ARTICLES

Takings Term II: New Tools for Attacking and Defending Environmental and Land-Use Regulation

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INTRODUCTION

The 1991 October Term of the United States Supreme Court can legitimately be called "Takings Term II," a sequel to the Court's regulatory takings activism of the 1986 October Term. Unlike the previous trio of Keystone, First English, and Nollan, however, the Court's contributions in Lucas, Yee, and PFZ are as significant for

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what the Justices did not say as for what they contributed to the pages of the *United States Reports*.

Because these cases pose so many yet unanswered questions, it would be imprudent and premature to predict in this article how discrete questions of environmental regulation will *certainly* be resolved by the federal courts. Instead, what we can do is examine how these three cases and their precursors can be used as tools by advocates in future struggles over the legitimacy and desirability of environmental and land-use protective schemes.

Part II examines the principal contributions made by *Lucas*, *Yee*, and *PFZ* to the ongoing (and decades-old) takings dialogue, while highlighting those key questions left unanswered. Part III introduces three charts that describe judicial behavior in, and "plot" the law of, takings law to this point (including recent controversial opinions from the United States Claims Court); and addresses some pieces of the puzzle that remain undeciphered. Part IV presents two sets of factors, derived from takings case law, that can be used as part of either an attack strategy for private sector advocates or a strategy for those defending public sector actors in disputes over the legality of environmental and land-use restrictions. The article closes by exploring three

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8. See, e.g., *infra* text accompanying notes 70-74 (conceptual severance), and text accompanying notes 131-44 (substantive due process).


10. See *Charles M. Haar and Michael Allan Wolf, Land-Use Planning* 879-88 (4th ed. 1989) (excerpts from leading takings cases). The main focus of this article is on takings by means of regulation, not the affirmative exercise of eminent domain by the state. See *id.* at 780-826 (cases involving legitimacy of public use). See also *infra* Table I.
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stages of takings judicial decision-making—bright-line formalism, relativist balancing, and anti-regulatory skepticism—and considers how the advocates and commentators on either side of this critical issue would benefit greatly from carefully considering the jurisprudential context of their disputes and of the solutions they offer the court.

II. A NEW TAKINGS TRILOGY: LUCAS, YEE, AND PFZ (One Win, One Loss, and One Nondecision)

The Supreme Court's decision to hear three landowner challenges to allegedly unconstitutional environmental and land-use regulations or practices caused great anticipation and anxiety among practitioners, commentators, and other legal professionals in the private and public sectors. When the outcomes are totaled, the final score is one win (Yee for the public, Lucas for the private), one loss (Lucas for the public, Yee for the private), and one nondecision (PFZ). For those who have long waited for a dramatic signal from the Court that the days of toleration of the abuse of private property are over, this reckoning was disappointing. The tally was equally frustrating for their counterparts, who hoped that the less conservative members of the Rehnquist Court would halt Justice Antonin Scalia's "Lochner-izing" at the Nollans' dry sand property line.

11. See, e.g., Nolon, supra note 9, at 1-2 (footnotes omitted):
   The U.S Supreme Court granted certiorari during its 1991 term to review three decisions that riveted the attention of the land use bar. . . . Groups as diverse as the National Cattlemen's Association, the Property Rights Preservation Association, and the Pacific Legal Foundation urged the Court to decide for the property owner. Entities ranging from the Municipal Art Society of New York, the Sierra Club, and the American Planning Association argued in favor of the State of South Carolina.

   Although anticipated before its arrival, last term's decision in [Lucas] has been rightly regarded as anticlimactic. . . . [W]hat the Court gave with one hand, it took away with the other. . . . The proper status of permanent but partial restrictions on land use was not explicitly addressed, but these may now be regarded as legitimate and non-compensable exercises under the state police power. Yet even with total regulatory takings, Justice Scalia stopped short of embracing Lucas's theory that the total loss of beneficial use constitutes a per se compensable taking.

   The Nollan majority interpreted the Fifth Amendment's takings clause as requiring aggressive judicial scrutiny of police power regulations affecting fundamentally regarded rights in private property. . . . The deferential
who focused on this score, the 1991 October Term was no match for
the irony of Keystone (Pennsylvania Coal revisited),\textsuperscript{14} followed by the
didacticism of First English (putting the lie to metaphorical takings),\textsuperscript{15}
and capped off by the activism of Nollan (upping the nexus ante).\textsuperscript{16}
But, as in sports, this final score belies the true nature of the contest.

Each of these cases has added "law" to the takings field, through
the articulation of new principles, the exposition of additional clari-
fications and distinctions, or the refusal to expand doctrine in a new
direction. The exploration of these contributions—and not the detailed
exegesis of each set of opinions\textsuperscript{17}—is the focus of this part of the
article.

This writer has noted elsewhere that, since the Supreme Court
first placed its imprimatur on zoning in Village of Euclid v. Ambler
Realty Co.,\textsuperscript{18} "the typical land use dispute pits a disgruntled property

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\item discourse of [earlier Supreme Court cases] requiring that a land use ordinance
must be merely rationally related to a public purpose in order to avoid a
constitutional challenge was directly confronted and overcome by Justice
Scalia's full-scale revival of Lochnerian substantive due process analysis.
\item The Keystone majority took pains to distinguish the modern Subsidence
Act from the Kohler Act that had been struck down in Pennsylvania Coal. See
\item Until the issue was settled in First English, some commentators insisted
that Justice Holmes was speaking metaphorically in Pennsylvania Coal Co. v. Mahon,
260 U.S. 393, 415 (1922), when he said "if regulation goes too far it will be recognized
as a taking." See, e.g., Charles L. Siemon, Of Regulatory Takings and Other Myths,
\item See, e.g., DANIEL R. MANDELKER, LAND USE LAW § 2.23, at 44 (2d ed.
1988): "This holding [in Nollan] modifies previous taking doctrine. It means the
Court will apply a heightened standard of judicial review when it considers whether
governmental interests are advanced by a land use regulation." See also Jerold S.
Kayden, Land-Use Regulations, Rationality, and Judicial Review: The RSVP in the
\item It is hard for a lawyer—especially an academic one—to forego the oppor-
tunity that a law review article offers to point out the court's mistakes, educate
judges as to where to take this area of the law in the future, or interpret the most
disagreeable sections of the majority's opinion so narrowly that it would be nearly
impossible for a future court to make the same mistake. Indeed, this author has
done each of the above in print. See, e.g., Michael A. Wolf, Accommodating
Tensions in the Coastal Zone: An Introduction and Overview, 25 NAT. RESOURCES
J. 7, 16-19 (1985); Michael A. Wolf, Three Strikes But Not Out: Hamilton Bank and
the Takings Question, FLA. B. J., May 1986, at 65. Still, the overriding purpose of
this Article—to consider the Supreme Court's recent regulatory takings offerings as
tools for those advocates conducting the ongoing legal debate between regulators and
private property owners—militates against the most abstract indulgence.
\item 272 U.S. 365 (1926).
\end{itemize}
owner . . . against the public zoning decision makers who have failed to appreciate the extent of the economic harm caused by their acts or failures to act.' 19 This paradigm, which applies as well in cases involving nonzoning land-use restriction and modern environmental regulations, holds for each of the cases discussed in this article. Thus, we can reduce the germane variables for the conflicts studied here to three: (1) "private use," that is, the nature of the landowner's activities (actual or proposed) on the regulated realty; (2) "public regulation," that is, the nature (ends and means) of the governmental restriction; and (3) "legal outcome," that is, the conclusion of the highest court considering the matter as to the legitimacy of the public regulation (on its face or as applied to the private use).

A. LUCAS: ONCE MORE ONTO THE BEACH

The three variables in Lucas are quite similar to those found in the most controversial opinion presented by the Court during Takings Term I: Justice Scalia's offering in Nollan. As in that California-based dispute, the private use in Lucas was beachfront residence. Unlike the Nollans, 20 however, Lucas did not defy the challenged public regulation—South Carolina's Beachfront Management Act, 21 a coastal preservation measure that outlawed nearly all new construction on specially protected parcels. 22 In common with the Nollans, however, the legal outcome of Lucas's challenge was a finding that the public regulation violated the Takings Clause of the Fifth Amendment 23 as applied to the petitioner's private use. In other words, like the

20. See Nollan v. California Coastal Comm'n, 483 U.S. 825, 829-30 (1987): "The Commission appealed to the California Court of Appeal. While that appeal was pending, the Nollans satisfied the condition on their option to purchase by tearing down the bungalow and building the new house, and bought the property. They did not notify the Commission that they were taking that action."
22. See Nollan, 112 S. Ct. at 2889-90 (footnote and citation omitted): "[U]nder the Act construction of occupiable improvements was flatly prohibited seaward of a line drawn 20 feet landward of, and parallel to, the baseline. The Act provided no exceptions."
Nollans, Lucas was successful in convincing the Court that the state had (most likely) overstepped its bounds.

Four aspects of Lucas are especially worthy of close study by those seeking guidance for similar conflicts in the future: the total taking allegation, the Court’s choice of a categorical methodology, the articulation of a nuisances-plus exception, and Justice Scalia’s invitation to reopen the parcel-as-a-whole debate.

1. A Total Taking

According to the state trial court, the South Carolina Court of Common Pleas, "Lucas’s two beachfront lots [were] rendered valueless by respondent’s enforcement of the coastal-zone construction ban." Scalia, speaking for a bare majority of five Justices, accepted this finding over the Council’s objections and despite the misgivings of the other four Justices. Justice Kennedy, though he concurred in the decision to remand the case to the state courts, deemed the trial court’s conclusion on value "a curious finding." To support his conclusion that "the writ of certiorari [was] granted improvidently," Justice Souter characterized the finding as "highly questionable," particularly in the light of the Court’s takings precedent. In his dissent, Justice Stevens’s skepticism was palpable as he noted that "on the present record it is entirely possible that petitioner has suffered no injury-in-fact even if the state statute was unconstitutional when he filed this lawsuit." Justice Blackmun, also in dissent, went even further as he applied the label "almost certainly erroneous" to the finding that the property had lost all economic value. The finding

24. The “most likely” was removed by the South Carolina Supreme Court on remand, as that court could find no common-law-based rationale for the total taking. See Lucas v. South Carolina Coastal Council, 424 S.E.2d 484, 486 (S.C. 1992): "Coastal Council has not persuaded us that any common law basis exists by which it could restrain Lucas’s desired use of his land; nor has our research uncovered any such common law principle." The case was then sent back down to the circuit court for a determination of "actual damages Lucas ha[d] sustained as the result of his being temporarily deprived of the use of his property."


26. Because the Council did not challenge the finding of no value in its Brief in Opposition to Lucas’s Petition for Certiorari, and because the state supreme court assumed no value as well, the Court would not hear the argument raised in the Brief for Respondent that that finding was erroneous. Id. at 2996 n.9.

27. Lucas, 112 S. Ct. at 2903 (Kennedy, J., concurring in the judgment).

28. Id. at 2925 (Souter, J., separate statement).

29. Id. at 2917-18 (Stevens, J., dissenting).

30. Id. at 2908 (Blackmun, J., dissenting).
was not only controversial but also noteworthy in other respects.

First, public sector advocates frightened by the holding of the *Lucas* Court can find solace in the fact that the occasions in which government deprives landowners of all value are, in Scalia's words, "relatively rare situations." The great bulk of disputes concerning restrictive land-use and environmental regulations involves alleged deprivations of most, but not all, of the value held by the affected landowner. Even after the *Lucas* opinion was announced, landowners have had a difficult time convincing courts that they have suffered a total deprivation at the hands of government officials.

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31. Id. at 2894.

32. See, e.g., Richard J. Lazarus, *Putting the Correct Spin on Lucas*, 45 STAN. L. REV. 1411, 1427 (footnote omitted): "because environmental protection laws almost never result in total economic deprivations, that categorical presumption will rarely apply. Instead the negative implication of the category's nonapplicability will dominate the lower courts' taking analysis."

33. In the relatively short time since the *Lucas* decision was announced, several state and federal courts have cited the case in regulatory takings challenges. In the following cases, the courts refused to find that the challenged public regulation effected a taking: McAndrews v. Fleet Bank of Massachusetts, 989 F.2d 13 (1st Cir. 1993), *affirming* McAndrews v. New Bank of New England, 796 F. Supp. 613 (D. Mass. 1992) (Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) provision preventing lessor from terminating lease with bank in receivership); Reahard v. Lee County, 968 F.2d 1131 (11th Cir. 1992) (county designation of property as resource protection area); Azul Pacifico, Inc. v. City of Los Angeles, 973 F.2d 704 (9th Cir. 1992) (vacancy provision in mobile home rent control ordinance); Carpenter v. Tahoe Regional Planning Agency, 804 F. Supp. 1316 (D. Nev. 1992) (regional planning authority's 8-month moratorium on new construction banning single-family residential use); Naegle Outdoor Advertising, Inc. v. City of Durham, 803 F. Supp. 1068 (M.D. N.C. 1992) (city ordinance prohibiting commercial, off-premises advertising signs after expiration of amortization period); Burns Harbor Fish Co., Inc. v.Ralston, 800 F. Supp. 722 (S.D. Ind. 1992) (ordinance banning gill net fishing); Presault v. United States, 27 Fed. Cl. 69 (1992) (National Trail Systems Act postponed reversioners' use of former railroad rights-of-way); Tabb Lakes, Inc. v. United States, 26 Cl. Ct. 1334 (1992) (jurisdictionally invalid cease and desist order by Army Corps of Engineers suspending construction on property found to contain wetlands); Tampa-Hillsborough County v. A.G.W.S., 608 So. 2d 52 (Fla. Dist. Ct. App. 1992) (temporary limitation of landowners' development opportunities caused by reservation map); Iowa Coal Mining Co. v. Monroe County, 494 N.W.2d 664 (Iowa 1993) (zoning ordinance prohibiting use of strip mining property as solid waste landfills); Fitzgarrald v. City of Iowa City, 492 N.W.2d 659 (Iowa 1992) (ordinance preventing construction from penetrating specified zone surrounding municipal airport); Wilson v. Commonwealth, 597 N.E.2d 43 (Mass. 1992) (destruction of property by natural forces, while administrative procedure preventing construction of revetment follows its normal, reasonable course); Woodbury Place Partners v. Woodbury, 492 N.W.2d 258 (Minn.App. 1992) (interim development moratorium); Smith v. Town
Second, by accepting the conclusion that the state had deprived Lucas "of all economically beneficial use," the majority felt justified in addressing the character of the "harmful or noxious uses" exception to the general prohibition against uncompensated total takings. A finding of anything less than total deprivation would have thrown Lucas's case into the "ad hoc, factual inquiries" analysis typified by the Court's opinion in *Penn Central Transportation Co. v. New York City.*

Because the majority left undisturbed the state courts' finding of no value, Scalia felt obligated to explore the extent of the noxious use exception. According to the Council, the environmental protection goals of the Beachfront Management Act, goals that even Lucas

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of Wolfeboro, 615 A.2d 1252 (N.H. 1992) (invalidated planning board's reconfiguration that prevented residential use of lot); Matter of Plan for Orderly Withdrawal, 609 A.2d 1248 (N.J. 1992) (State Insurance Commission requirement that affiliates of insurer forfeit licenses upon insurer's withdrawal from market); Bernardsville Quarry v. Bernardsville Borough, 608 A.2d 1377 (N.J. 1992) (ordinance imposing licensing requirements for quarry operations and limiting the depth to which property can be quarried). In only two cases have the courts seriously considered the possibility of a total taking. See Berrios v. City of Lancaster, 798 F. Supp. 1153 (E.D. Pa. 1992) (though condemnation of leased property amounted to total destruction of plaintiffs' leasehold interest, month-to-month lease did not constitute a distinct investment-backed expectation sufficient to require compensation); Powers v. Skagit County, 835 P.2d 230 (Wash. Ct. App. 1992) (case remanded to determine if total deprivation occurred).

35. Id. at 2897.
36. See id. at 2896-97 (citations omitted): "In the [state supreme] court's view, these concessions brought petitioner's challenge within a long line of this Court's cases sustaining against Due Process and Takings Clause challenges the State's use of its 'police powers' to enjoin a property owner from activities akin to public nuisances."


[Justice Stevens'] 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, "the 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.

38. Perhaps the strongest part of the *Lucas* decision is Scalia's deconstruction of the "harm-preventing"/"benefit-conferring" distinction. See Lucas, 112 S. Ct. at 2897-99.

conceded were legitimate,40 excused the drastic diminution in value of Lucas's two lots; the state supreme court agreed.41 Scalia was not as easily convinced.

2. A Categorical Approach

In his majority opinion, Scalia placed total deprivation cases in a separate category, distinct from the Penn Central-type weighing of multiple factors42 and, despite some similarities, from the "categorical treatment"43 used in physical occupation cases such as Loretto v. Teleprompter Manhattan CATV Corp.44 In what is probably the most controversial part of his opinion,45 Scalia cites four cases to support the explication of what he asserts is an existing category of per se takings:46 Agins v. City of Tiburon,47 Hodel v. Virginia Surface Mining & Reclamation Association, Inc.,48 Keystone, and Nollan. On closer inspection, however, none of the four directly calls for the categorical treatment of "no value" takings that is central to the majority's holding.

The General Assembly finds that:

(1) The beach/dune system along the coast of South Carolina is extremely important to the people of this State and serves the following functions:

   (c) provides habitat for numerous species of plants and animals, several of which are threatened or endangered. Waters adjacent to the beach/dune system also provide habitat for many other marine species;
   (d) provides a natural health environment for the citizens of South Carolina to spend leisure time which serves their physical and mental well-being.

(2) Beach/dune system vegetation is unique and extremely important to the vitality and preservation of the system.

(3) Many miles of South Carolina's beaches have been identified as critically eroding. . .

41. Id. at 901.
43. Lucas, 112 S. Ct. at 2893.
44. 458 U.S. 419 (1982).
45. See, e.g., Lucas, 112 S. Ct. at 2909 (Blackmun, J., dissenting) (The majority "takes the opportunity to create a new scheme for regulations that eliminate all economic value."); Epstein, supra note 12, at 1369 n.4 (citation omitted) ("The constitutional pedigree of [Scalia's] nuisance test is not always clear.")
46. Lucas, 112 S. Ct. at 2893-94.
47. 447 U.S. 255 (1980).
In none of the four cases cited did the Court conclude that the government had totally deprived the landowner of value. In fact, in three of the cases—Agins, Hodel, and Keystone—the Court did not even find that a taking had occurred. Thus, the statements in these cases concerning total deprivation are dicta.

Also problematic is Scalia's use of the takings formulation first offered by Justice Powell in Agins: “As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation 'does not substantially advance legitimate state interests or denies an owner economically viable use of his land.'” Actually, in Lucas, as in Nollan, Scalia exaggerated the pedigree and expanded the scope of this two-prong test.

First, the “numerous occasions” on which the Court used the Agins formulation total but eight, including Powell’s Agins opinion and one dissent. In only one of those cases, Nollan, did the Court find that a taking had occurred because the “substantially advance” prong had not been satisfied. Second, in Agins, Justice Powell stated that the two-prong formulation came into play in cases involving “[t]he application of a general zoning law to particular property.” In fact, the two cases cited by Powell were landowner challenges to

49. See, e.g. Keystone, 480 U.S. at 499; Agins, 447 U.S. at 262.
52. See Nollan v. California Coastal Comm’n, 483 U.S. 825, 834 (1987) (quoting Agins, 447 U.S. at 260): “We have long recognized that land use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.'” The period of “long recognition” was at most nine years, the period between Nollan (1987) and Penn Central (1978), the case cited in Agins as the source of the “economically viable use” prong.
54. Actually, this part of Nollan could be read as dictum (that is, language that is not necessary for the resolution of the case before the court), for Scalia notes that, even under the rational basis test insisted upon by the coastal commission, the condition failed. See Nollan, 483 U.S. at 837. See also Kayden, supra note 16, at 313-14.
55. Agins, 447 U.S. at 260 (emphasis added).
local government restrictions (use zoning in *Nectow v. City of Cambridge* and historic preservation in *Penn Central*). In *Nollan*, Scalia expanded this to cases challenging all "land use regulation" by local and state officials, more specifically, a state coastal commission's conditional approval of a landowner's construction plans. By the time Lucas's challenge reached the Court, Scalia had expanded the reach of the test to a state-mandated, environmentally based, beachfront protection scheme. Even as the majority extended the reach of the two-prong test, however, it held out slight hope for public officials that even a total deprivation could be justified.

3. Or Is It Noncategorical?: The Nuisances-Plus Exception

While Scalia's method in *Lucas* is categorical in the sense that he identified a discrete classification for total takings cases, the other dictionary definition of categorical ("Being without exception or qualification; absolute." ) is not satisfied. The majority concedes that there is an exception, though arguably a small one, in the "confiscatory regulations" category:

Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that the background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.

Stated otherwise, if, before the challenged public regulation has gone into effect, there already exists a valid, common law restriction on the property that would prohibit the same activities as the challenged public regulation, then even a total deprivation would be permissible.

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58. *Nollan*, 483 U.S. at 834.
62. *Id.* (footnote omitted).
Of course, the most intriguing questions posed by *Lucas* concern the nature and extent of this exception. The Court tells us that this "nuisances-plus" exception encompasses private nuisance, public nuisance, and other restrictions, and that "[t]he fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common law prohibition . . . ." Still, the Court's conception of these common law restrictions is not static for, as Scalia notes, "changed circumstances or new knowledge may make what was previously permissible no longer so." Therefore, two sets of circumstances remain in which total uncompensated deprivations will not constitute a taking: (1) situations in which the challenged public regulation merely restates preexisting common law principles (we can call this "redundant regulation") and (2) situations in which the challenged public regulation is a statutory response to "changed circumstances or new knowledge" that could have been addressed by common law devices (we can label this "responsive regulation").

The Court provides an example of each. For redundant regulation, we have "the owner of a lake bed [who] is denied the requisite permit to engage in landfilling operations that would have the effect of flooding others' land." As an illustration of responsive regulation, we have "the corporate owner of a nuclear generating plant, when it is directed to remove all improvements from its land upon discovery that the plant sits astride an earthquake fault." As for Lucas himself, the Supreme Court remanded the case back to the state court that had not yet engaged in Scalia's categorical treatment (with its exceptions). Unlike the remand in *First English*, however, the state court in *Lucas* was not given the opportunity to reconsider the total takings allegation for, as noted above, the five-member majority considered that key issue as settled.

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63. In footnote 16, Scalia gives examples of that other: "litigation absolving the State (or private parties) of liability for the 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." *Lucas*, 112 S. Ct. at 2900 n.16 (quoting Bowditch v. Boston, 101 U.S. 16, 18-19 (1880)).
64. *Lucas*, 112 S. Ct. at 2901.
65. *Id.* (citing *RESTATEMENT (SECOND) OF TORTS* § 827, cmt. g (1979)).
67. *Id.*
4. Parcel-as-a-Whole Revisited

The finding of no value, however, did not stop the Lucas Court from offering dictum on the nature of a total taking. Scalia uses his seventh footnote to remind his reader that the Justices are still not in accord concerning the “parcel as a whole test” articulated by Justice Brennan in Penn Central.71 Chief Justice Rehnquist’s dissent in that case and in his Keystone dissent challenged the denominator, in the ratio of post-regulation value over pre-regulation value, used by the majority of Justices who had concluded that the historic preservation and coal-mining regulations did not result in total deprivations. Rehnquist was concerned that Penn Central’s air rights and the coal companies’ “coal in place” and support estate may have been rendered worthless after the public regulations went into effect.

70. See Lucas, 112 S. Ct. at 2894 n.7 (citations omitted):
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. . . . Unsurprisingly, this uncertainty regarding the composition of the denominator in our “deprivation” fraction has produced inconsistent pronouncements by the Court. . . .

“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 parcel as a whole . . . .

72. See Penn Central, 438 U.S. at 149 n.13 (citation omitted) (Rehnquist, J., dissenting):
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 . . . , 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.

73. See Keystone Bituminous Coal Ass’n v. DeBenedictis, 480 U.S. 470, 517 (1987) (Rehnquist, C.J., dissenting): “in this case, enforcement of the Subsidence Act and its regulations will require petitioners to leave approximately 27 million tons of coal in place. There is no question that this coal is an identifiable and separable property interest.” See also id. at 519 (Rehnquist, C.J., dissenting): “I see no reason for refusing to evaluate the impact of the Subsidence Act on the support estate alone, for Pennsylvania has clearly defined it as a separate estate in property.”
The determination of the denominator of the takings fraction, what Margaret Jane Radin has called “conceptual severance,”74 is probably the major battleground for future takings cases as they work their way through the appellate system of the federal and state courts.75 The debate over the nature of the property affected by the public regulation concerns not only total takings cases but also the more common cases involving less-than-total regulatory takings in which the courts rely on “ad hoc, factual inquiries.”76 Footnote seven is welcome encouragement to those advocates of private use in pending and future disputes over public regulation.

B. YEE: NOT A COMPELLING CASE

Rent control has been the target of disgruntled private property owners for decades77 and the Takings Clause has often been the legal weapon of choice.78 Despite this relentless assault, however, state-sanctioned schemes for limiting the rents and other benefits conferred upon landlords have survived a number of challenges that have reached the Supreme Court.79

Opponents of rent control were not the only interested observers when the Supreme Court agreed to hear a challenge to Escondido, California’s mobile home rent control ordinance, a public regulation

74. See Margaret Jane Radin, The Liberal Conception of Property: Cross Currents in The Jurisprudence of Takings, 88 COLUM. L. REV. 1667, 1676 (1988): [Conceptual severance] consists of delineating a property interest consisting of just what the government action has removed from the owner, and then asserting that that particular whole thing has been permanently taken. Thus, this strategy hypothetically or conceptually “severs” from the whole bundle of rights just those strands that are interfered with by the regulation, and then hypothetically or conceptually construes those strands in the aggregate as a separate whole thing.
75. See infra notes 212-24 and accompanying text.
76. See Penn Central, 438 U.S. at 124.
79. See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 440 (1982) (citations omitted): “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.”
that, according to the petitioners, "when viewed against the backdrop of California's Mobilehome Residency Law, amounts to a physical occupation of their property entitling them to compensation . . . ."  

Landowners' attorneys and other champions of private use saw Yee as an opportunity for the Court to signal that its opinion in Loretto should not be restricted to its facts. In other words, the per se physical occupation test could be applied in cases of constructive occupation by the government. The Yees' unsuccessful attack on the City of Escondido's mobile home rent control scheme was an attempt to expand the scope of the Court's holding in Loretto, a 1982 case in which the Court found that an illegal taking by physical occupation had been effected by cable boxes and cables placed on and inside Loretto's apartment building.  

Our attention is particularly drawn to two elements of the decision. In a majority opinion penned by Justice Sandra Day O'Connor, the Court refused to accept petitioners' invitations to expand the reach of Loretto or to evaluate the Yees' challenge under the alternative, Penn Central-based analysis.

1. Getting Physical

The Yees claimed that the combination of state and local mobile home regulation placed them in a severe financial bind. A California law "limit[ing] the bases upon which a park owner may terminate a mobile home owner's tenancy," coupled with the Escondido ordinance "set[ting] rents back to their 1986 levels, and prohibit[ing] rent increases without the approval of the City Council," constituted government-sponsored occupation of the Yees' mobile home pads. Justice O'Connor summarized the petitioners' arguments and conclusions in the following manner:

Park owners may no longer set rents or decide who their tenants will be. As a result, . . . any reduction in the rent for a mobile home pad causes a corresponding increase in the value of a mobile home, because the mobile home owner now owns, in addition to a mobile home, the right to occupy a pad at a rent below the value that would be set by the free market. Because . . . the park owner cannot evict a mobile home

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82. Yee, 112 S. Ct. at 1526 (citing Mobilehome Residency Law, CAL. CIV. CODE § 798.56 (West 1982 & Supp. 1991)).
83. Yee, 112 S. Ct. at 1527 (citing Escondido Ordinance § 4(g)).
owner or easily convert the property to other uses, the value thus represents the right to occupy the pad at below-market rent indefinitely. And because the [state law] permits the mobile home owner to sell the mobile home in place, the mobile home owner can receive a premium from the purchaser corresponding to this increase in value. As a result, the rent control ordinance has transferred a discrete interest in land—the right to occupy the land indefinitely at a sub-market rent—from the park owner to the mobile home owner. Petitioners contend that what has been transferred from park owner to mobile home owner is no less than a right of physical occupation of the park owner's land.

Despite contrary holdings from two federal circuits, the Court refused to stretch *Loretto* this far.

The critical element of compulsion was missing in the Yees' case for, as O'Connor noted, "[t]he government effects a physical taking only where it requires the landowner to submit to the physical occupation of his land." Because the Yees voluntarily entered the mobile home pad rental business and because state and local laws did not force them to stay in business, the Justices could conclude that, unlike in *Loretto*, "no government has required any physical invasion of petitioners' property." With the physical occupation argument removed, the Yees attempted to shift their strategy by alleging that a regulatory taking had occurred. Although the Court identified some of the factors that might be appropriate to the “ad hoc, factual inquiries” in a less-than-total, regulatory takings case, prudence dictated that judicial resolution of those issues would have to await a subsequent court action.

2. Reserving the Question Asked Too Late

The Supreme Court was primarily interested in the Yees' case because of the apparent conflict between the law in California state

84. *Yee*, 112 S. Ct. at 1528 (citation omitted).
86. *Yee*, 112 S. Ct. at 1528.
87. *Id.*
88. *See id.* at 1530 (wealth transfer to mobile home owner who sells home, deprivation of park owner’s right to exclude).
courts and two federal circuits, including the federal circuit that was responsible for California. The Court agreed to hear arguments on only two of petitioners’ questions.89 The takings question referred specifically to decisions that had attempted to extend _Loretto:_

Two federal courts of appeal have held that the transfer of a premium value to a departing mobilehome tenant, representing the value of the right to occupy at a reduced rate under local mobilehome rent control ordinances, constitute[s] an impermissible taking. Was it error for the state appellate court to disregard the rulings and hold that there was no taking under the fifth and fourteenth amendments?90

The Court, citing Supreme Court Rule 14.1(a) and the rule’s promotion of fairness to the respondent and judicial efficiency,91 found it imprudent to entertain any non- _Loretto,_ regulatory takings arguments.92

The rule instructs the Justices to consider “[o]nly the questions set forth in the petition, or fairly included therein . . . .”93 O’Connor’s logic tracks well with the categorical approach used several weeks later by Justice Scalia in _Lucas._ She characterized the regulatory takings issue as “related to . . . and perhaps complementary to” the question offered by the Yees but not “fairly included therein.”94 “Consideration of whether a regulatory taking occurred,” O’Connor reasoned, “would not assist in resolving whether a physical taking occurred as well; neither of the two questions is subsidiary to the other. Both might be subsidiary to a question embracing both—Was there a taking?—but they exist side by side, neither encompassing the other.”95 Table I is a graphic representation of O’Connor’s point.

The Court’s refusal to answer the regulatory takings question in _Yee_ is a two-part warning to future litigants in cases alleging violations of the Takings Clause occasioned by public regulation. Those advocating private use are cautioned to cover all of the relevant bases and to encourage judges to move from one takings category to the other.

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90. _Yee_, 112 S. Ct. at 1533 (quoting Petition for Certiorari, at i) (alteration in original).
91. _Yee_, 112 S. Ct. at 1532-33 (citing Sup. Ct. R. 14.1(a)).
92. _Yee_, 112 S. Ct. at 1533.
93. _Id._ at 1532 (quoting Sup. Ct. R. 14.1(a)).
94. _Yee_, 112 S. Ct. at 1533.
95. _Id._ (citations omitted).
TABLE I
A Takings Schematic

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<table>
<thead>
<tr>
<th>Condition</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Condemnation</td>
<td>A</td>
</tr>
<tr>
<td>Inverse Condemnation</td>
<td>B</td>
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<tr>
<td>Regulatory Taking</td>
<td>C</td>
</tr>
<tr>
<td>Compelled Physical Occupation</td>
<td>D</td>
</tr>
</tbody>
</table>

C See, e.g., San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 638 n.2 (Brennan, J., dissenting): "The phrase 'inverse condemnation' generally describes a cause of action against a government defendant in which a landowner may recover just compensation for a 'taking' of his property under the Fifth Amendment, even though formal condemnation proceedings in exercise of the sovereign's power of eminent domain have not been instituted by a government entity."
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until the court either finds a violation\footnote{See, e.g., Richardson v. City and County of Honolulu, 802 F. Supp. 326, 332-38 (D. Haw. 1992) (ordinance imposing ceiling on renegotiated lease rents for condominium units was not physical occupation taking, but was regulatory taking).} or is convinced that the government has avoided all of the takings pitfalls.\footnote{See, e.g., Sandpiper Mobile Village v. City of Carpinteria, 12 Cal. Rptr. 2d 623, 625-27 (Ct. App. 1992) (mobile home rent control ordinance neither physical occupation nor regulatory taking); Manocherian v. Lenox Hill Hospital, 586 N.Y.S.2d 726, 731-34 (Sup. Ct. 1992) (statute requiring landlords to provide renewable leases neither physical occupation nor regulatory taking).} The warning to public sector advocates is more specific. The Yee Court held open the possibility that, in future cases, the Justices might find wealth-shifting regulations to be regulatory takings, even if the property owners hurt by the government restriction were not compelled to engage in regulated conduct.\footnote{Compare Colony Grove Association v. City of Carson, 14 Cal. Rptr. 2d 849, 850-53 (Ct. App. 1992) (complaint alleges facts that could establish that mobile home rent control ordinance effect was regulatory taking) with Southview Associates, Ltd. v. Bongartz, 980 F.2d 84, 92-95 (2d Cir. 1992) (no government compulsion for residential subdivision developer denied land-use permit). See also Presault v. United States, 27 Cl. Ct. 69, 95 (1992) (applying \textit{Penn Central} analysis to temporary physical occupation effect by National Trails Act).} In other words, the Court’s deference to public regulators does have its limits.

C. \textit{PFZ: LOCHNER\textsuperscript{TM} STAYS BURIED}

For a time, the extreme deference granted government officials regulating the use of land seemed in jeopardy during Takings Term II.\footnote{The Yees actually hoped to raise two alternative arguments once the physical occupation theory was rejected: "a denial of substantive due process and a regulatory taking." As the due process argument was not even raised or addressed below, the Court dismissed it in passing. \textit{Yee}, 112 S. Ct. at 1531. See Joseph L. Sax, \textit{Property Rights and the Economy of Nature: Understanding} Lucas v. South Carolina Coastal Council, 45 \textit{STAN. L. REV.} 1433, 1433-34 (footnote omitted):

The Court granted certiorari on several potentially far-reaching issues, among them whether the ordinance denied the landowner substantive due process. Had Yee prevailed on that ground, it would have portended greatly increased judicial involvement in property cases, opening an opportunity for courts to overturn legislative judgments in ways that have not been seen since the era of \textit{Lochner v. New York}. As Professor Sax notes, \textit{id.} at 1434 n.7, Justice Stevens, in his \textit{Lucas} dissent, accused the majority of "denying the legislature much of its traditional power to revise the law governing the rights and uses of property," thus turning the clock back to the \textit{Lochner} era. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2921 (1992) (Stevens, J., dissenting).} By the time the term ended, however, the Court had passed up
the opportunity to climb back up the slippery slope of substantive due process in order to protect private use even more strongly.

In PFZ, a developer's three-part challenge was whittled down to one issue by the Court: the allegation that the refusal of the Regulations and Permits Authority of the Commonwealth of Puerto Rico (ARPE) to process PFZ's construction drawings for a hotel and residential development project violated PFZ's rights to substantive due process. Following oral argument, however, the Justices chose not to second-guess local regulators, adhering instead to the Euclidian deference to which we have grown so accustomed in the land-use field.

Two aspects of PFZ are most noteworthy: first, the presentation of, and reaction to, PFZ's assertion of a constitutionally protected right to use real property; and second, the abruptness with which the Court rejected a landowner's invitation to depart from decades of deference and restraint in the area of private use regulation.

1. An Appealing Argument—At First

To attract the attention of the United States Supreme Court is no mean feat, especially now, as the Rehnquist Court has moved to


102. See Brief of Petitioner at i, PFZ Properties, Inc. v. Rodriguez, 112 S. Ct. 1151 (1992) (No. 91-122): "Whether an arbitrary, capricious or illegal denial of a construction permit to a developer by officials acting under color of state law can state a substantive due process claim."


If these reasons [supporting Euclid's zoning scheme] ... do not demonstrate the wisdom or sound policy in all respects of those restrictions which we have indicated as pertinent to the inquiry, at least, the reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.

See also Donald G. Hagman & Julian Conrad Juergensmeyer, Urban Planning and Land Development Control Law § 10.2, at 297 (2d ed. 1986) (footnote omitted): "[Euclid] was the Supreme Court's first chance to apply substantive due process to a land use regulatory scheme. ... The four-fold diminution in the landowner's property value was simply the avoidable consequence of the police power function. Regrettable, perhaps, but not actionable. Euclid, quite simply, opened the doors to everything land use control law is today."
reduce the Justices’ caseload. In its Petition for Writ of Certiorari, PFZ depicted a tale of frustration and betrayal at the hands of inept and malicious planning officials.

The tale of woe began in May of 1976 with the planning board’s adoption of “a resolution approving a development project” followed by an unsuccessful challenge carried to the Supreme Court of Puerto Rico in 1978, ARPE approval of plans for the first phase of the project and PFZ’s submission of construction drawings in 1981, six years of official inaction by ARPE during which time PFZ alleges that ARPE officials and the governor obstructed progress on the development, culminating in PFZ’s filing of an original complaint in federal district court in December of 1987. Eight months later, ARPE notified PFZ that the developer “would not receive a construction permit, because its project had ceased to have effect,” a decision that PFZ unsuccessfully attempted to have the courts of Puerto Rico review. PFZ’s amended complaint followed in October 1988; it was dismissed by the district court and the First Circuit affirmed the dismissal.

Although allegations of government caprice and arbitrariness are serious, they are by no means unfamiliar to the Court for, on several recent occasions, the Justices have allowed similar claims to die in the lower courts. Most likely, the Court’s attention was caught by PFZ’s allegation that the First Circuit was out of step with the majority of federal circuit courts that had addressed the question of whether a developer’s substantive due process rights are violated by the arbitrary and capricious denial of a permit.
PFZ asserted that courts in at least eight other circuits had "reached an opposite conclusion from the First Circuit."112 PFZ maintained that the maverick court had held "that rejections of development projects and refusals to issue building permits, even if malicious, in bad faith and for invalid or illegal reasons, cannot implicate substantive due process, unless the improper motivation is accompanied by the deprivation of another specific constitutional right."113 While PFZ's characterization of the First Circuit's hard-line position is subject to debate,114 the Court seized the opportunity, at least temporarily, to resolve the apparent split among the circuits and to provide some guidance for litigants confused by the relationship between regulatory takings and due process violations.115

The Court's decision to hear arguments only on "[w]hether an arbitrary, capricious or illegal denial of a construction permit to a developer by officials acting under color of state law can state a substantive due process claim under 42 U.S.C. § 1983"116 posed strategic difficulties for PFZ. Without a procedural due process claim in reserve, PFZ's attorneys devoted a good deal of their argument to the articulation and defense of a landowner's constitutionally protected "Right to Devote Private Property to a Legitimate Use."117

"THE PETITION SHOULD BE GRANTED TO RESOLVE THE SPLIT OF AUTHORITY IN THE CIRCUIT COURTS ON THE ISSUE OF WHETHER THE ARBITRARY AND CAPRICIOUS DENIAL OF A CONSTRUCTION PERMIT TO A DEVELOPER CAN EVER CONSTITUTE A SUBSTANTIVE DUE PROCESS VIOLATION."

112. Id.
113. Id. (citing Chiplin Enterprises, Inc. v. City of Lebanon, 712 F.2d 1524, 1528 (1st Cir. 1983).
114. First, the judges of the First Circuit are not as callous as PFZ would have the Court believe, as they foreclose substantive due process relief only when adequate state remedies exist. See Chiplin Enterprises, Inc. v. City of Lebanon, 712 F.2d 1524, 1528 (1st Cir. 1983): "A mere bad faith refusal to follow state law in such local administrative matters simply does not amount to a deprivation of due process where the state courts are available to correct the error." Second, even the renegade circuit acknowledges that planning conflicts that are "tainted with fundamental procedural irregularity, racial animus, or the like" do not fit the description of the "run of the mill dispute between a developer and a town planning agency" that would not engender substantive a due process violation. Creative Environments, Inc. v. Estabrook, 680 F.2d 822, 833 (1st Cir.), cert. denied, 459 U.S. 989 (1982) (emphasis added).
115. See Pearson v. City of Grand Blanc, 961 F.2d 1211, 1214 (6th Cir. 1992): "Our research . . . reveals the circuits to be deeply divided concerning the theories to be employed in federal court cases challenging zoning."
In the summary of their argument, PFZ's attorneys alleged that the First Circuit "ignored this Court's recognition that the legitimate use of private property is a protected constitutional right." Later in its brief, PFZ identified the chief source of that claimed right to be the Supreme Court's holding in *State of Washington, ex rel. Seattle Title Trust Co. v. Roberge*:

The rights protected by substantive due process are not limited solely to fundamental rights. The Due Process Clause protects against the deprivation of other rights implicating "life, liberty, or property," as well. Thus, within the context of substantive due process, this Court has expressly recognized that the right of a landowner "to devote its land to any legitimate use is property [sic] within the protection of the Constitution."

Actually, the quotation should read "properly within the protection of the Constitution." Though slight and understandable, PFZ's error is not benign, however, for it might give the reader the impression that this "right" is more directly tied to the Fourteenth Amendment's "life, liberty, and property" formulation than intended by the *Roberge* Court. PFZ did not allege that this right was a fundamental one that warranted the Court's strict scrutiny but that it was an otherwise constitutionally protected right "implicating 'life, liberty, or property.'" The mistake in the quotation strengthens PFZ's position that property is "implicated" and, thus, that substantive court review, focused on the legitimacy of ARPE's actions and not the fairness of the process, would be in order.

During oral argument, PFZ's attorney repeated the misquotation when asked by one of the Justices, "Is the question open in this Court as to whether there is a property right under Puerto Rican law in the construction permit, or do we have to—is the only issue before

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118. *Id.* at 10.
119. 278 U.S. 116 (1928).
121. *Roberge*, 278 U.S. at 121 (emphasis added).
123. By cloaking that right in something even suggestive of fundamentality, PFZ seemed to be inviting the Justices to engage in the kind of means-end scrutiny that we identify with *Lochner* and the activism of the Court's conservative bloc in the 1920s and early 1930s. See, e.g., 2 Melvin I. Urofksy, *A March of Liberty: A Constitutional History of the United States* 616-32 (1988).
us if there is a property right, was it taken?" Counsel’s response compounds the error in the brief: “I think the only issue is . . . if there was a property right, was it taken. This Court has said in [Roberge] that the right to devote one’s land to a legitimate use is property within the protection of the Constitution.”

This exchange typifies the difficulties that the attorneys and the Court had in separating the procedural from the substantive due process claims. As the oral argument proceeded, the reasoning became even more convoluted, as Justice O’Connor observed, “It sounds like you’re trying to make a takings claim dressed up as a due process claim.” Counsel’s attempts to clarify that this was a due process “deprivation” claim and not a Fifth Amendment taking were swallowed up in the confusion. Forced to address the procedural/substantive distinction in the context of ARPE’s delays in processing PFZ’s development permit, petitioner’s counsel never even discussed the question of the alleged singularity of the First Circuit’s position.

Respondent’s counsel, whose oral argument proceeded without nearly as much interruption by the Justices, stated in summary of her argument that “if we don’t have a fundamental interest and if [PFZ] doesn’t have a liberty interest under the due process clause, then I don’t know what he has unless it is a claim that there has been

126. See Brief for Petitioner at 11, PFZ, 112 S. Ct. 1151 (1992) (No. 91-122) (citation and footnote omitted): “the Due Process Clause encompasses a guarantee of fair procedure. Thus, a § 1983 action may be brought to remedy a deprivation of life, liberty or property which occurs in violation of procedural due process. Such claims are evaluated on the basis of what process the state provides, and whether that process is itself constitutionally adequate.” In the footnote to this passage, PFZ notes, “The Court did not grant certiorari with respect to PFZ’s procedural due process claims; this discussion is solely for purposes of completeness.” Id. at 11 n.14. When one reviews PFZ’s versions of the facts, one should not be surprised that some of the Justices suspected that this was nothing more than a procedural due process dispute.

128. Id. at 19-20.
a wrongful adjudication of his claim, which sounds to me like procedural due process." Perhaps the Court agreed, because only twelve days later the Justices retracted their decision to hear PFZ's petition.

2. The Confusion Continues

PFZ's claim was not the only opportunity presented to the Court during the 1991 October Term to address the complexities of substantive due process in a "nonfundamental right" setting. On November 5, 1991, merely one week before PFZ's petition for certiorari was granted, the Justices heard oral argument in Collins v. City of Harker Heights. The resolution of that dispute provides some clues concerning the Court's abrupt about-face in PFZ.

Like PFZ, Collins, whose husband (a municipal sanitation worker) had "died of asphyxia after entering a manhole to unstop a sewer line," sought the Court's recognition that the public defendant had violated substantive due process rights under the Fourteenth Amendment. Specifically, the petitioner sought to convince the court "that the governmental employer's duty to provide its employees with a safe working environment is a substantive component of the Due Process Clause." The oral argument, held early in the Court's term, revealed the Justices' unwillingness to expand the constitutional basis for reviewing alleged abuses of government power. One Justice acknowledged that "our problem, [is] obviously, a reluctance to have an undifferentiated, broad-based substantive due process right under [section] 1983." Not surprisingly, on February 26, 1992, the same day as oral argument in PFZ, a unanimous Court joined in Justice Stevens's opinion.

129. Id. at 39.
133. Collins, 112 S. Ct. at 1064.
134. Id. at 1069.
135. Official Transcript Proceedings at 16, PFZ, 112 S. Ct. 1151 (1992) (No. 91-122). See also id. at 22-23: "QUESTION: Substantive due process is wonderful. It really—it—everything turns into a constitutional thing." Later, in response to respondent's counsel's assertion that "[s]ubstantive due process takes its position from context," Justice Scalia commented, "I guess I don't understand substantive due process at all." Id. at 44.
rejecting the constitutionally protected interest proffered by Collins.

The words used by the Court in refusing Collins's invitation to intervene did not bode well for PFZ's case:

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 uncharted area are scarce and open-ended. *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 225-226 (1985). The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field. 136

Despite some egregious facts, deference was still in order for, as Stevens pointed out, the Court's "refusal to characterize the city's alleged omission in this case as arbitrary in a constitutional sense rests on the presumption that the administration of Government programs is based on a rational decisionmaking process that takes account of competing social political, and economic forces." 137

Neither *Collins* nor PFZ will end the confusion over the nature and extent of substantive due process protections afforded by the Constitution as interpreted by the federal courts. A recent case from the Sixth Circuit skillfully addresses the often bewildering state of the law in the land-use regulatory area. In *Pearson v. City of Grand Blanc*, 138 a Section 1983 lawsuit "stemming from the routine denial of a zoning change," the court affirmed the trial court's grant of summary judgment but corrected the district court's conclusion "that all federal zoning cases should be treated as takings." 139 The appellate court's careful attempt to "collate the law on this subject [and] catalogue the various approaches" in federal courts serves as an important contribution to the judicial discourse on the regulation of private use and as hard evidence that this is a troubling area of the law that is likely to catch the Court's attention in a future dispute.


137. *Collins*, 112 S. Ct. at 1070 (citation omitted).


Current and future litigants would benefit from familiarizing themselves with the Pearson court’s six varieties of “federal zoning claims”: Just Compensation Takings, Due Process Takings, Arbitrary and Capricious Substantive Due Process, Equal Protection, Procedural Due Process, and First Amendment. Because, as in PFZ, the disgruntled landowner was alleging a substantive due process violation owing to the government’s arbitrary and capricious actions, the Pearson court devotes special attention to that category by sampling analyses and approaches from the various federal circuits. This review confirms, as PFZ’s counsel alleged in its original certiorari petition, that the lower federal courts are divided when it comes to determining the circumstances that would give rise to a substantive due process violation when the fairness of the procedures are not directly at issue.

As long as this split between circuits remains, as long as dissatisfied property owners bring their claims of arbitrary and capricious treatment to the federal courts, and as long as the temptation remains for Supreme Court Justices to invigorate efforts to protect private use by simply reciting language from some of the Court’s classic land-use cases, counsel will continue to raise substantive due process concerns in petitions for certiorari. Because there is little indication that any of these three contingencies will evaporate, we can look forward to a renewal of this debate in a future Supreme Court case.

140. Id. at 1215-16.
141. Id. at 1216. Although we might quibble with this list (for example, courts’ dissimilar treatments of free speech and religion cases might necessitate either new categories or, perhaps, subcategories), reviewing the Sixth Circuit’s compendium is still a very good start.
142. Id. at 1217.
143. Id. at 1217-19.
144. See id. at 1220 (footnote omitted): “The Supreme Court in recent years has at least thrice reaffirmed a general right of substantive due process, stating that the Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions ‘regardless of the fairness of the procedures used to implement them.’” In the omitted footnote, the court cited Zinemon v. Burch, 494 U.S. 113, 125 (1990) (quoting Daniels v. Williams, 474 U.S. 327, 331 (1986)), and Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 223-26 (1985). Pearson, 961 F.2d at 1220 n.47.
145. See, e.g., Nollan v. California Coastal Comm’n, 483 U.S. 825, 834-35 (1987) (citing Agins, Penn Central, and Euclid to support substantial nexus test). But see Nollan, 483 U.S. at 842 (Brennan, J., dissenting): “the court imposes a standard of precision for the exercise of a State’s police power that has been discredited for the better part of this century.”
III. Takings Law in Flux: Plotting Judicial Behavior

We would be rash to consider the latest Supreme Court takings offerings in a vacuum. Indeed, in the largely “ad hoc” world of takings, context is everything. Decisions in new cases depend not only on facts and circumstances but also on how the new takings jurisprudence builds on and relates to the old.

Each of the three cases we have studied so far, for example, can be linked with Supreme Court precursors. *Lucas*, in its invocation of nuisance law, recalls such classic cases as *Mugler v. Kansas*, 146 *Reinman v. City of Little Rock*, 147 and *Village of Euclid v. Ambler Realty Company*. 148 In *Yee*, the Court refused to distinguish or overrule precedents that had insulated rent control from constitutional challenge 149 and that had narrowly defined the category of *per se* takings effected through physical occupation. 150 The Court’s reconsideration of its decision to resolve PFZ’s substantive due process claim evokes memories of the “procedural tango” danced by the Justices during the early and mid-1980s when, in four consecutive cases, the Court found reasons not to confront the takings question head on. 151

We can establish even more direct ties from the questions left unanswered in the 1993 cases to the decisions making up the trilogy in Takings Term I. Justice Scalia’s concerns in *Lucas* over the parcel-as-a-whole test 152 are largely a response to the tension embodied in the contrasting calculations provided in Stevens’ and Rehnquist’s

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146. 123 U.S. 623, 669 (1887) (destruction of public nuisance not a taking).
147. 237 U.S. 171, 176 (1915) (within city’s police power to declare livery stable nuisance in fact).
148. 272 U.S. 365, 387-88 (1926) (“the law of nuisances . . . may be consulted . . . for the helpful aid of its analogies in the process of ascertaining the scope of, the [police] power”).
149. See supra note 78 and accompanying text.
151. See Haar & Wolf, supra note 10, at 902 (footnote omitted):
From 1980 to 1986, in a series of four cases that made their way ultimately to a decision by the Supreme Court, the Justices disappointed an ever-growing audience of practitioners, jurists, and academics awaiting a definitive answer to the regulatory takings puzzle—that is, whether and when governmental regulation can amount to a taking that requires compensation under the fifth amendment.
152. See supra notes 70-72 and accompanying text.
opinions in *Keystone*. The question of whether mobile home rent control regulations can effect a temporary regulatory taking would have been resolved in accordance with *First English*, which is the case that put an end to the procedural tango. PFZ's efforts to direct the Court's attention to the nexus between means and ends mirror Justice Scalia's incantation of the "substantially advance" formula that dates back to the days of *Euclid*. These are the ways that today's law of takings builds incrementally on the shifting foundation of the past.

Counsel representing public and private sector actors in disputes concerning land-use and environmental regulation, or those hoping to head off such disputes, are understandably confused by what appears to be a cacophony of judicial voices. Attempts to reconcile conflicting holdings are often unsatisfying as, for example, in the *Keystone* majority's efforts to distinguish Justice Holmes's chestnuts in *Pennsylvania Coal*. The ad hoc approach validated in *Penn Central* makes a lot of sense given the wide variety of regulations affecting property; the special attachment Americans feel for private property, a devotion that even has mythic proportions; and the range of emergencies, real and perceived, that often prompt costly local, state, and federal responses.

Unless, and until, the Court broadens its categorical methodology in the takings area, it would make little sense here, in an article that treats case law as the advocate's tool, to prescribe a unifying theory.

See also *supra* note 73.


155. See *supra* notes 54 and 145 and accompanying text.


159. See, e.g., *Dep't of Agric. and Consumer Servs. v. Mid-Florida Growers, Inc.*, 521 So.2d 101, 105-06 (Fla. 1988) (McDonald, C.J., dissenting), cert. denied, 488 U.S. 870 (1988):
The conduct of the department should be reviewed in the light of the perceived emergency confronting the department when the canker was found. In hindsight, it may be that the department overreacted and confiscated property not needed, but a review of the department's actions should not be made on hindsight.
for takings effected by regulation and, thereby, to engage in further hairsplitting. It makes much more sense to attempt to take a descriptive approach as we strive to understand the actual behavior of judges who are charged with reconciling private use and public regulation in concrete settings.

Table II serves this descriptive function as it simply illustrates the two key factors that contend for the decision-maker’s notice in regulatory takings cases: the level of public harm as perceived at the time the challenged regulation goes into effect and the degree of diminution in value of the discrete segment of private property negatively affected by the challenged regulation. The first variable, “Danger to public health, safety, morals,” is represented by the vertical axis and identified with Justice Brandeis’s dissenting opinion in Pennsylvania Coal, the landmark (if not seminal) Supreme Court regulatory takings case. The second variable, “Property rights retained,” is represented by the horizontal axis and identified with Justice Holmes’s opinion for the Pennsylvania Coal majority.

160. As the text following this note indicates, the variables represented on the chart track with the sentiments of majority and dissenting opinions in Pennsylvania Coal. For those less historically inclined, the table also tracks well with the Penn Central Court’s “factors that have particular significance.” See Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) (emphasis added) (citations omitted):

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. 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 public good.

Note, however, that Table II, because it reflects judicial behavior in regulatory takings cases, is inappropriate for disputes involving “physical invasion by Government,” for the Court has assigned those cases to a separate takings category. See supra Table I.


Justice Holmes, for the Court in *Pennsylvania Coal*:
"[T]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking . . . [T]his is not a question of degree -- and therefore cannot be disposed of by general propositions. . . ."

Justice Brandeis, dissenting in *Pennsylvania Coal*:
"[R]estriction imposed to protect the public health, safety or morals from dangers threatened is not a taking. . . ."

Although Table II is straightforward, the determination of whether or not a dispute falls within the striped ("TAKING") area depends, of course, on the numerical value assigned to each variable. The likelihood that the court will find a taking increases as one moves
down either scale. As the level of perceived public harm increases, 
only a concomitantly greater private use deprivation (reducing the 
numerical value on the horizontal axis) will lead the court to a 
conclusion that a taking has occurred.\textsuperscript{164} If the court believes that the 
diminution in private property value is relatively slight, even the 
slightest public need will permit the regulation to survive the regulatory 
depredation.\textsuperscript{165} As long as judges continue to adhere to the calculus 
represented by Table II, there is no control, other than the votes of 
other judges, that would prevent a decision-maker from either inflat-
ing the value assigned to a perceived public danger (in order to 
rationalize a compensation-free regulation) or from too narrowly 
confining the "parcel as a whole" to a discrete segment (in order to 
justify a finding of a constitutional violation). In these ways, the 
table, though eminently unhelpful in instructing a court how best to 
act in theory is, nonetheless, an accurate depiction of judicial behavior 
in fact.\textsuperscript{166}

As the Justices' opinions in \textit{Lucas} and \textit{Yee} indicate, the state of 
takings law is complicated and in flux. Each year brings dozens of 
reported appellate opinions from federal and state courts in which 
judges are asked to determine whether a regulation has effected a 
violation of the federal or state takings provisions. Such a decisional 
torrent in a relatively noncontroversial and settled area of law is hard 
enough for a practitioner to maneuver through and manage. When 
the area is as evidently unstable and mutable as takings law, advocates 
have an even greater need for guidance.

Such guidance, unfortunately, is typically found in judicial aph-
orisms such as \textit{Pennsylvania Coal}'s "too far" formulation\textsuperscript{167} or the 
familiar platitude from \textit{Armstrong v. United States}:\textsuperscript{161} "[the] Fifth

\begin{enumerate}
\item In \textit{Keystone}, for example, the majority found that the Subsidence Act 
responded to more urgent needs than the Kohler Act that was struck down sixty 
years before. \textit{See Keystone Bituminous Coal Ass'n v. DeBenedictis}, 480 U.S. 470, 
487-88 (1987); "With regard to the Kohler Act, the Court believed that the Com-
monwealth had acted only to ensure against damage to some private landowners' 
homes. . . . Here, by contrast, the Commonwealth is acting to protect the public 
interest in health, the environment, and the fiscal integrity of the area."
\item Courts, for example, have recognized that zoning can be employed for a 
wide range of purposes. \textit{See Hagman & Juergensmeyer}, \textit{supra} note 104, §§ 3.14-
.22 ("Purposes of Zoning").
\item The majority and dissenting opinions in \textit{Penn Central} and \textit{Keystone} are 
good examples of how different judges can assign dramatically different weight to 
the same variables. \textit{See supra} notes 71-73 and accompanying text.
\item \textit{Pennsylvania Coal Co. v. Mahon}, 260 U.S. 393, 415 (1922).
\item 364 U.S. 40 (1960).
\end{enumerate}
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."¹⁶⁹

Perhaps the most helpful takings formula is the bipartite test included by Justice Powell in the Court's opinion in Agins.¹⁷⁰ Table III, which plots classic and recent takings cases along the lines of the Agins test, enables us to identify some of the problem areas that remain in the wake of Takings Term II.

The Agins formula has been applied by the courts to cases in which the landowner has alleged a regulatory taking through total or less-than-total deprivation.¹⁷¹ As discussed previously,¹⁷² Powell noted that the Court had found a taking when the challenged regulation "does not substantially advance legitimate state interests or denies an owner economically viable use of his land."¹⁷³ Thus, in Table III, three of the four boxes in the matrix include cases in which courts have determined that a Fifth Amendment violation may have occurred¹⁷⁴ for, in order to win a takings challenge, the opponents of the regulation only need to demonstrate that one of Powell's conditions has been satisfied.

Most of the cases included in Table III—Nollan, Penn Central, Agins, Keystone, Pennsylvania Coal, First English, and Lucas—are Supreme Court decisions whose names and holdings are, by now, familiar to the reader. In the five cases located in the upper right box, the Court found that neither condition was satisfied. Therefore, the landmark preservation ordinance (Penn Central), open-space plan (Agins), and state Subsidence Act (Keystone) survived challenges brought by private users who failed to demonstrate that no economically viable use remained in their property.

Other Supreme Court cases fall into one of the three takings boxes. In Nollan, the Court concluded that "the permit condition [did not] serve[] the same [legitimate] governmental purpose as the development ban."¹⁷⁵ In contrast to Nollan, the Court in Pennsylvania

¹⁶⁹. Id. at 49.
¹⁷⁰. See supra notes 51-58 and accompanying text.
¹⁷¹. For the various taking categories, see supra Table I.
¹⁷². See supra note 52 and accompanying text.
¹⁷⁴. In some of the cases included in the table, the court remanded the case to the lower courts for trial, at which time a takings determination would be made. See, e.g., First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 322 (1987).
Coal, First English, and Lucas did not base its holding on the nexus between the challenged regulation and legitimate state interests but relied instead on the allegation that the challenged regulations—the subsidence mining act (Pennsylvania Coal), the interim flood protection ordinance (First English), and the Beachfront Management Act (Lucas)—left the landowners with no economically viable use.176

As we focus on the remaining entries in Table III, selected recent decisions by state and lower federal courts that used the Agins formulation, we can get a fuller flavor of the range of cases implicating the Takings Clause. Upon remand by the Supreme Court, the California appeals court in First English determined that neither prong of the Agins takings test had been satisfied because “[Ordinance 11,855] did not deny First English ‘all use’ of the property and the uses it did deny could be constitutionally prohibited under the Country’s power to protect public safety.”177 Thus, once all the facts had been presented, the appellate court’s holding was not unlike that of the other cases in Table III’s “nontaking” box.

A second state court post-Takings Term I case resulted in a contrary decision for the challenged regulator. In Seawall Associates v. City of New York,178 the New York Court of Appeals found three reasons why Local Law No. 9, an ordinance “[prohibit[ing] the demolition, alteration, or conversion of single-room occupancy (SRO) properties and obligat[ing] the owners to restore all units to habitable condition and lease them at controlled rents for an indefinite period,” effected a taking.179 First, the court agreed with the plaintiffs that the ordinance “has resulted in a physical occupation of their properties

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176. In Pennsylvania Coal, Justice Holmes found that “[a]s applied to this case the statute is admitted to destroy previously existing rights of property and contract.” Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) (emphasis added). In First English; the Court “assume[d] that the Los Angeles County ordinance[s] ha[ve] denied appellant all use of its property for a considerable period of years . . . .” First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 322 (1987) (emphasis added). In Lucas, the Court accepted the trial court’s finding that “Lucas’s two beachfront lots [were] rendered valueless by respondent’s enforcement of the coastal-zone construction ban.” Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2896 (1992) (emphasis added).


179. Id. at 1060-61.
TABLE III
APPLYING THE AGINS TWO-PART TEST
(PRE-LUCAS)

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<th>Does not substantially advance legitimate state interests</th>
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<td>Does not deny an owner economically viable use</td>
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<td>Denies an owner economically viable use</td>
<td>Pennsylvania Coal</td>
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<td>First English (Supreme Court)</td>
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<td>Whitney Benefits</td>
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<td>Permanek</td>
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<td>Lucas</td>
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= TAKING
and is, therefore, a per se compensable taking." 180 Second, the court found "inescapable" the conclusion "that the effect of the provisions is unconstitutionally to deprive owners of economically viable use of their properties." 181 Finally, the necessary ends-means connection was lacking, as "the nexus between the obligations placed on SRO property owners and the alleviation of the highly complex social problem of homelessness is indirect at best and conjectural." 182 Assuming that the majority's analysis is accurate, 183 as a "three-time loser," Seawall has certainly earned its place in the lower right position in Table III.

The five remaining cases—Loveladies Harbor, 184 Florida Rock, 185 Whitney Benefits, 186 Formanek, 187 and Tabb Lakes, 188—originated in the United States Claims Court, now known as the United States Court of Federal Claims. 189 The plaintiffs sought compensation under the Tucker Act 190 for federal environmental activities that allegedly violated Fifth Amendment takings strictures. 191 In four of these five cases, landowners sought compensation for alleged regulatory takings attributable to the activities of the United States Army Corps of Engineers (Corps) in administering the wetlands dredge and fill pro-

180. Id. at 1062 (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 427 (1982)). Although the Court in Yee provided a narrow reading of Loretto, see supra notes 81-87 and accompanying text, the Seawall court's condemnation of "the forced occupation by strangers under the rent-up provisions of the law" arguably fits within Loretto's categorical approach. Seawall, 542 N.E.2d at 1065.

181. Seawall, 542 N.E.2d at 1068.

182. Id. at 1069. In a piercing dissent, Judge Bellacosa cautioned his colleagues that, "[i]ke the economic theories underlying Lochner we, as Judges, should not inquire into the wisdom or wholesomeness of SRO's as shelter for potentially 52,000 new, displaced homeless persons—that policy choice belongs to the elected officials who enacted the law." Seawall, 542 N.E.2d at 1072 (Bellacosa, J., dissenting).

183. The majority's conclusion that the restrictions in Local Law No. 9 "deny the owners 'economically viable use' of their properties" is somewhat problematic after Lucas. Seawall, 542 N.E.2d at 1066.


191. See 28 U.S.C.A. § 1491(a)(1) (West 1986 & Supp. 1993): "The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, . . . or upon any express or implied contract with the United States . . . ."
gram under Section 404 of the Clean Water Act. In the fifth case, Whitney Benefits, the plaintiff mining company demonstrated that the Surface Mining Control and Reclamation Act (SMCRA) effected a taking of its mineral estate.

As the cases in the table suggest, the Claims Court has become a laboratory of federal environmental takings law. While state and federal supreme courts have devoted hundreds of pages to working out the intricacies of takings theory, Claims Court judges, moving cases through the summary judgment and ripeness stages, have wrestled with assignment of liability and, ultimately, assessment of damages. For example, the government was found accountable for the following sums (not including interest, which could be quite substantial): $2,658,000 for the ninety-nine percent diminution in Loveladies Harbor, $1,029,000 for the ninety-five percent diminution in Florida Rock, $60,296,000 for the total diminution in Whitney Benefits, and $933,921 for the eighty-eight percent diminution in Formanek.

The holdings in Whitney Benefits and Tabb Lakes are quite consistent with the Supreme Court decisions occupying the same boxes in Table III. Because the deprivation occasioned by SMCRA was absolute, Whitney's condition was not unlike that of the successful plaintiffs in Pennsylvania Coal, First English, and Lucas.

Because the Corps' activity did not fail substantially to further governmental interests and did not reduce property value below the economically viable use standard, Tabb Lakes' status was similar to that of the unsuccessful claimants in Penn Central, Agins, and Lucas.

193. Whitney Benefits, 926 F.2d at 1174.
196. See, e.g., id. at 385-86 (ripeness challenge rejected).
197. For example, in 1991 the Federal Circuit in Whitney Benefits tacked interest dating from 1977 onto the more than sixty million dollar judgment. Whitney Benefits, 926 F.2d at 1178.
198. Loveladies Harbor, 21 Cl. Ct. at 160-61.
199. Florida Rock, 21 Cl. Ct. at 175-76.
200. Whitney Benefits, 926 F.2d at 1174, 1178.
201. Formanek, 26 Cl. Ct at 340-41.
202. See supra note 176 and accompanying text.
Keystone. Judge Nettesheim, in considering Tabb Lakes' claim that the Cease and Desist Order improperly issued by the Corps effected a temporary regulatory taking, had the benefit of the Court's discussion in Lucas. As this was not a physical invasion case and because the facts indicated "that plaintiff was not deprived of all economically viable use of its property," neither "categorical" approach was appropriate.

Instead, Nettesheim, relying on the majority's dismissal of Justice Stevens' criticism in footnote eight of Lucas, found it appropriate at that stage to consider the Penn Central "ad hoc" factors:

Thus Lucas appears to allow the proposition that a plaintiff need not suffer total deprivation of economic value in order to have suffered a taking. In the absence of a categorical taking, the Court reaffirmed the necessity for a traditional factual inquiry into the character of the government action and its economic impact on plaintiff. In other words, in taking stock of the economic impact of a regulation, if the regulation has deprived a property owner of all economically viable use of its property, the inquiry need proceed no further. If less than a deprivation of all economically viable use is found, a court is to consider the other factors enunciated in Penn Central.

This approach is quite consistent with the logical flow of Justice Scalia's argument in Lucas. Scalia concludes the paragraph in which he introduces "[t]he second situation in which we have found categorical treatment appropriate" with the Agins takings formulation, adding special emphasis to the phrase "or denies an owner economically viable use of his land." Thus, the Lucas majority equates total deprivation (and the second categorical approach) with the denial of economically viable use. Only when there is a less-than-total deprivation should the decision-maker consider the nature of the govern-

203. See, e.g., supra note 52 and accompanying text.
204. Tabb Lakes, 26 Cl. Ct. at 1343.
205. Id. at 1348.
206. Id. at 1351.
208. Tabb Lakes, 26 Cl. Ct. at 1350.
209. Id. at 1351.
ment action and the specific investment-backed expectations of the claimant in an attempt to balance private use and public need.

Three of the Court of Claims cases included in the lower half of Table III include analyses that are inconsistent with this attentive reading of Lucas. As noted above, the diminutions in value found by the court in Loveladies Harbor, Florida Rock, and Formanek, although significant, were not absolute. Yet, in all three cases, the court cited the bipartite Agins formulation and used the Penn Central factors in order to determine whether a denial of economically viable use had occurred.\footnote{211}

In a post-Lucas world, Florida Rock and Formanek would fall outside the scope of Table III. Because some value remained in the affected parcels, the multi-factor analysis represented in Table II would be more appropriate. As the court in Loveladies Harbor determined that the substantial nexus condition had not been satisfied, this case would join Nollan in the upper-right corner of the post-Lucas table. These changes are illustrated in Table IV.

Are the changes between Tables III and IV of any significance? After all, the outcome of a specific takings challenge should be the same regardless of whether the Penn Central factors are used before or after the court determines remaining value. The full impact of the Lucas Court’s strategy cannot be appreciated, however, unless we consider the discussion of conceptual severance included in Scalia’s seventh footnote.\footnote{212}

As long as the Court continues to employ the relatively expansive “parcel-as-a-whole approach” that we identify with Justice Brennan’s opinion in Penn Central,\footnote{213} the likelihood of an ultimate judicial finding of absolute deprivation is not great.\footnote{214} Government officials will take advantage of the opportunity to impress upon the court the need for, and appropriateness of, the challenged regulation.\footnote{215}

\footnote{211. See Loveladies Harbor, Inc. v. United States, 21 Cl. Ct. 153, 155 (1990); Florida Rock Industries, Inc. v. United States, 21 Cl. Ct. 161, 168 (1990); Formanek v. United States, 26 Cl. Ct. 332, 335 (1992). In Formanek, the court’s calculation of deprivation is particularly problematic. Judge Robinson accepted plaintiffs’ appraiser’s “opinion that without the fill permit, plaintiffs’ entire parcel [112 acres] is worth perhaps $1,000 an acre.” Formanek, 26 Cl. Ct. at 340. Compared to a pre-regulation value of over $900,000, this is a substantial diminution. However, when compared to the $18,000 price paid in 1960 by one of the plaintiffs (Formanek) for a 160-acre parcel that included the 112 acres in dispute, $112,000 is far from paltry. Id. at 333.}

\footnote{212. Lucas, 112 S. Ct. at 2894 n.7. See supra notes 70, 74.}

\footnote{213. See supra note 71.}

\footnote{214. See supra notes 31-33 and accompanying text.}

\footnote{215. See, for examples, supra Table III and infra Table IV, and the cases included in the upper right box.}
TABLE IV
APPLYING THE AGINS TWO-PART TEST
(POST-LUCAS)

<table>
<thead>
<tr>
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<td>Louisiades Harbour</td>
<td>Agins</td>
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<tr>
<td>Denies an owner economically viable use</td>
<td>Keystone</td>
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<td>Seawall Associates</td>
<td>First English (remand)</td>
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= TAKING
If, however, enough Justices join Chief Justice Rehnquist in an effort to narrow the focus of the takings inquiry to a smaller, discrete slice of property, the chances that a court would use a categorical (per se) approach would be enhanced. Public sector advocates' arguments over the desirability of the regulation would thus be irrelevant unless counsel could squeeze the challenged regulation into the confines of the nuisances-plus exception.

The litigation involving Loveladies Harbor's residential development plans in Long Beach Township, New Jersey illustrates the risks public regulators face in the relaxation or abandonment of Brennan's parcel-as-a-whole test. In one of the Claims Court's most controversial cases of late, Chief Judge Smith, in rejecting the government's motion for summary judgment, confined the scope of the takings analysis to the 12.5 acres affected by the Corps' denial of a fill permit. One critic offers this description of the court's process of whittling down the parcel:

Based on its interpretation of the Supreme Court's recent decision in *Keystone*, the *Loveladies* court began by restricting its analysis to the 57.4 acres that the plaintiff owned when the taking occurred. The court then went beyond *Keystone* by arguing that not all properties held at the time of the taking always can be considered as part of the parcel as a whole. Subsequently, the court refused to consider 38.5 of these 57.4 acres because the Corps almost certainly would deny a permit to develop those areas. Finally, the court excluded 6.4 of the remaining 18.9 acres from consideration, because these 6.4 acres were no longer contiguous with the 12.5 acres at issue.

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216. See supra note 73.
217. See, e.g., Hanley, supra note 194, at 725; Kennedy, supra note 194, at 341-44.
219. Id. at 391-93.
220. Hanley, supra note 194, at 345 (footnotes omitted). See also Kennedy, supra note 194, at 744 (footnotes omitted):

When deciding what constitutes the parcel as a whole, the Claims Court sets aside its own decision in *Deltona Corp. v. United States* [657 F.2d 1184 (Ct. Cl. 1981)], which looked at the original parcel and compared it to the value of what was left after the government action. This comparison was made despite the fact that the developer, Deltona Corp., already sold a large portion of the original parcel. While it is true that the Deltona court's comparison of the original purchase to what was left after the government action was one of a few considerations, it was a consideration nonetheless.
At the trial stage, Chief Judge Smith had little trouble finding that the effect of the permit denial on the 12.5 acres was devastating as he noted that "the value of the property virtually has been eradicated as a result of government action."\(^{221}\)

The critics of Smith's approach in \textit{Loveladies Harbor} include his colleague, Judge Nettesheim. In \textit{Tabb Lakes}, there was no need to choose between defendant's and plaintiff's parcel-as-a-whole "scenarios"\(^{222}\) because, even using the smaller parcel, "[t]he undisputed facts of record support a finding that any losses suffered by plaintiff could amount to no more than a mere diminution in value . . . ."\(^{223}\) Still, Nettesheim, noting plaintiff's reliance on \textit{Loveladies Harbor}, cautioned that the 1990 decision was "currently on appeal to the Federal Circuit [and] runs contrary to the established precedents of \textit{Deltona} and \textit{Jentgen}."\(^{224}\)

The Smith/Nettesheim conflict in the Claims Court is indicative of the unstable nature of takings law today, particularly in cases involving environmental regulation of land use. Moreover, now that the Supreme Court has simplified its approach to total takings cases, the ramifications of this conflict are even greater than before \textit{Lucas}. Unless, and until, the Court settles this issue, public and private sector advocates will be called upon to provide competing delineations of the parcels upon which the public regulation has had a negative impact. For the time being, determining the parcel-as-a-whole is a major component of each side's dispute resolution strategy.

\textbf{IV. Planning Strategy: Takings Term II's Legacy for the Advocate}

Now that a year has passed since the conclusion of Takings Term II, we have gained some perspective on how \textit{Lucas}, \textit{Yee}, and \textit{PFZ}
build on the judicial offerings of the past. As noted above, counsel and courts have begun to include the latest Supreme Court takings cases into their litany of relevant precedent. In order to make a difference in outcome, however, advocates involved in extant and potential takings litigation involving land-use and environmental regulation need to move beyond the mere recitation of new case cites and quotations to the active incorporation of the latest judicial theories into concrete disputes. Table V offers two blueprints for planning that move: an attack strategy for private use proponents and a defense strategy for those seeking to justify public regulation.

225. For a sampling of recent cases, see supra notes 33, 96-98.
The first factor for private sector advocates derives directly from the majority opinion in *Lucas*. If the claimant can demonstrate to the court that the case involves total deprivation, a task made easier if the decision-maker focuses only on the property directly affected by the regulation, the battle is all but won unless the regulation is merely a modern version of a common-law restriction. Even if value remains in the parcel at issue the cause is not lost if the facts indicate that the regulation is not substantially related to legitimate governmental goals (factor two); that, on balance, the diminution in value is not offset by a compelling public need (factor three); that the regulation effects even a slight physical occupation of private property (factor four); or that the government’s actions (or inaction) are so arbitrary, capricious, or beyond the bounds of reason as to amount to a substantive due process violation (factor five).

Those defending government regulation from takings claims have an equally effective set of tools. By demonstrating that, even after the regulation, the parcel-as-a-whole retains any value, government counsel can avoid the categorical approach employed in *Lucas* (factor one). Even a finding of total deprivation will not be fatal if the public sector advocate can convince the court that this is an instance of either redundant or responsive regulation (factor two). In the more likely event that the court finds that the property retains some value, counsel should emphasize the pressing need for government action (factor three). When the private user alleges that a case of physical occupation is presented, the public sector advocate should advise the court that, before applying the *Loretto* categorical treatment, there must be a demonstration of actual, government-compelled invasion (factor four). Similarly, allegations that the government has abused its power should be met by cautioning the decision-maker that, as long as there remains a conceivably rational basis for the challenged regulatory activity, it would be inadvisable to depart from the deference normally accorded legislators and administrators (factor five).

Table V is by no means a detailed “checklist to takings litigation.” Rather, by treating leading takings decisions as tools for the

226. There is nothing magical about the order of the factors presented in Table V. It is always up to counsel to decide, based upon the facts and the law, which are the strongest and weakest arguments and which precedents provide the firmest support.
227. If the facts don’t so indicate, move one. See Fed. R. Civ. P. 11.
228. See supra notes 63-67 and accompanying text.
229. Several takings issues are not addressed by the chart, including among others standing, finality, calculation of damages, and burden of proof.
advocate, the table is intended to aid in the initial planning stages of disputes that appear headed toward judicial resolution. Equally important to a command of the holdings, legal principles, and key phrases garnered from leading cases is an understanding of the jurisprudential mindset that spawned the various components of takings law.

In the late nineteenth century, regulatory takings challenges, such as that brought by breweries against state prohibition in *Mugler*, were dismissed out of hand by a Supreme Court that had erected and maintained formal barriers between the police power and eminent domain: "The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law."231

To Professor Morton Horwitz, *Mugler* is typical of the categorical approach that dominated American jurisprudence before the turn of the century:232

Nothing captures the essential difference between the typical legal minds of nineteenth- and twentieth-century America quite as well as their attitude toward categories. Nineteenth-century legal thought was overwhelmingly dominated by categorical thinking—by clear, distinct, bright-line classifications of legal phenomena. Late nineteenth-century legal reasoning brought categorical modes of thought to their highest fulfillment.233

As the nation approached the Progressive Era, legal theorists began to label such a technique "formalistic and artificial."234

The period stretching from *Pennsylvania Coal* through *Penn Central* was marked by a different mindset as judges sought to achieve a balance between competing claims of private need and public good. Weaned from the absolutist approach of previous decades, judges refused to choose sides, sitting instead as relativist arbiters in a wide array of takings, due process, and equal protection challenges. This, too, was typical of the times, for

231. *Id.* at 669.
233. *Id.* at 17.
234. *Id.* at 18.
in the twentieth century, the dominant conception of the arrangement of legal phenomena has been that of a continuum between contradictory policies or doctrines. Contemporary thinkers typically have been engaged in balancing conflicting policies and "drawing lines" somewhere between them. Nineteenth-century categorizing typically sought to demonstrate "differences of kind" among legal classifications; twentieth-century balancing tests deal only with "differences of degree." 235

Table II and the "ad hoc factual inquiries" analysis used in regulatory takings cases are quintessential illustrations of this notion of continuum.

What then do we make of the move in *Lucas*, prefigured ten years before in *Loretto*, toward takings categories? At first glance, this appears to be simply a return to the formalism of the past as jurisprudence comes full circle. This cyclical view of legal thought, though attractive to pro-regulatory critics who would group the Rehnquist Court's conservatives with the laissez-faire jurists of a century past, is inaccurate.

"Post-progressive" takings law builds on both sets of traditions. Formalistic elements, such as the categorical approach used in total takings and physical occupation cases, blend with balancing components, such as the *Penn Central* factors appropriate to less-than-total deprivation regulatory takings challenges, to form a flexible, albeit confusing, judicial response to fundamental questions concerning the position held by private property in the modern regulatory state.

Attorneys need to attend to this jurisprudential synthesis if they hope to serve their client’s interests and to continue to move the law of takings along a constructive path. For example, the Yees’ counsel learned that while the Court was willing to hear arguments regarding the scope of the physical occupations “category,” there was little enthusiasm on the part of a majority of Justices to subject the rent control scheme to *Penn Central*-type balancing. 236 Similarly, the South Carolina Coastal Council received a costly lesson on how important it is to avoid a finding of total deprivation given the narrow scope of the nuisances-plus exception. 237

The issues both decided and undecided by Takings Term II highlight the tension between these two schools of legal thought. In

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235. *Id.* at 17.
236. See *supra* notes 91-95 and accompanying text.
237. See *supra* note 24.
the coming years, we can expect the parcel-as-a-whole issue to be a major battleground, for every opinion narrowing the scope of takings review moves the court closer to the total deprivation, categorical approach. Similarly, by confining the physical invasion category to cases of actual and compelled occupation, the Justices shifted many potential challenges to the balancing side of the equation.

For decades, the Supreme Court rarely concerned itself with cases involving disgruntled property owners seeking to brand confiscatory regulations as violative of the Fifth Amendment’s takings and due process protections. The promise of judicial oversight contained in Euclid\textsuperscript{238} went largely unfulfilled for the next several decades.\textsuperscript{239} The Court, in accordance with its desire not to sit as a “zoning board of appeals,”\textsuperscript{240} chose to hear neither controversial nor typical land-use cases.\textsuperscript{241}

In the 1970s, the Court gradually began to participate in the land-use area, at first by indirection, by selecting cases primarily involving issues such as standing, civil liberties, and civil rights.\textsuperscript{242} In \textit{Penn Central}, the Justices reentered the regulatory takings fray and nearly each succeeding Supreme Court Term has produced at least one more takings opinion.

Not surprisingly, given the diverse philosophical make-up of the Burger and Rehnquist Courts, several of these public regulation cases have engendered divisions on the Court\textsuperscript{243} as well as some interesting alliances.\textsuperscript{244} This lack of unanimity is to be expected, especially as members of the Court seem torn between two competing values. On the one hand, Justices in a variety of land-use cases have promoted

\begin{itemize}
\item \textsuperscript{238} See Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 397 (1926) (Court “[l]eft other provisions [of zoning] to be dealt with as cases arise directly involving them”).
\item \textsuperscript{239} It seemed otherwise just two years after \textit{Euclid}, when, in Nectow v. City of Cambridge, 277 U.S. 183 (1928), the Court found that the city’s zoning ordinance confiscated the plaintiff’s property.
\item \textsuperscript{240} See Village of Belle Terre v. Boraas, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting): “Our role is not and should not be to sit as a zoning board of appeals.”
\item \textsuperscript{241} See \textit{Haar & Wolf}, \textit{supra} note 10, at 193-94; \textit{Haagman & Juergensmeyer}, \textit{supra} note 104, § 3.2, at 40.
\item \textsuperscript{243} \textit{Penn Central}, \textit{Keystone}, \textit{Nollan}, and \textit{Lucas}, for example, all featured heated dissents.
\item \textsuperscript{244} See \textit{Wolf}, \textit{supra} note 19, at 265-66.
\end{itemize}
respect for new federalism by allowing state and local officials to respond to modern social, technological, and economic conditions despite allegations of federal constitutional and statutory violations. These judges can find their inspiration not only in the rhetoric of contemporary politicians but also in Justice Brandeis's notion of the laboratory of the states.

On the other hand, there has been a growing skepticism, particularly in environmental law cases, about the goals and tactics of regulators. The popular press is rife with environmental regulation horror stories—tales of “innocent” people imprisoned for the crime of tampering with private property, desert and prairie potholes that government officials have labeled wetlands, corporations driven to the brink of bankruptcy and employees thrown out of work owing to red tape and unrealistic restrictions, overzealous regulators out to

245. The rent control cases, see supra note 78, are probably the best examples of this deference. See also Hawaii Housing Auth. v. Midkiff, 467 U.S. 229 (1984) (approving eminent domain scheme aimed at addressing land oligopoly); Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978) (rejecting challenge to historic preservation program).

246. See, e.g., Ronald Reagan, Inaugural Address, 1981 Pub. Papers, 1, 2 (Jan. 20, 1981): “All of us need to be reminded that the Federal Government did not create the States; the States created the Federal Government.”

247. New State Ice Co. v. Liebhmann, 285 U.S. 262, 311 (1923) (Brandeis, J., dissenting): “There must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs.”

248. See, e.g., Walter Williams, Environmental Terror: Government Style, DALLAS MORNING NEWS, Nov. 28, 1992, at 31A: “Bill Ellen is one week from beginning a six-month prison sentence, four months of home detention and one year of supervised release. What was Bill Ellen’s crime? Did he rob or murder? Did he cheat on taxes or car-jack someone? No, Mr. Ellen was judged guilty of a ‘wetlands’ violation.” See also H. Jane Lehman, Trials and Tribulations of Landowners, L.A. TIMES, Oct. 18, 1992, at K2 (noting “growing backlash that has brought together an increasing number of small-scale property owners fed up with what they view as governmental interference in the name of environmental preservation and land use planning”).

249. See, e.g., NAHB Calls for Legislation to Protect Wetlands, Save Jobs, PR NEWSWIRE, Oct. 17, 1991, available in LEXIS, Nexis Library, PRNEWS File (“rules and regulations which apply to Florida’s marshy wetlands may be exactly the same as for a landlocked pothole in the Nevada desert that rarely sees a drop of water”); Maura Dolan, Wetlands Law Swamped by Rising Tide of Criticism, L.A. TIMES, July 5, 1991, at A25: “Administration sources say that some White House officials . . . want to eliminate protection for vernal pools, prairie potholes, playa lakes and other seasonal wetlands that are important breeding grounds for amphibians . . . The EPA wants to retain those protections.”

250. See, e.g., Charles K. Lunt, “Environmentalist” Vigilantes off on an
extort private lands for public use, and government bans based on bad science. Members of Congress have, at times, responded to popular calls to rein in misguided and power-hungry bureaucrats. In recent years, federal judges have also responded by seeking to rescue private users from the stranglehold of allegedly confiscatory and arbitrary environmental laws and regulations.

When the administration and agency officials responsible for promulgating and enforcing regulations have expressed concerns about the costs and efficacy of environmental protection, judges can easily

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*Emotional Witch Hunt*, Houston Chronicle, Jan. 24, 1993, at 5: "Industrial bans, regional environmental lockouts and the myriad other costly, operating restrictions have caused industry downsizing and many company closures. The oil, mining and timber industries alone have lost jobs numbering in the hundreds and hundreds of thousands."


It is not easy being a private landowner these days. The proliferation of environmental and other land use regulations has removed the private control that was once associated with private property. In the Adirondacks, for example, the Adirondack Park Agency limits more than 1 million acres of private land to no more than one home per 43 acres.


No restraining order or preliminary injunction shall be issued by any court of the United States with respect to any decision to prepare, advertise, offer, award, or operate a timber sale or timber sales in fiscal year 1990 from the thirteen national forests in Oregon and Washington and Bureau of Land Management lands in western Oregon known to contain northern spotted owls.

accommodate their desire to promote deference and healthy skepticism. When, however, a “pro-environmental” administration takes a more aggressive attitude, the potential for conflict increases considerably.

The next few years promise to be exciting ones for practicing and academic lawyers active in the environmental and land-use areas. New disputes will work their way through the judicial system and judges will confront fact patterns that call for clarification and modification of current principles. Only the passage of time will tell which case law tools will prove most helpful to advocates, whether one jurisprudential mindset will prevail, and which values will predominate. With a new presidency, new Court membership, and novel regulations on the horizon, the future of takings law appears especially enigmatic. However, by attending to the contributions made in cases such as Lucas, Yee, and PFZ, we will certainly be more prepared for the inevitable—Takings Term III.


256. Perhaps the clearest symbol of the administration’s commitment to a pro-environment agenda was Bill Clinton’s choice of Senator Al Gore as his running mate. See Al Gore, Earth in the Balance: Ecology and the Human Spirit (1992). See also Edward Flattau, Assaulting Environmentalists, Clev. Plain Dealer, June 26, 1993, at 7B:

Op-ed pieces debunking various pollution threats and environmental regulations have been appearing with increasing frequency, especially since the Clinton-Gore administration has taken office.

A number of environment-bashing books are being released by free-market think tanks, and some talk show hosts are seeking to attract audiences by trashing the authenticity of everything from global warming to endangered species. . . .

These critics are trying to make Vice President Al Gore a symbol of environmental extremism in the hope he will create a public backlash to their favor . . . .