouragement to pro-takings advocates for whom it is indeed proving to be a case "full of sound and fury signifying nothing."³³⁸

takings claims regarding a statute requiring industry to remit to the state 50% of unclaimed beverage container deposits), accord *Massachusetts Wholesalers of Malt Beverages v. Commonwealth*, 609 N.E.2d 67 (Mass. Mar. 1, 1993); *Metropolitan Property & Casualty Ins. Co. v. Rhode Island Insurers' Insolvency Fund*, 811 F. Supp. 54 (D.R.I. Feb. 2, 1993) (rejecting a takings claim arising from a state statute permitting the state's insolvent insurers' fund, which was divided into separate accounts for different types of coverage, to assess insurers belonging to one account in order to pay claims against insolvent insurers belonging to different accounts, when intra-account assessments were insufficient for that purpose; the statute did not increase the cap on assessments against individual insurers which existed prior to the statute's enactment, and did not alter an insurer's right to fully recoup assessments in its rate base for the succeeding year); *Broughton Lumber Co. v. Columbia River Gorge Comm'n*, 975 F.2d 616 (9th Cir. Sept. 15, 1992) (affirming dismissal because a takings challenge was not ripe where the landowner had not sought compensation through state remedies and failed to prove that the state remedies were inadequate), *petition for cert. filed*, 61 U.S.L.W. 3775 (U.S. Apr. 22, 1993); *Anderson v. Alpine City*, 804 F. Supp. 269 (D. Utah Oct. 5, 1992) (finding that a claim was not ripe where there was no final city action on plats, no indication that excessive delay would destroy the beneficial use of property and developers had not sought compensation through available state procedures); *Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency*, 808 F. Supp. 1474 (D. Nev. Dec. 9, 1992) (holding that a regulatory takings claim was barred by the relevant statute of limitations); *Mason v. United States*, 27 Fed. Cl. 832 (Mar. 25, 1993) (Nettesheim, J.) (holding that a takings claim arising from erosion allegedly caused by construction of dams by Army Corps of Engineers was barred by statute of limitations); *Ceientano v. City of West Haven*, 815 F. Supp. 561 (D. Conn. Mar. 15, 1993) (finding that the failure to obtain a formal, definitive decision by the city planning and zoning commission rendered the takings claim unripe).

³³⁸ William Shakespeare, *Macbeth* act 5, sc. 5.



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Inside. . .

FEATURE ARTICLE

3

Lucas, One Year Later: Merely a Footnote to the Takings Doctrine
by Michael Rubin and Jonathan Silverstein

DECISIONS

Air

18

Court Vacates Previous Decision: *Motor Vehicle Manufacturers Association v. New York State Department of Environmental Conservation*

Air (Asbestos)

19

Asbestos Fibers Need Not Be Seen in Order for Emissions to be "Visible": *United States v. Midwest Suspension and Brake*

CERCLA

20

NCP Withstands Challenge by States: *Ohio v. U.S. Environmental Protection Agency*

Hazardous Waste

24

State's Definition of Hazardous Waste Upheld: *In re Olin Corporation*

Wetlands

26

Court Affirms CWA's Jurisdiction Over Isolated Wetlands: *Hoffman Homes, Inc. v. Administrator, U.S. Environmental Protection Agency*

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**LUCAS, ONE YEAR LATER:
MERELY A FOOTNOTE TO THE
TAKINGS DOCTRINE**

By,

Michael Rubin*
and
Jonathan Silverstein**

I. Summary

Its bark is worse than its bite. This is the situation with both the regulatory takings doctrine in general and the *Lucas* decision¹ in particular. In other words, despite the "hype" and polemics of the so-called "property rights movement,"² the reality remains that a regulatory taking of private property — and the concomitant governmental duty to pay compensation — will be found only in the most egregious cases. This conclusion is only reinforced by the perspective gained in the year since the *Lucas* case was decided. Specifically, the past year has seen the persistence, indeed growth, of two salutary trends, the "non-segmentation" principle and the "sequence" principle.

II. Pre-*Lucas*

The regulatory takings, or inverse condemnation, doctrine states that, under the U.S. Constitution,³ in some cases where the government so regulates a private owner's use of his or her property as to deprive such owner of substantially all its value,

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the government must pay the owner "just compensation." In such cases, the private owner can then sue the government to collect this money.

Last summer's *Lucas* decision augmented, without overruling, previous caselaw in this area. Therefore, pre-*Lucas* law is not a mere relic. Indeed, some of the concepts from the pre-*Lucas* era assume a new importance now. This is especially true of the "non-segmentation" principle and the "sequence" principle, two critical defenses to most takings claims. Thus, this section gives a thumbnail sketch of the law prior to the issuance of the *Lucas* decision.

A. The Penn Central Takings Test

Perhaps the single most important case addressing the takings question in the modern era is *Penn Central Transportation Company v. City of New York*, decided in the late 1970s, which set out a three-part test:

The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the government action.⁴

Of course, each of these three criteria raises additional questions. For instance, virtually all takings cases focus on the part of the test concerning the economic impact of the regulation. The question then becomes: How severe does an economic impact have to be in order to constitute a taking? To some extent, this depends on the other two factors. But, generally, the answer is that the impact must be "so complete as to deprive the owner of all or most of his interest."⁵

B. The Non-Segmentation Principle
Pre-Lucas

1. The General Non-Segmentation Principle

The *Penn Central* Court itself recognized that this substantially-complete-deprivation rule raised still another question. In measuring the completeness of the deprivation, the question arises as to the scope of the property to be considered. In another case, *Keystone Bituminous Coal Association v. DeBenedictis*, the Supreme Court once posed the question as follows:

Because our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property "whose value is to furnish the denominator of the fraction."⁶

Let us rephrase this "denominator" question in concrete terms. The total obliteration of all use of an acre of property might at first seem to constitute a taking. But, if that acre is merely a portion of a still-valuable 100-acre tract, then the context suggests a different result. This is especially so if we assume that all parts of the tract are equally valuable. In this hypothetical, is the denominator 1 or 100? In other words, is the fraction 1/1 (result: a taking) or 1/100 (result: no taking)?

Thus, plaintiffs often attempt to narrowly define the property in question (*i.e.*, reduce the denominator). In other words, landowners seek to carve their property into discrete sections in order to reach the conclusion that there has been a total deprivation of economic value. The question postulated by such cases as *Penn Central* and *Keystone Bituminous* is whether these attempts by landowners are valid.

The *Penn Central* opinion answered its own question in the negative: "[T]aking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."⁷ In other words, a court must address the "nature and extent of the interference with the rights in the parcel-as-a-whole."⁸

This standard can variously be called the "parcel-as-a-whole theory" and the "non-segmentation principle." Under this principle, the court will not merely focus on the particular affected portions of land identified by the private investor. Rather, any additional land that can logically be connected to the affected land will be included in the calculus.

This approach abounds in lower court decisions. For example, the trend-setting decision of *Deltona Corporation v. United States*¹⁰ found no taking even though the U.S. Army Corps of Engineers (Corps) had denied Clean Water Act § 404 wetlands permits with respect to a land area constituting seventy-five percent of the area then available to be developed. Under *Deltona*, so long as there are some valuable uplands or fillable wetlands remaining after the denial of a wetlands alteration permit, compensation must be denied.

Deltona set the pattern for a long series of cases in both wetlands and other contexts which insisted on viewing any deprivation in the context of all of the developer's related holdings.¹¹ As will be shown below, this salutary trend has continued since *Lucas*.

Moreover, *Deltona* went beyond endorsing the parcel-as-a-whole concept by allowing the government to include, in the definition of the parcel-as-a-whole, land which the plaintiff-developer had already developed and sold-off when the regulation came into effect.¹² The court thus factored into the equation not only the yet-to-be-developed areas, but also those areas that had been successfully developed earlier.

2. Caveats Regarding the Non-Segmentation Principle

Four caveats are in order, however. First, plaintiff-landowners may rely on another case, *Loveladies Harbor, Inc. v. United States*,¹³ to support their theory on what constitutes the parcel-as-a-whole. *Loveladies* runs contrary to the established precedent of *Deltona*. In *Loveladies*, the Claims Court ruled on what constituted the parcel-as-a-whole, excluding from its analysis all but 11.5 acres of the 250-acre property originally purchased for development. The court reasoned that the bulk of this originally purchased property was no longer in plaintiffs' possession at the time the complaint was filed. However, three factors can be used to diminish the effect of *Loveladies*. As of this writing, the case is currently on appeal to the Federal Circuit. Further, the case has been specifically called into question by *Tabb Lakes v. United States*¹⁴ and *Mock v. Department of Environmental Resources*.¹⁵ Most importantly, the case can be distinguished from most fact situations because, in that case, the portion of the tract which was excluded from consideration had been sold off many years before the regulatory scheme even came into effect.

The second caveat is a practical matter. The litigator and regulator alike should be alert to attempts to disguise the unity of ownership between the portion of land in question and the larger tract of which it is naturally a part. Owners may attempt subterfuges to isolate the most heavily regulated portion of the property from the surrounding land. This is an attempt to have a court ignore the unaffected holdings and the remaining value they represent. Fortunately, courts will seek to transcend such devices by looking at the substance of the transactions. In determining whether additional lands should be taken into account, "[f]actors such as the degree of continuity, the dates of acquisition, the extent to which the parcel has been treated as a single unit, the extent to which the protected lands enhance the value of remaining lands, and no doubt many others . . . enter the calculus."¹⁶

The third caveat concerns temporary takings. These constitute a special case. We have seen that, under the non-segmentation principle, intense government interference which is limited in *space* usually does not constitute a taking. Thus, in the example of government obliteration of the value of one acre out of a 100 acre tract, there is no taking. However, intense government interference which is limited in *time* often does constitute a taking. Thus, obliteration of the value of all 100 acres of that same tract for one year could well constitute a taking. In short, for takings purposes, a landowner may not segment his or her ownership interest geographically, but such owner may segment that same interest temporally.¹⁷

The fourth caveat concerns physical invasions. Again, these situations constitute a special case. Generally, the non-segmentation principle broadly calls for dealing with property as a whole. This entails collecting the divisible individual aspects of ownership into one "bundle of rights." However, courts are particularly sensitive to one particular "stick" which comprises such "bundle." This is the landowner's right to exclude others. Courts tend to isolate this particular aspect of ownership rather than lumping it together with the others. If this one "stick" is destroyed, compensation is often due notwithstanding the remaining value in the balance of the "bundle." Therefore, government regulations which force the landowner to accommodate the passage of strangers onto his or her land form a special category. Here, a taking will more readily be found.¹⁸ A full discussion of this type of taking is beyond the scope of this article.

C. The Sequence Principle Pre-Lucas

1. The General Sequence Principle

The three-part *Penn Central* test includes, as a component, an inquiry into whether restrictions interfere with "distinct investment-backed expectations."¹⁹ Thus, the question is whether government actions "interfere with interests tha

are sufficiently bound up with the reasonable expectations of the claimant to constitute 'property' for Fifth Amendment purposes.²⁰

In practical terms, what does this mean? The above language can be restated as the proposition that there is no taking if the prohibited use was not part of an owner's title, or "bundle of rights," to begin with. And, it is only a small leap to rephrase the proposition as follows: when one invests in property, the extent of the rights one acquires is dependent on the regulatory regime then in existence. Thus, regulations imposed prior to the plaintiff's investment cannot constitute a taking. Obviously, this is the same thing as stating that only regulations imposed subsequent to a plaintiff's investment in property can constitute a taking of that property. To coin a phrase, this may be called "the sequence principle."

In the vast majority of cases, application of the principle means that only legislation enacted, or regulations promulgated, after the plaintiff's purchase of the property can be the basis of a successful takings claim. Thus, sequence should be one of the first factors a practitioner operating in this field examines when confronted with a takings claim.²¹

The sequence principle is empirically validated by the actual ad hoc decisions of the courts. The authors' survey of officially reported state and federal cases which find a taking demonstrates that virtually all of these cases involved regulations enacted after the plaintiff's purchase.²² Thus, the pattern is clear. The sequence between two particular events is critical. The two events are: (1) The plaintiff's risk of his or her capital (usually the plaintiff's acquisition of property) and (2) the effective imposition of the regulation. Only where the risk precedes the imposition will a taking be found.

Regrettably, this simple formulation was not neatly stated in the cases until very recently. While implicit in the opinions, and intuitively obvious, the sequence principle was never clearly

articulated or authoritatively expounded during the pre-*Lucas* period. Rather, such exposition would have to await the *Preseault* case, handed down after *Lucas*.

2. Caveats Regarding the Sequence Principle

Again, four caveats are in order.

The first caveat concerns the smattering of the cases where a taking was found although the law in question was in effect prior to the acquisition of the property. This result can usually be explained by the fact that the particular application of the prior law was unforeseeable. In other words, the law was later applied in a novel and unpredictable way.²³

The second caveat concerns the same smattering of cases. In some instances, a taking might be found even though the law itself is both in effect and clear at the time of the acquisition. But, in these cases the nature of the plaintiff's property is not clear at that point in time. At the time of acquisition, the plaintiff's property might have a latent characteristic that, when discovered, brings the property within the scope of the regulation. Assuming that plaintiff had no reason to know of the condition, a taking might be found in these situations. This approach is suggested by the case of *Formanek v. United States*.²⁴ In that case, land was acquired piecemeal until 1966. Then, in 1983, the Corps exercised authority to further restrict the land because of the discovery, in 1979, of a rare fern. Knowledge of the presence of the rare fern was not the type of knowledge a reasonable buyer would have. In such a case, even if the law were previously in effect, its application to the property in question would have been unforeseeable at the time of the acquisition. Therefore, an unpredictable emergence of a trait of the regulated property rather than an unpredictable interpretation of the law resulted in the finding that a taking had occurred.

Third, in some cases the government purportedly relied on pre-existing law, but this law was misapplied by the government subsequent to the plaintiff's acquisition. For instance, in *Kaiser Aetna v. United States*,²⁵ the federal government erroneously required the petitioners to open a marina to the general public.²⁶

Fourth, in one case, the owner's risk of capital entailed an activity other than the owner's purchase of the property in question. In *Ruckelshaus v. Monsanto Company*,²⁷ a taking was found with regard to U.S. EPA disclosure, under a new law, of certain information previously submitted by certain corporations. In *Ruckelshaus*, the investment was the act of turning over certain intellectual property to the government in order to obtain a license rather than the act of originally acquiring that property.²⁸ Significantly, *Ruckelshaus*, in keeping with the sequence principle, only found a taking with respect to that portion of the information which had been submitted prior to the new law.

These cases differ from the typical fact pattern. Still, even taking into account these factual anomalies, the general rule that only regulations newly imposed subsequent to a plaintiff's investment in property can constitute a taking of that property is borne out by the cases.

D. Summary of Pre-Lucas Law

In sum, on the eve of the *Lucas* case, the broad outlines of the regulatory takings doctrine were well established. Exercises of the police power were protected unless such exercises both deprived the owner of virtually all of the property and were newly imposed after the owner invested in the property. While some "property rights" inroads had been made in the distinct areas of temporary takings and physical invasions, the overall conceptual edifice remained intact.

As will be shown below, *Lucas* did not undermine this edifice. Indeed, with the benefit of hindsight, we can discern that *Lucas* actually may have served to reinforce it.

III. *Lucas*

A. The Lucas Takings Test

In the summer of 1992, the U.S. Supreme Court handed down its *Lucas* decision. The decision mandates that a court in a takings case should proceed initially with an inquiry into the economic impact of the regulation. Generally, if the effect of the regulation is to deny plaintiff all economically viable use of its property, plaintiff is entitled to compensation for a taking notwithstanding inquiry into the other two factors outlined in *Penn Central*.²⁹ Thus, in *Lucas*, the Supreme Court announced a standard for a *per se*, or categorical, regulatory taking. This is an alternative to, and not a displacement of, *Penn Central*. Thus, a plaintiff has two avenues by which to pursue a takings claim.

The *Lucas* majority itself, however, sought to allay the concerns of regulators as to the possible breadth of this new categorical rule. The Court reassuringly stated that its holding would only apply in "relatively rare situations" and "extraordinary circumstance[s]."³⁰ But, such narrow application is necessarily wholly dependent on the continuing efficacy of the non-segmentation principle and the sequence principle. Only the bulwark created by these two principles confines the *Lucas* holding to the limited field of total unexpected deprivations.

Therefore, we turn to the question of the viability of these principles in the *Lucas* era. (Fortunately, as we shall see, both of these principles not only survived *Lucas* but have fared quite well since.)

B. The Non-Segmentation Principle in Lucas

Since *Lucas* involved the entirety of Mr. Lucas' holdings in the vicinity in question, the non-segmentation principle was not at issue. However, this did not stop Justice Scalia, in *dicta*, from ruminating on the topic. In his notorious footnote 7, he cast a cloud of doubt on the extent of the principle.³¹ At the time, this alarmed

environmentalists.³² However, in light of the cases decided since *Lucas*, discussed below, this footnote appears to be nothing more than a stray comment.

C. The Sequence Principle in *Lucas*

In several ways, moreover, *Lucas* indicates that both its own categorical rule and the *Penn Central* test are subject to the sequence principle. The facts themselves are an excellent illustration of the principle. In *Lucas*, the landowner acquired residential property to develop single-family homes in an area subject to the jurisdiction of the South Carolina Coastal Council. Subsequent to plaintiff's purchase, the Council established an erosion line beyond which construction would not be permitted. The landowner's homesites were seaward of that line. Therefore, due to this new enactment, he could not build anywhere on his lots.

The Court focused on the landowner's expectations as of the date on which he acquired his interest. It held that a state may resist compensating property owners for a burdensome regulation:

[O]nly if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were *not part of his title to begin with*. This accords, we think, with our "takings" jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the state's power over, the "bundle of rights" that they acquire *when they obtain title* to property. . . .³³

Reinforcing the notion of sequence, *Lucas* teaches that limitations that severely burden land use "cannot be newly legislated or decreed (without compensation), but must inhere to the title itself, in the restrictions that background principles of the State's law of property and

nuisance already placed upon land ownership."³⁴ The import of *Lucas* to the takings practitioner is that it fixes the date on which the claimant acquires his property as the date for determining whether he possesses a compensable property interest. Apparently, only regulations subsequently imposed can give rise to a takings claim and then only if establishing new principles.

This can be stated in different terms. One scholar has posed the following question:

The . . . question is: when does the taking occur? If I buy the lot next to Mr. Lucas today, I know there is a law that says I can't build there. May I pay \$500,000 for the lot and then sue the state for a taking, because Justice Scalia says that this statute can't take away my rights without compensation? That doesn't make any sense. Isn't that statute now part of the background understanding of the law? Environmental statutes have been around for a number of years. Perhaps the diminution of value, or the taking, occurs when a statute is enacted. And whatever property owners lost, they lost a long time ago.

Doesn't anybody who buys property buy it subject to the limitations of statutes in existence at the time?³⁵

One central thesis of this article is that the answer is yes.

In sum, *Lucas*, when read closely, appears to be an endorsement of the sequence principle as an integral part of the takings doctrine.

D. The So-Called "Nuisance Exception" in *Lucas*

No small forest of trees has fallen to produce the paper for commentary on the nuances of the *Lucas* decision.³⁶ Much of this commentary centers around the precise meaning of the *Lucas* court's statement that legislation which merely codifies pre-existing common-law nuisance or other background principles does not give rise to a taking. Justice Scalia stated that a law or decree which prohibits all economically beneficial use is nonetheless valid if it does "no more than duplicate the result that could have been achieved in the courts . . . under the State's law of nuisance, or by the State under its complementary power to abate nuisances."³⁷ This has been referred to simply as the "nuisance exception."

This so-called "nuisance exception" must be read in context, however. Why does *Lucas* exempt nuisance abatement from its categorical rule? Because nuisances, by definition, have always been prohibited. Nuisances were prohibited long before any conceivable plaintiff took title to his or her land. A corollary tenet is that any new enactment which merely implements the common law of nuisance is not really a new restriction at all. Rather, such an enactment is really just a new incarnation of an old restriction.

This is consistent with the overall thrust of *Lucas*. *Lucas*, as we have seen, focuses on new impositions.

Thus, properly understood, the "nuisance exception" is not really an exception at all. Rather, the "nuisance exception" is probably merely a specific application of this broader sequence principle. A restriction directed at a nuisance is merely an example of a whole class of restrictions. This class is comprised of all those restrictions in effect at the time an owner purchases the property. This whole class, we submit, is exempt from the categorical rule and, for that matter, the takings doctrine generally.

Thus, the commentary's focus on nuisance misses a larger point. The real question is not whether the restriction counteracts a nuisance, but whether the restriction is new or old. The terms "new" and "old," of course, are used in relation to the time of the plaintiff's purchase. In this light, the "nuisance exception" is merely a handy means of reminding all concerned that a law which is newly-enacted might in some cases be merely a codification of longstanding rules. Some seemingly new laws are really old laws for takings purposes.

Thus, if the authors correctly read *Lucas*, the "newly-enacted" test, *i.e.*, the sequence principle, provides a clear bright line that can often end the controversy in the regulator's favor before the case ever gains momentum. However, while such a clear-bright-line sequence test began to emerge in *Lucas*, it remained for the post-*Lucas* authorities, in particular the *Preseault* case, to definitively and neatly declare this rule. Therefore, it is to those authorities that we now turn.

IV. Post-*Lucas*

A. Commentary

In the immediate wake of *Lucas*, some commentators on both sides of the property rights debate interpreted *Lucas* as a landmark victory for the property owner over state regulation.³⁸ One commentator even went so far so to refer to the "Scalia guillotine."³⁹

Viewed from the perspective of one year after the *Lucas* decision, however, the legal impact of that decision is, in fact, quite mild. The virulent private-property tone of some of the footnotes in the decision⁴⁰ has been effectively tamed by the Supreme Court itself. Indeed, *Lucas* may have actually enhanced government regulatory authority in one respect. At least two lower courts, the U.S. Claims Court in the *Preseault* case and the Ohio Supreme Court in *Community Concerned Citizens*, were emboldened to deny

private claims by the authority of none other than the *Lucas* decision itself.

This conclusion is demonstrated by the authors' survey of all of the major case-law dealing with regulatory takings issues in the past year (from June 29, 1992, to June 29, 1993). The authors define "major" to include: (1) All officially reported takings opinions which were decided in the U.S. Supreme Court and (2) all officially reported takings opinions dealing with land use which were decided in the federal circuit courts, the state supreme courts, and, due to its special jurisdiction and expertise, the U.S. Claims Court. We have excluded cases primarily dealing with claims of either physical invasion of property or the facial invalidity of statutes.

As detailed in this section, there were eight such decisions. All eight have been in favor of the public regulators and against the private claimants. Moreover, these cases upheld the government specifically on both non-segmentation and sequence issues. Thus, environmental regulators are "batting a thousand" since *Lucas*.

B. Post-Lucas Cases Reaffirming the Non-Segmentation Principle

1. *Tabb Lakes*

*Tabb Lakes, Inc. v. United States*⁴¹ provides the first explicit application of the non-segmentation rule in the aftermath of *Lucas*.

The plaintiff, Tabb Lakes, owned a large parcel of land which it intended to develop. The Corps had focused on three out of five sections of the property. Specifically, the Corps had issued a cease-and-desist order regarding certain wetland areas, thus preventing development on 171 of the 219 building lots in the three sections. This order had been in effect for 3.2 years when a federal court, in a separate earlier suit filed by Tabb Lakes, finally ruled that the Corps was in error. Having prevailed on the invalidity of the Corps' action, the plaintiff turned around and filed

another suit, this time seeking compensation for a temporary taking.

The court grappled with the question of what constituted the parcel-as-a-whole. The court chose from three alternative conceptions: (1) The directly affected wetlands themselves, (2) the three affected sections, or (3) the entire plot.⁴² The court, adhering to the non-segmentation principle, ultimately decided on the last option.

In short, at every turn, the court steadfastly refused to parse, *i.e.*, segment, the landowner's interests as finely as the landowner wished.⁴³

2. *Southview*

Southview Associates v. Bongartz,⁴⁴ dismissed plaintiff's regulatory taking claims on ripeness grounds. More importantly, however, the author of this decision explained that the takings challenge would have failed on the merits in any event.

A permit to develop a site had been denied because of the adverse effects the proposed development would have had on a deer habitat area located on the property.⁴⁵ Invoking the parcel-as-a-whole theory, however, Judge Oakes refused to ignore those remaining areas of the parcel which were still available for development now that the habitat area would have to be set aside.⁴⁶

It is noteworthy that Judge Oakes took this opportunity to give a resounding endorsement of Vermont's Act 250,⁴⁷ a model of aggressive governmental land use control.

3. *Bernardsville Quarry*

In *Bernardsville Quarry v. Bernardsville Borough*,⁴⁸ the would-be operator of a quarry was unable to secure municipal permission to recommence operations.

The court rejected the operator's attempt to define its right to remove stone as a separate property interest. Refusing to subscribe to this attempt at conceptual segmentation, the court stated that the owner "did not purchase mining rights or mineral rights in property as such. Rather, it purchased a tract of land that could be put to a variety of uses that included the quarrying of stone."⁴⁹

4. *Iowa Coal*

In the same vein as *Bernardsville Quarry*, the Supreme Court of Iowa earlier this year refused to find a taking on similar facts. In *Iowa Coal Mining Company v. Monroe County*,⁵⁰ the court held that a zoning ordinance adopted to prevent plaintiff from combining a solid waste landfilling operation with its existing strip-mining business did not act as a taking.

C. Post-Lucas Cases Reaffirming the Sequence Principle

1. *Preseault*

If the *Lucas* opinion left any doubt as to the efficacy of the sequence principle (and apparently it did in light of the commentators' general failure to discern this rule), that doubt was greatly reduced by one particular recent case, *Preseault v. United States*.⁵¹ *Preseault* is a striking vindication of the sequence principle.

In *Preseault*, the U.S. Claims Court refused to find a taking when the Interstate Commerce Commission allowed a railroad right-of-way, running through the Preseault family's land, to be converted to use as a public trail. To simplify a complex set of facts, the parcel in question was the subject of various title transfers spanning the period from 1966 to 1990. During this same period, the federal law governing abandonments of, and reversionary interests in, railroad rights-of-way continued to undergo significant change to the detriment of the private landowners on whose land such rights-of-way are situated. Thus, there was a series of changes in

title which took place against the background of a series of changes in the law.⁵²

The court emphasized that each transfer of title followed a change in the law which affected each set of owners' expectations to re-enter the land.⁵³ The court concluded that this lowered each successive set of owners' reasonable expectations that such owners would enjoy a reversion of the right-of-way.

Thus, the court, harkening back to *Lucas*, denied the Preseaults' claim on the grounds that the regulation diminishing the value of their rights was promulgated prior to their acquisition.

Because *Preseault* so clearly manifests what is implicit in *Lucas*, its discussion of *Lucas* is worthy of lengthy quotation:

The Supreme Court in *Lucas* did not advocate examining the property owner's title of the bundle of rights he acquired by turning back all the way to the time when the land was first conveyed by the owner's predecessors in interest. The Court looked, instead, at those limitations on his ownership interests as of the date on which he acquired the property. Thus, the relevant date for determining plaintiffs' historically rooted expectancies should not be that on which the parcels were conveyed by plaintiffs' predecessors in interest, but, rather, the dates on which plaintiffs themselves acquired title to their properties. . . .

The *Lucas* bright-line test stops the musical chair shifting identity of property owners and fixes the date of injury as the most recent purchase or transfer. In this dynamic model, it cannot be said

that plaintiffs had compensable property interests by the dates of the most recent purchase or transfer of [the] parcel.⁵⁴

To recapitulate, clearly the conversion did not serve to prevent a public nuisance.⁵⁵ Nevertheless, the court held that this conversion did not constitute a taking. This was because of the sequence principle.⁵⁶

There is an additional wrinkle that makes *Preseault* particularly compelling from both a legal and practical standpoint. The Preseaults actually had originally acquired the land in the 1960s, prior to the significant legislation curbing their rights. However, the Preseaults then engaged in a series of transfers among themselves, business entities wholly-owned by themselves, and close business associates. In other words, the series of transfers culminating in the Preseaults' most recent acquisition of the land was essentially among the Preseaults themselves. For instance, the most recent was a transfer in 1990 from the Preseaults as individuals to their partnership, an entity called "985 Associates." Thus, the question arose as to which transfer would constitute the Preseaults' acquisition for purposes of the sequence principle. The Preseaults argued for the earliest possible date since this would vest them with their property rights prior to the new legislation.

The court, however, would not view transfers between the Preseaults as individuals and their own closely-held firm as "ministerial matters of form, or otherwise irrelevant" to the takings analysis. In essence, the court invoked an estoppel against the Preseaults. Since the Preseaults and 985 Associates were separate entities in the eyes of the law, and since this separation benefitted them in certain ways, the entities must be viewed separate for *all* legal purposes.⁵⁷ Thus, the date of the last transfer would be used by the court even though the transfer was not an arm's-length transaction. Since this transfer was subsequent to the passage

of the laws in question, no compensation was due.

The advantage of *Preseault's* strict application of the sequence principle will not be lost on those familiar with land tenure patterns in the regulated community. Building booms are often associated with a rapid series of speculative transfers of title. These conveyances may be for financial or tax advantages. However, under *Preseault*, each one of these conveyances essentially amounts to an acceptance, by the developer, of all regulations enacted up to that point. Ironically, a developer who contrives such a "straw transfer" or a "land-flip" may find himself hoisted by his own petard.

2. *Community Concerned Citizens*

A less elaborate, but equally forceful, declaration of the sequence principle is found in *Community Concerned Citizens v. Union Township Board of Zoning Appeals*.⁵⁸ There, the Ohio Supreme Court bluntly stated that no taking could be found and that *Lucas* was inapplicable because "[t]he regulations were not changed after the property was purchased."⁵⁹

3. *Concrete Pipe*

A recent case from the Supreme Court itself further shows that the *Lucas* decision does *not* foreshadow a new pro-property approach.

*Concrete Pipe and Products v. Construction Laborers*⁶⁰ involved a multi-employer pension trust fund plan and an employer named Concrete Pipe which had been a contributor to the plan for three and one-half years before withdrawing from it. Upon withdrawing from the plan, Concrete Pipe was assessed a "withdrawal liability" pursuant to certain federal pension law amendments enacted in the interim. Concrete Pipe contended that the amendments worked a taking of its property.⁶¹

The court explained that, because the pensions were already heavily regulated prior to the amendments, the substance of the amendment was foreseeable. Supporting this conclusion, the court utilized the sequence principle:

At the time Concrete Pipe purchased [its company] and began its contributions to the Plan, pension plans had long been subject to federal regulation, and "[t]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments."⁶²

Thus, at least in the case of personal property, where an industry or practice is already intensely regulated, the new accretion of additional restrictions of the same type will not require compensation. Concrete Pipe's property interest was already governed by laws which were closely related to the challenged enactment when that interest vested, and this chronology precluded a judicial determination that compensation was required. Thus, the court distinguished *Lucas* by following, indeed slightly extending, the logic behind the sequence principle.⁶³

This taking decision was filed by a unanimous court, including Justice Scalia, the author of *Lucas*. Thus, *Concrete Pipe* compels the conclusion that *Lucas* was intended to facilitate compensation only in the most extreme cases — where the deprivation is both reasonably unforeseen and complete. Or, to use the language of this article, a deprivation must be measured against both the sequence principle and the non-segmentation principle in order to be a taking.

4. *Reahard*

In *Reahard v. Lee County*,⁶⁴ the U.S. Court of Appeals for the Eleventh Circuit vacated and remanded a conclusory decision that the

reclassification of land belonging to the plaintiff amounted to a taking.

The court insisted that certain subsidiary factual inquiries be made.⁶⁵ In a passage evocative of *Preseault*, the court stated that these necessary inquiries include the histories of both the regulation and the possession of the property and the diminution in investment-backed expectations after the passage of the regulation.⁶⁶

V. Conclusion

Lucas initially caused a ripple of anxiety throughout the environmental community. In particular, two footnotes in the *Lucas* opinion have gained a certain notoriety among environmentalists.⁶⁷

However, in the year since *Lucas*, land use planning and control have actually gained legal ground against the takings challenge. With this hindsight, we can see that the anti-regulatory footnotes in *Lucas* are *not* indicative of the general trend. Indeed, *Lucas* itself is merely a footnote to the overall pro-regulatory state of law. Affirmative environmental protection remains ascendent in our times.

Our task as attorneys general is to explain this fact, not only to the courts before whom we appear, but more importantly, to our clients: the government regulatory agencies and the general public.

ENDNOTES

1. *Lucas v. South Carolina Coastal Council*, _____ U.S. _____, 112 S. Ct. 2886, 120 L.Ed.2d 799 (1992).

2. For an excellent discussion of this movement, see John A. Humbach, *What is Behind the 'Property Rights' Debate?* 10 Pace Envtl. L. Rev., 21, 22 (1992). As Professor Humbach reported in this article, written prior to *Lucas*, this movement has been recently active in the political as well as the legal arena:

We see the strength of the emerging "property rights" movement in the successful lobbying campaign that has stymied the efforts of three federal

agencies to rationalize federal wetlands regulations and standardize wetlands definitions. We see it in proposed legislation such as the Private Property Protection Act of 1991, essentially a move to curb federal regulatory power, passed by the Senate as part of the bill to raise the Environmental Protection Agency to Cabinet status. Originally offered as S. 50, the bill would codify and harden the impact of a 1988 Executive Order (E.O. 12630), which authorizes the Department of Justice to review and rule on the effect that proposed federal regulations will have on private property rights. We see it in new cases in the courts, by one recent count nearly 200 of them in the Federal Claims Court alone. Current claims for relief against the federal government have been estimated to exceed over a billion dollars as people try to reach out and tap the Treasury because of wetlands and other environmental regulations that they do not like.

(Citations omitted.) See also Zinn & Copeland, *Wetlands Issues in the 102d Congress, Cong. Res. Serv. Iss. Br.* 91058 (Sept. 12, 1991); Charles P. Alexander, *Gunning for the Greens*, Time, Feb. 3, 1992, at 70; Marcia Coyle, *Property Revival*, Nat'l. L.J., Jan. 27, 1992, at 1 ("conservative legal strategists long for an economic rights revival"); Kirstin Downey, *A Conservative Supreme Court Addresses Property Rights*, Wash. Post, Feb. 16, 1992, at H1; David Kaplan & Bob Cohn, *Pay Me or Get Off My Land*, Newsweek, March 9, 1992, at 70; H. Jane Lehman, *Landowners Go to Court to Fight for Property Rights*, Wash. Post, Jan. 4, 1992, at E1; Keith Schneider, *Environmental Laws Face a Stiff Test From Landowners*, N.Y. Times, Jan. 20, 1992, at A1; Catherine Yang with Peter Hong, *The Grass is Looking Greener for Landowners*, Bus. Wk., July 13, 1992, at 31 ("property-rights activists plan to test how far the court is willing to carry its logic").

For representative literature of this movement itself, see Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain*, 115-21 (1985), and *Property as a Fundamental Civil Right*, 29 Cal. L. Rev. 187 (1992); Rivert C. Ellickson, *Alternative to Zoning: Covenants, Nuisance Rules and Fines as Land Use Controls*, 40 U. Ch. L. Rev. 681 (1973); and William G. Laffer III, *The Private Property Rights Act: Forcing Federal Regulators to Obey the Bill of Rights*, Heritage Found. Rep. Iss. Bull. 173 (1992).

The intellectual leaders of this movement make no secret of their ultimate goal — to require that the courts overrule most major social and environmental legislation. See

Epstein, *Takings*, *supra*: "It will be said that my position invalidates much of the twentieth-century legislation, and so it does." *Id.* at 281.

3. Of course, takings claims may also be based on various state constitutions. However, a discussion of those cases is beyond the scope of this article.

4. 438 U.S. 104, 124 (1978) (citations omitted).

5. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984).

6. 480 U.S. 470, 497 (1987) (quoting Frank L. Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation Law"*, 80 Harv. L. Rev. 1165, 1192 (1967)).

7. 438 U.S. at 130 (emphasis added).

8. *Id.* at 130-31. (emphasis added); accord *Keystone Bituminous Coal*, *supra* note 6, 480 U.S. at 497.

9. See John A. Humbach, *Evolving Thresholds of Nuisance and the Takings Clause*, 18 Colum. J. Envtl. L. 1,21 (1993), and *Taking' The Imperial Judiciary Seriously: Segmenting Property Interests and Judicial Revision of Legislative Judgments*, 25-26 (scheduled to be published in Catholic U.L. Rev., in August 1993) (coining the phrase "no-segmentation principle" from which the authors have adopted the phrase "non-segmentation principle").

10. 657 F.2d 1184 (Cl. Ct. 1981).

11. See *Lakeview Development v. South Lake Tahoe*, 915 F.2d 1290 (9th Cir. 1990) (no taking where investor was allowed to develop fourteen townhouses and a hotel instead of forty-two townhouses and a hotel); *Jentgen v. United States*, 657 F.2d 1210 (1981) (no taking where eighty percent of land was rendered undevelopable by Corps regulation); *Smithwick v. Alexander*, 12 Envtl. L. Rep. (Envtl. L. Inst.) 20790 (E.D.N.C. Mar. 23, 1981) (fact that 18 out of 20 acres were rendered unusable did not constitute a taking); *Ciampitti v. United States*, 22 Cl. Ct. 310 (1991) (viewed as part of larger tract, wetlands designation reduced value by mere twenty-five percent and landowner had recouped investment); *Graham v. Estuary Properties, Inc.*, 399 So. 2d 1374 (Fla. 1981) (regulation did not render land "virtually worthless" where a portion was still capable of being developed); *Florida DEP v. Schindler*, 804 So.2d 555 (Fla. Dist. Ct. App. 1992) (entire 3.5 acres should have been considered as a whole not just 1.85 acres where development was prohibited); *Department of Environmental Regulation v. MacKay*, 544 So. 2d 1065 (Fla. Dist. Ct. App. 1989) (property owner did not demonstrate deprivation of all beneficial use of property where use of 2.5 acres out of 3.2 acres was denied to applicant); *Fox v. Treasure Coast*

Regional Planning Coun., 442 So.2d 221 (Fla. Dist. Ct. App. 1983) (government could reduce plan to develop 1,700 acres to only 654 acres, leaving over 1,000 acres in natural state); American Dredging Co. v. State Department of Environmental Protection, 391 A.2d 1265 (N.J. 1978) (looking at full acreage in determining private loss, no taking found where only 80 out of 2,500 acres (approximately three percent) were regulated); Presbytery of Seattle v. King County, 787 P. 2d 907 (Wash. 1990) (rejecting landowner's argument that takings analysis should focus on a piece of the property rather than the entirety).

12. 657 F.2d at 1184.

13. 21 Cl. Ct. 153 (1990), *appeal docketed*, No. 91-5050 (Fed. Cir. Feb. 11, 1991).

14. 26 Cl. Ct. 1334 (1992).

15. 623 A.2d 940 (Pa. Commw. Ct. 1993).

16. Ciampitti v. United States, 22 Cl. Ct. 310, 318 (1991).

17. See *First English Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987). A full explication of this problem is beyond the scope of this article.

18. See, e.g., *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

19. *Supra* note 4 at 124.

20. *Id.* at 98 (citations omitted).

21. This handy rule-of-thumb can be derived logically from the language of the opinions. See *Ruckelshaus v. Monsanto Co.*, *supra* note 5, 467 U.S. at 1006-07 (no taking found to the extent that the government acted in a manner that was authorized by law "at the time of" the plaintiff's action with respect to the property); *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 227 (1986) ("prudent employers then had more than sufficient notice not only that pension plans were currently regulated, but also that withdrawal itself might trigger additional financial obligations") (emphasis added).

22. *Lucas v. South Carolina Coastal Council*, *supra* note 1 (in 1986, Lucas bought two residential lots; in 1988 the legislature barred Lucas from erecting any permanent habitable structures); *First English Evangelical Lutheran Church v. Los Angeles County*, *supra* note 17 (land purchased in 1957; flood destroyed existing structure in 1978; ordinance forbidding re-building adopted in 1979); *Nollan v. California Coastal Commission*, *supra* note 18 (Nollan acquired option to buy land specifically conditioned on the building of a new house on that land; much later,

California Coastal Commission imposed an exaction -- a condition on granting a building permit); *Lore v. Teleprompter Manhattan CATV*, 458 U.S. 419 (1982) (plaintiff purchased building in 1971; defendant sought to invoke 1973 New York law which negated certain rights of landlords); *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922) (mineral estate and support estate purchased in 1800s; Kohler Act prohibiting effective use of these estates passed in 1921); *Whitney Benefits v. United States*, 926 F.2d 1169 (Fed. Cir. 1991) (property leased by mining company in 1974; strip-mining reclamation legislation enacted in 1977 which denied use of property as coal mine; no other economically viable use available); *A.A. Profiles, Inc. v. City of Ft. Lauderdale*, 850 F.2d 1483 (11th Cir. 1988) (contract to purchase land in 1979; wood-chopping development approved later that year; area rezoned from heavy industrial to light industrial in 1980); *Florida Rock v. United States*, 21 Cl. Ct. 161 (1990) (purchase in 1972, Clean Water Act amended in 1977 effecting total loss of value); *Loveladies Harbor, Inc. v. United States*, *supra* note 13 (plaintiffs purchased land in 1956; in the 1970s, wetlands regulations went into effect causing ninety-nine percent diminution in value); *Q.C. Construction v. Gallo*, 649 F. Supp. 1331 (D.R.I. 1986) (property purchased in early 1983; building moratorium imposed later in 1983); *Bartlett v. Zoning Commission of Old Lyme*, 282 A.2d 907 (Conn. 1971) (property purchased in 1961; land reclassified and restricted in 1968); *Morris County Land Improvement Co. v. Parsippany-Troy Hills Township*, 193 A.2d 232 (N.J. 1968) (land acquired in 1978; then new regulations essentially froze land in its natural state); *Karches v. City of Cincinnati*, 526 N.E.2d 1350 (Ohio 1988) (one co-plaintiff had leased a parcel of land with an option to purchase and made substantial improvements while the second co-plaintiff had actually purchased a separate parcel of land; thereafter an ordinance was passed re-zoning both properties from industrial to riverfront); *Annicelli v. South Kingstown*, 463 A.2d 133 (R.I. 1983) (purchase and sale agreement made on May 8, 1975; new zoning ordinance adopted three weeks later); *Johnson and Wales v. DiPrete*, 448 A.2d 1271 (R.I. 1982) (building purchased at time when existing zoning allowed use as dormitories; much subsequent legislative and administrative activity culminated in deprivation of plaintiff's ability to put the building to this use); *Allingham v. City of Seattle*, 749 P.2d 160 (Wash. 1988) (plaintiff owned land before passage of "Greenbelt Ordinance" which required portions of land to remain undeveloped) (*rev'd* on other grounds by *Presbytery of Seattle v. King County*, 787 P.2d 909 (Wash. 1990)).

23. See, e.g., *Yancy v. United States*, 915 F.2d 1534 (Fed. Cir. 1990) (purchase of turkeys in October 1983; USDA, without precedent, quarantined healthy turkeys indefinitely because of influenza epidemic in November 1983; court stressed investment-backed expectation that healthy turkeys would not be quarantined).

24. 26 Cl. Ct. 332 (1992). Beachfront Management Act left each of Lucas's beachfront lots without economic value.
25. 444 U.S. 164 (1979). See also *Yuba Natural Resources, Inc. v. United States*, 10 Cl. Ct. 486 (1986), *aff'd in rel. part*, 821 F.2d 638 (Fed. Cir. 1987) (mineral rights acquired in 1905; federal government wrongfully refused to honor those rights in 1975).
26. *Kaiser-Aetna* also involved the physical invasion concept.
27. 467 U.S. 986 (1984).
28. *Id.* at 1006-07.
29. 112 S. Ct. 2886, 2910.
30. *Id.* at 2894.
31. Footnote 7 reads, in part:
 Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole. . . . Unsurprisingly, this uncertainty regarding the composition of the denominator in our "deprivation" fraction has produced inconsistent pronouncements by the Court. . . . The answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the State's law of property — *i.e.*, whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value. In any event, we avoid this difficulty in the present case, since the "interest in land" that *Lucas* has pleaded (a fee simple interest) is an estate with a rich tradition of protection at common law, and since the South Carolina Court of Common Pleas found that the
Id. n. 7 (citations omitted).
32. See, *e.g.*, Humbach, *Evolving Thresholds of Nuisance and the Takings Clause*, *supra* note 9 (forecasting a possible "abrogation or substantial truncation" of the non-segmentation rule).
33. *Lucas*, 112 S. Ct. at 2899 (emphasis added) (footnote omitted).
34. *Id.* at 2900.
35. William Funk, *Lucas v. South Carolina Coastal Council: Unanswered Questions*, NRLI News, January 1993 at 9.
36. See, *e.g.*, Barry M. Hartman, *Lucas v. South Carolina Coastal Council: The Takings Test Turns a Corner*, 23 *Envl. L. Rep. (Envl. L. Inst.)* 10003 (1993); John A. Humbach, *Evolving Thresholds of Nuisance, and Taking The Imperial Judiciary Seriously*, *supra* note 9; Barry I. Pershkov and Robert F. Housman, *In the Wake of Lucas v. South Carolina Coastal: A Critical Look at Six Questions Practitioners Should be Asking*, 23 *Envl. L. Rep. (Envl. L. Inst.)* 10008 (1993).
37. 112 S. Ct. at 2900.
38. See, *e.g.*, Cotton C. Harness III, *Lucas v. South Carolina Coastal Council: Its Historical Context and Shifting Constitutional Principles*, 10 *Pace Envl. L. Rev.* 5 (1992) ("threatens to supplant traditional views"); Hartman, *supra* note 36 ("a departure"); John A. Humbach, *supra* note 32 (a "flat-out reassign[ment] [of] a portion of this nation's ultimate environmental . . . authority from the legislatures" which might "revolutionize traditional conceptions"); Michael Blumm, *Lucas v. South Carolina Coastal Council: Property Myths and Judicial Activism*, NRLI News, January 1993 at 8 ("may be . . . the beginning of widespread judicial second-guessing of legislatures"); Funk, *supra* note 35 ("it may be the beginning of a new property rights revolution" and "the Reagan-Bush Supreme Court may reinvigorate property rights in a way we haven't seen"); Edward J. Sullivan, *Lucas v. South Carolina Coastal Council: Constitutional Revisionism*, NRLI News, January 1993 at 10 ("seek[s] to resurrect the doctrine of substantive due process which would erode the social contract which underlies environmental regulation"); Kenneth M. Murchison, "Lucas v. South Carolina Coastal Council: Uncertain Doctrine, Local Caution," NRLI News, January 1993 at 12 ("read broadly, it would substantially alter current doctrine"); James Huffman, *Lucas v. South Carolina Coastal Council: The Right Direction*, NRLI News, January 1993 at 13 (urging

lower courts to extend the logic of *Lucas* to reverse the parcel-as-a-whole theory).

39. John R. Nollan, *Private Property Investment, Lucas and the Fairness Doctrine*, 43 Pace Envtl. L. Rev. 43, 65. See also *Lucas*, 112 S. Ct. at 2904 (Blackmun, J., dissenting) ("the court launches a missile").

40. 112 S. Ct. at 2909-10, nn. 7,8 (1992).

41. 26 Cl. Ct. 1334 (1992).

42. *Id.* at 1346. An earlier hint of the continued life of the non-segmentation principle after *Lucas* came not from a judicial act, but rather from an instance of judicial inaction. In *Tull v. Virginia*, 113 S. Ct. 191 (1992), the Court denied *certiorari* in a case that would have challenged the non-segmentation principle directly. The court thereby let stand a lower court decision upholding the non-segmentation principle. The lower court had refused to award compensation where the state had denied the owner of a forty-three acre site a permit to fill approximately two acres of wetlands on the site. *Tull v. Virginia* (Cir. Ct. Accomack County Nov. 4, 1992), cited in Humbach, *Evolving Thresholds*, *supra* note 9 at 22-23, n. 122. *Tull* while not itself binding authority, heralded the non-segmentation cases to come after *Lucas*.

43. *Id.* at 1347-48.

44. 980 F.2d 84, 100 (2nd Cir. 1992), *cert. denied*, 113 S. Ct. 1586 (1993).

45. *Id.* at 90-91.

46. *Id.* at 106-07.

47. Vt. Stats. Ann. tit. 10 (Conservation and Development), ch. 151 § 6001 *et seq.* (1984 & Supp. 1991).

48. 608 A.2d 1377 (N.J. 1992).

49. *Id.* at 1389.

50. 494 N.W.2d 664 (Iowa 1993).

51. 27 Cl. Ct. 69 (1992).

52. *Id.* at 90.

53. *Id.* at 91.

54. *Id.* at 88, 90-91.

55. *Id.* at 95.

56. The *Preseault* court acknowledged that the case before it was a physical invasion case. However, this fact was of no avail to the plaintiffs because the physical invasion concept cannot overcome the sequence principle. If the invasion were previously allowed, it will not be deemed a taking. 27 Cl. Ct. at 95.

57. *Id.* at 88.

58. 613 N.E.2d 580 (Ohio 1993).

59. *Id.* at 585 (emphasis in original).

60. _____ U.S. ____, ____ S. Ct. ____, 61 U.S.L.W. 4611 (1993).

61. *Id.* at 4612.

62. *Id.* at 4623 (citation omitted).

63. *Id.* The Court also distinguished *Lucas* by following the non-segmentation principle.

64. 968 F.2d 1131 (11th Cir. 1992).

65. *Id.* at 1136.

66. *Id.* This case raises, but does not resolve, the problem of application of the sequence principle to inherited property. The question remains as to which conveyance constitutes the last acquisition: the decedent's purchase or the acquisition by inheritance.

67. See text of footnote 7, *supra* note 31. In footnote 8, Justice Scalia stated:

Justice Stevens criticizes the "deprivation of all economically beneficial use" rule as "wholly arbitrary", in that "[the] landowner whose property is diminished in value 95% recovers nothing," while the landowner who suffers a complete elimination of value "recovers the land's full value." This analysis errs in its assumption that the landowner whose deprivation is one step short of complete is not entitled to compensation. Such an owner might not be able to claim the benefit of our categorical formulation, but, as we have acknowledged time and again, "[t]he economic impact of the regulation on the claimant and . . . the extent to which the regulation has interfered with distinct investment-backed expectations" are keenly relevant to takings analysis generally. It is true that in a least some cases the landowner with

95% loss will get nothing, while the landowner with total loss will recover in full. But that occasional result is no more strange than the gross disparity between the landowner whose premises are taken for a highway (who recovers in full) and the landowner whose property is reduced to 5% of its former value by the highway (who recovers nothing). Takings law is full of these "all-or-nothing" situations.

Justice Stevens similarly misinterprets our focus on "developmental" uses of property (the uses proscribed by the Beachfront Management Act) as betraying an "assumption that the only uses of property cognizable under the Constitution are *developmental* uses." . . . We make no such assumption. Though our prior takings cases evince an abiding concern for the productive use of, and economic investment in, land, there are plainly a number of noneconomic interests in land whose impairment will invite exceedingly close scrutiny under the Takings Clause.

112 S. Ct. 2895, n.8 (citations omitted).

DECISIONS

Air

Court Vacates Previous Decision: *Motor Vehicle Manufacturers Association et al. v. New York State Department of Environmental Conservation*, No. 92-CV-869 (N.D.N.Y. July 13, 1993)

Background

In an earlier decision (*see* the March 1993 *Journal*), the court granted summary judgment to the defendants, holding that New York violated the Clean Air Act (CAA) when it adopted California's stringent emission standards for new motor vehicles without also adopting California's more stringent fuel requirements. The state filed a motion for rehearing.

Holding

In the earlier proceeding, the plaintiffs argued that New York's failure to adopt California's fuel regulation violated the "undue burdens" and "third vehicles" prohibitions of section 177 of the CAA, 42 U.S.C. § 7507. The court's earlier decision had agreed with the plaintiffs that the higher sulfur content of commercial fuel presently sold in New York would degrade catalytic converters in low emission vehicle (LEVs). Therefore, according to the manufacturers' argument, the catalytic converter in LEVs sold in New York would have to be installed in a different manner, thereby creating a "third vehicle."

On reconsideration, the court determined that the finding on which its previous decision rested was, in retrospect, erroneous. That finding was that the content of New York fuels would force the plaintiffs to redesign the exhaust emission control system of California vehicles. The court noted that the error in its original holding was in not considering the degree and nature of the effect of the higher sulfur fuels sold in New York. Since there are issues of fact still to be determined, summary judgment was not appropriate.

However, the court did not disturb its earlier decision concerning the necessity of providing a two-year leadtime to motor vehicle manufacturers. The court applied its ruling only to General Motors' (GM) cars since the evidence only showed that GM's production year was affected. The court also let stand its earlier ruling concerning the states' sales mandate for zero emissions vehicles (ZEVs). In that decision, the court held that the ZEV regulation violated the third vehicle prohibition because New York's colder weather would require that the ZEVs sold there have installed heaters.

Witness List for June 27, 1995 hearing:

Senators who have requested to testify:
Sen. Hatch

Witnesses:

Panel One - Views of the Administration
John R. Schmidt

Panel Two - Baseline

Joseph Sax - Counsel to Secretary of the Interior
Roger Marzulla - former AAG, ENRD -- will discuss flaws of current system
Frank Michelman - Harvard Law Professor - similar to Sax
Jonathan Adler - Competitive Enterprise Institute

Panel Three - Views of affected interests

Ed Thompson - Public Policy Dir., Amer. Farmland Trust
Jim Little - National Cattlemen's Association
Bruce Smith or Randy Lee - National Homebuilders Ass'n
Bruce Smith or Randy Lee - National Homebuilders Ass'n
Dick Moer - National Trust for Historical Preservation
Rep. Richard Russman - NH/NCSL

Meeting: Hearing Strategy

Experts or theorists

role of "eminent scholar"

will discuss flaws of current system

similar to Sax

Talking Points on Property Rights

The House has passed a bill that would require compensation whenever an action under the wetlands programs, the Endangered Species Act, or (for water) federal reclamation or land use laws, diminishes the value of a portion of a property by 20%. An even broader bill is pending in the Senate which would require compensation for an agency action under any federal law where the value of a portion of a property falls 33%.

These proposals are a bad idea because -

- They ignore the interests of other property owners and of the public.
- They force a choice between imposing enormous costs on the taxpayer or foregoing protection of the community and the environment.
- They require payment for losses that are speculative.
- They ignore 200 years of Constitutional tradition.
- They will create a claims industry that will enrich lawyers and appraisers and generate huge new bureaucracies.
- They are a budget buster.

A property owner never has had an absolute right to use property without regard to the impact of that use on other landowners or the community. Over a hundred years ago, the Supreme Court said, "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."

- The fundamental flaw in these bills is that in general, the only factor which triggers the compensation requirement is whether the value of property is decreased.
- This "one-size-fits-all" prescription for takings cases ignores the array of other considerations to which the courts have looked for over 200 years, including the merits of the government's action, whether limitations were in place or could have been

anticipated at the time of purchase, and the impact of the activity which the claimant wants to undertake on other property owners.

These bills will result in huge claims being made where the Constitution does not require compensation, where the losses are highly speculative or where payment is totally unwarranted.

- ~~The bills are drafted in such a way that a property owner will be able to show a 20% or 33% reduction in the value of a "portion" of a property for countless types of government actions.~~
 - * If an owner of a 1,000 acre parcel of land is denied a permit to fill a wetland comprising only 1 acre of his property, he may file a claim under these bills with respect to only the 1 acre of land, thereby making the payment for a 20% or 33% loss in value thresholds almost irrelevant.
 - * This is contrary to decades of Supreme Court cases which have looked to the impact on the property as a whole to evaluate whether there has been a taking.
- Neither bill requires a claimant to show actual losses. Rather, simply showing that a government action prevented the claimant from undertaking some hypothetical activity at some time in the future could be sufficient to collect from the government.
- The government could be required to pay compensation under the Senate bill if a claimant loses a government subsidy as might occur if water deliveries are reduced to stop wasteful irrigation practices that cause excessive runoff resulting in water pollution.
- Exceptions to compensation requirements in the bills would not be sufficient to prevent unwarranted claims.
 - * The "nuisance" exceptions provided in the bills are technical and very limited, and ordinarily do not cover cumulative or long-term health and safety risks, civil rights protection or other vital protections.

- * Other exceptions in the House bill are vague, full of potential loopholes and would be subject to endless litigation.

If government is faced with the Hobson's choice of paying questionable claims or foregoing important health, safety and environmental regulations, neighboring property owners could be severely harmed. For example, prohibitively costly claims could be filed where--

- Government requires controls on a strip-mining operation to prevent toxic waste flowing in to adjacent rivers.
- Restrictions are imposed on the movement of animals and plants necessary to prevent the spread of dangerous disease.
- Government prohibits the siting of a toxic waste dump adjacent to a school.

Indeed, these bills are so poorly conceived that a property owner could claim that the value of his/her property interests has been reduced where government -

- Bans assault weapons (potential claimants include manufacturers of weapons or ammunition)
- Requires that a restaurant expand bathroom facilities to accommodate persons in wheelchairs (claims for lost table space)
- Re-routes aircraft to reduce noise in residential areas (or refusing to re-route traffic)
- Establishes acreage allotments and marketing quotas for tobacco crops

These bills are budget busters.

- The House bill alone would cost taxpayers over \$28 billion over the next 5 years.
- The Senate bill is much broader in scope and will cost many times that amount.

Contrary to popular belief, it is not the "little guy" that would be helped by these bills. The bills impose very sophisticated and complex legal questions that will create a business boom for lawyers and appraisers and provide large landowners and land speculators new opportunities to file claims against the government.

- Huge bureaucracies would be created to process claims.

While these proposals apply primarily to the federal government, it would only be a matter of time before they also spread to state and local government activity as well.

- Advocates will argue that if a 20% reduction in value standard is OK at the federal level, why not the state and local level as well?
- Basic zoning and other local land use planning functions of local government -- which represent more than 90% of governmental land use planning activity -- will become things of the past.
- Citizens will lose the ability to control the growth and development of their communities.

There is a better way.

- We need to examine federal laws to change those that unnecessarily burden landowners.
 - * The Administration already is taking steps to give relief to most homeowners from the requirements of the Endangered Species Act and wetlands regulation.
- We need to improve access to the courts for landowners who have suffered a "taking" as defined under the Constitution.
- The Administration has been working closely with the courts on approaches to ensure that takings claims may be resolved quickly and efficiently, including the use of alternative dispute techniques where appropriate.

June 13, 1995