

# *Fordham Environmental Law Review*

---

*Volume 6, Number 3*

2011

*Article 12*

---

## Judge Plager's "Sea Change" in Regulary Takings Law

James L. Huffman\*

\*

Copyright ©2011 by the authors. *Fordham Environmental Law Review* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/elr>

# JUDGE PLAGER'S "SEA CHANGE" IN REGULATORY TAKINGS LAW

JAMES L. HUFFMAN\*

## INTRODUCTION

From the beginning of the modern environmental movement,<sup>1</sup> the Takings Clause of the Fifth Amendment to the United States Constitution<sup>2</sup> has loomed as a potential constraint on the achievement of environmentalist ambitions.<sup>3</sup> Through the 1970s and most of the 1980s, the Takings Clause was seldom found to limit the ability of government to pursue an increasingly aggressive environmental agenda.<sup>4</sup> Indeed, the few Supreme Court opinions on takings during that period left property owners with little more than their votes in a political battle to protect their rights from the sometimes severe impacts of environmental regulations.<sup>5</sup> The shield of the Fifth Amendment had provided very little protection.<sup>6</sup>

---

\* Dean and Professor of Law, Lewis and Clark Law School; J.D. 1972, University of Chicago; M.A. 1969, Fletcher School of Law and Diplomacy; B.S. 1967, Montana State University. The author is grateful to Andrew Glikbarg, a 1995 graduate of Lewis and Clark Law School, and Brett Swift, Research Attorney, Natural Resources Law Institute, Lewis and Clark Law School, for research assistance.

1. By most accounts, the modern environmental movement began with Earth Day in 1970. In fact, the central, and sometimes conflicting, themes of modern environmentalism are rooted in two 19th century movements: conservationism and preservationism. See PAUL G. STOLTZ, *THE AMERICAN WILDERNESS CONSERVATIONISM VERSUS PRESERVATIONISM: A CLASH OF TWO VISIONS* (1986); PHILIP SHABECOFF, *A FIERCE GREEN FIRE: THE AMERICAN ENVIRONMENTAL MOVEMENT* (1993).

2. The U.S. Constitution, Fifth Amendment, provides: "nor shall private property be taken for public use without just compensation." U.S. CONST. amend. V.

3. See, e.g., FRED BOSSELMAN ET AL., *THE TAKINGS ISSUE: A STUDY OF THE CONSTITUTIONAL LIMITS OF GOVERNMENTAL AUTHORITY TO REGULATE THE USE OF PRIVATELY-OWNED LAND WITHOUT PAYING COMPENSATION TO THE OWNERS* (1973). Cf. DAVID L. CALLIES & FRED P. BOSSELMAN, *AFTER LUCAS: LAND USE REGULATION AND THE TAKING OF PROPERTY WITHOUT COMPENSATION* (David L. Callies ed., 1993).

4. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987) (holding that state may prohibit coal mining, which would cause subsidence of surface land, without compensation); *Agins v. City of Tiburon*, 447 U.S. 255 (1980) (approving a zoning plan that restricted landowner's development rights); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978) (upholding landmark preservation program against takings challenge).

5. Through the 1970s and 1980s, property rights advocates had little effective political organization. In the last few years, property rights organizations have emerged in virtually every state with significant political consequences. At the national level, the Republican Contract with America has led to the adoption of property compensation measures in both the Senate and the House of Representatives. For a survey of action at the state level, see HERTHA L. LUND, *PROPERTY RIGHTS LEGISLATION IN THE STATES: A REVIEW* (1995).

6. Nor did the parallel provisions in state constitutions provide significant protection for property owners. See Glynn S. Lunney, Jr., *A Critical Reexamination of the*

In 1987, the Supreme Court decided three regulatory takings cases, two of which indicated that there might still be life in the Takings Clause.<sup>7</sup> Subsequent decisions of the Supreme Court have gradually confirmed that property owners have reason for optimism.<sup>8</sup> Although the Court's votes have been close in these cases,<sup>9</sup> even the appointment of two new justices by President Clinton has not closed the door on the Court's revival of the Takings Clause.<sup>10</sup>

While the Supreme Court's opinions are unquestionably important, developments in the lower federal courts give property owners even more reason for optimism. Although the constitutional protection of property rights is not necessarily an obstacle to environmental protection,<sup>11</sup> regulation-minded environmentalists see these same lower court developments as reason for great concern.<sup>12</sup>

---

*Takings Jurisprudence*, 90 MICH. L. REV. 1892, 1944 n.229 (1992), for a catalogue of state constitutional provisions.

7. *First English Evangelical Lutheran Church v. Los Angeles*, 482 U.S. 304 (1987) (holding that the government cannot remedy a temporary taking by repealing the offending legislation, but rather, that compensation is due); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (holding that the government takes property when conditions unrelated to legitimate purposes are imposed). The exception in the 1987 trilogy was *Keystone*, 480 U.S. at 470, in which the Court, on facts very similar to those held to be a taking in *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922), found no taking.

8. *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994) (finding a taking when a building permit was conditioned on the grant of an easement to the city for a bicycle path and flood plain runoff); *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992) (finding a taking when beach protection legislation had effect of prohibiting property owner from constructing a home).

9. In *Dolan*, Chief Justice Rehnquist delivered the Opinion of the Court, in which Justices O'Connor, Scalia, Kennedy, and Thomas joined. Justice Stevens filed a dissenting opinion in which Justices Blackmun and Ginsburg joined. Justice Souter filed a separate dissenting opinion. In *Lucas*, Justice Scalia delivered the Opinion of the Court, in which Chief Justice Rehnquist and Justices White, O'Connor, and Thomas joined. Justice Kennedy filed an opinion concurring in the judgment. Justices Blackmun and Stevens filed dissenting opinions. Justice Souter filed a separate statement.

10. Justice Ginsburg's dissent in *Dolan* replaced Justice White's vote, which had been cast with the majority in *Lucas*, thus narrowing the majority's margin. One can only speculate about how Justice Breyer will vote in future takings cases, but, because he replaced dissenter Justice Blackmun, the majority will remain the same even if Justice Breyer votes against the property owner.

11. Advocates of free market environmentalism take the position that property rights protection is critical to wise resource management and that many, if not most, environmental objectives will be better achieved through a clearly defined system of property rights and free markets. See James L. Huffman, *Markets, Regulation, and Environmental Protection*, 55 MONT. L. REV. 425 (1994); James L. Huffman, *Protecting the Environment from Orthodox Environmentalism*, 15 HARV. J.L. & PUB. POL'Y 349 (1992); TERRY L. ANDERSON & DONALD R. LEAL, *FREE MARKET ENVIRONMENTALISM* (1991); REINVENTING ENVIRONMENTALISM IN THE NEW ERA (Terry L. Anderson ed., 1995).

12. See, e.g., Michael C. Blumm, *The End of Environment Law? Libertarian Property, Natural Law, and the Just Compensation Clause*, 25 ENVTL. L. 171 (1995).

Since 1982, most of the takings cases in the federal courts have arisen in the Court of Federal Claims and have been appealed to the Federal Circuit Court of Appeals.<sup>13</sup> This change has contributed to the revival of the Takings Clause for two reasons. First, because the Federal Circuit was a new court in 1982, most of its members were appointed during the Reagan and Bush Administrations.<sup>14</sup> Thus, there is somewhat more philosophical agreement among its members than there is on other Courts of Appeals. Second, by limiting takings jurisdiction to the Federal Court of Claims and the Federal Circuit, Congress permitted the development of a specialization in takings jurisprudence. Such specialization allows judges to focus their attention on particular problems and to develop both expertise and coherent theories about how to resolve those problems.

Two recent Federal Circuit decisions, involving takings challenges to the Army Corps of Engineers' enforcement of the Clean Water Act's section 404 wetlands regulations,<sup>15</sup> both authored by Judge Jay Plager, are of particular importance to the future of takings jurisprudence. In *Florida Rock Industries, Inc. v. United States*,<sup>16</sup> Judge Plager challenged the reasonably well-established distinction between physical and regulatory takings. In *Loveladies Harbor, Inc. v. United States*,<sup>17</sup> the Court drew upon the Supreme Court's recent decision in *Lucas v. South Carolina Coastal Council*<sup>18</sup> to articulate a significant change to the three-part test that the Supreme Court set forth in *Penn Central Transportation Co. v. New York City*.<sup>19</sup> Because the Federal Circuit will play a major role in the development of future takings jurisprudence,<sup>20</sup> these two decisions, and others sure to follow as the many takings claims emerge from the Federal Court of Claims,<sup>21</sup> merit careful and thoughtful analysis.

---

13. Federal Courts Improvement Act of 1982, 28 U.S.C. § 41 (1988). This act reorganized the Court of Claims, created the Court of Appeals for the Federal Circuit, and gave both courts specific subject-matter jurisdiction, including Fifth Amendment takings claims.

14. The Federal Circuit has 17 judges, six of whom are on senior status. Of the eleven regular-status judges, four were appointed by President Reagan and five by President Bush.

15. 33 U.S.C. § 1344 (1988 & Supp. V 1993).

16. 18 F.3d 1560, 1564 (Fed. Cir. 1994), *cert. denied*, 115 S. Ct. 898 (1995).

17. 28 F.3d 1171, 1179 (Fed. Cir. 1994).

18. 112 S. Ct. 2886 (1992),

19. 438 U.S. 104, 124 (1978).

20. Of course the Supreme Court has ultimate authority to define takings doctrine, but the Supreme Court is unlikely to hear many takings cases in the next several years. Denial of certiorari, as in *Florida Rock*, 115 S. Ct. at 898, will be the most common result for appeals from Federal Circuit decisions.

21. *See, e.g.*, *Alaska v. United States*, 32 Fed. Cl. 689 (1995); *Fallini v. United States*, 31 Fed. Cl. 53 (1994); *Whitney Benefits, Inc. v. United States*, 30 Fed. Cl. 411 (1994).

## I. FLORIDA ROCK INDUSTRIES V. UNITED STATES

Prior to the 1972 enactment of the Clean Water Act ("CWA"),<sup>22</sup> Florida Rock Industries had purchased 1560 acres of land, and had commenced phosphate mining thereon.<sup>23</sup> Pursuant to section 404 of the CWA,<sup>24</sup> the Corps of Engineers ("Corps") ordered Florida Rock to stop its mining activities in 1978, pending application for, and approval of, a dredge-and-fill permit.<sup>25</sup> Florida Rock applied for a permit for the entire 1560-acre parcel, but was advised that the Corps would only consider an application to cover land sufficient for three years of mining.<sup>26</sup> Florida Rock's subsequent application for a permit to mine 98 acres was denied by the Corps in 1980 on the basis that it "would cause irreparable loss of an ecologically valuable wetland parcel and would create undesirable water turbidity."<sup>27</sup>

Accepting the validity of the Corps' denial of its permit application,<sup>28</sup> Florida Rock filed suit in the United States Court of Claims seeking compensation for a taking of their property.<sup>29</sup> The Court of Claims found that there had been a compensable regulatory taking and ordered the government to pay \$1,029,000 to Florida Rock.<sup>30</sup> On appeal to the Federal Circuit, the Court of Claims decision was found to be in error on the appropriate measure of the after-taking value of

22. 33 U.S.C. §§ 1251-1387 (1988 & Supp. V 1993).

23. 18 F.3d 1560, 1562 (Fed. Cir. 1994), *cert. denied*, 115 S. Ct. 898 (1995).

24. The operative language of § 404 says nothing about wetlands or wetlands protection. "The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a) (1988). In an opinion later withdrawn, the Seventh Circuit held that the EPA's wetlands regulations were not authorized by § 404 and that in any event, Congress did not have the constitutional authority to command such regulations. *Hoffman Homes, Inc. v. Administrator, United States Environmental Protection Agency*, 961 F.2d 1310 (7th Cir. 1992).

25. *Florida Rock*, 18 F.3d at 1562.

26. *Id.* at 1562-63.

27. *Id.* at 1563.

28. Florida Rock thus recognized an important distinction overlooked by most advocates of limited Fifth Amendment protections for property owners. The fact that the government is responsible to compensate for taken property does not mean that the government may not pursue its regulatory objective. A property owner may be entitled to compensation for losses that result from legitimate government actions. The Takings Clause is not concerned with the extent of government's regulatory authority. Rather it is concerned with the wealth distribution impacts of government's exercise of its regulatory authority. The costs resulting from government action are real costs. The Takings Clause requires the taxpayers to bear those costs by prohibiting the government from imposing those costs on individuals who happen to own affected properties. See *infra* text accompanying notes 148-52.

29. *Id.*

30. *Florida Rock Indus., Inc. v. United States*, 8 Ct. Cl. 160 (1985), *aff'd in part & vacated in part*, 791 F.2d 893 (Fed. Cir. 1986) [hereinafter *Florida Rock II*], *cert. denied*, 479 U.S. 1053 (1987).

the land.<sup>31</sup> On remand, the Court of Federal Claims concluded that after the denial of the permit, the fair market value of the land was negligible, and reinstated the \$1,029,000 award with compound interest.<sup>32</sup> Judge Plager's opinion in *Florida Rock* is thus the second time that the Federal Circuit has considered this case.

In light of the Federal Circuit's earlier decision in the case, the initial question for the court was whether the Court of Claims had properly determined the fair market value of the land.<sup>33</sup> This determination was critical, first, to the question of whether or not there was an unconstitutional taking, and second, if a taking was found to have occurred, to the measure of compensation owing to Florida Rock. The Federal Circuit differed with Judge Smith's conclusion that the property had negligible value after the denial of the permit,<sup>34</sup> and, on that basis, remanded for further proceedings in the Court of Federal Claims.<sup>35</sup> To guide the lower court in its reconsideration of the case, Judge Plager offered an analysis that provides an indication of what might be expected from the Federal Circuit in future regulatory takings cases.<sup>36</sup>

Judge Plager began by reciting the oft-repeated formula from *Penn Central*, which calls upon courts to determine whether or not there has been a taking by balancing "the economic impact of the regulation on the claimant, the extent to which the regulation interferes with investment-backed expectations, and the character of the Government action."<sup>37</sup> According to Judge Plager, in *Florida Rock*, "it [was] the economic impact of the regulation that [was] at issue."<sup>38</sup> Because the lower court failed to properly evaluate the economic impact on Florida Rock, the Federal Circuit was forced to remand, but not without

---

31. *Florida Rock II*, 791 F.2d at 905. The appellate court held that the correct measure of damages was "fair market value" rather than "immediate use" value, the standard applied by the Court of Federal Claims. See *Florida Rock*, 18 F.3d at 1563.

32. *Florida Rock Indus., Inc. v. United States*, 21 Ct. Cl. 161 (1990) [hereinafter *Florida Rock III*], vacated, 18 F.3d 1560 (Fed. Cir. 1994), cert. denied, 115 S. Ct. 898 (1995).

33. *Florida Rock Indus., Inc. v. United States*, 18 F. 3d 1560, 1565-67 (Fed. Cir. 1994), cert. denied, 115 S. Ct. 898 (1995).

34. In *Florida Rock II*, the Federal Circuit instructed the Court of Claims to consider "purchases which are made by market speculators as well as home builders and other developers" as comparable sales in determining the market value of the land. 791 F.2d at 903; See *Florida Rock*, 18 F.3d at 1565. Based upon the Federal Circuit's "passing reference to buyers being 'correctly informed,'" *Florida Rock*, 18 F.3d at 1565 (quoting *Florida Rock II*, 791 F.2d at 903), the Court of Claims rejected all comparable sales data on the ground that the purchasers lacked sufficient sophistication and knowledge, and found that the property had no remaining value. *Florida Rock III*, 21 Ct. Cl. at 172. Judge Plager's opinion instructs the Court of Claims that its view is "contrary to generally accepted understandings of market valuation, and finally, contrary to the working assumptions of a free market." *Florida Rock*, 18 F.3d at 1566.

35. *Florida Rock*, 18 F.3d at 1560, 1565, 1573.

36. *Id.* at 1564-65.

37. *Id.* at 1564.

38. *Id.*

addressing the important question of when, if at all, a partial diminution in value would result in a taking.<sup>39</sup>

Based upon his reading of *Lucas*, Judge Plager concluded that "in some circumstances, no balancing of factors is required,"<sup>40</sup> because "the economic impact factor alone may be determinative."<sup>41</sup> Plager has thus linked the conclusion in *Lucas*, that there is a categorical taking when a regulation leaves the claimant with no remaining economic value, to the economic impact factor from *Penn Central's* balancing test. This interpretation of *Lucas* is important because it calls into question the whole concept of the balancing test. There is no reason that the balance will favor the claimant in every case when there is a total loss of economic value. In such a case, the claimant may also have little in the way of investment-backed expectations and the government action may be extremely important. In other words, the public benefits of a regulation may well outweigh the costs to the claimant, even when the claimant is left with no economic use of the regulated property. Indeed, there are probably few circumstances in which the public benefit of a regulation will not outweigh the cost imposed upon an individual property owner. Therefore it is not surprising that, until 1987, property owners had little prospect of prevailing under the *Penn Central* balancing test.

Judge Plager explained that the *Lucas* Court had found that a presumptive taking occurs when a property is left without any economic use because "the regulation has an effect equivalent to a permanent physical occupation."<sup>42</sup> Although Plager seems to suggest that the *Lucas* opinion's treatment of a total loss of economic use as a categorical takings reflects an irrebuttably presumptive tilting of the balance in the property owner's favor, his analysis demonstrates that the categorical taking doctrine announced in *Lucas* really has nothing to do with balancing. Rather it has to do with the economic illogic of a distinction between physical occupations of property and regulatory actions that reduce the value of property.

Plager pointed out that even when the economic impact of a physical occupation is minor, the Supreme Court has found a categorical taking without regard to the character of the government action.<sup>43</sup> He quoted Justice Brennan's dissenting opinion in *San Diego Gas & Electric Co. v. City of San Diego*<sup>44</sup> for the proposition that, from the property owner's point of view, it matters little whether restrictions on the use of property result from police power regulations or from condem-

39. *Id.* at 1567-73.

40. *Id.*

41. *Id.*

42. *Id.* at 1564-65.

43. *Id.* at 1569 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)).

44. 450 U.S. 621 (1981).

nation or physical invasion.<sup>45</sup> Thus, if there is a logic to the distinction between physical occupations and regulatory restrictions, it has nothing to do with the economic factors of the *Penn Central* balancing test.<sup>46</sup>

Judge Plager's *Florida Rock* opinion goes as far as it can in divorcing regulatory takings doctrine from the unfortunate concept of balancing.<sup>47</sup> While one can understand Plager's payment of lip service to the Supreme Court's reliance on a balancing test in takings cases (the Federal Circuit is, after all, an "inferior" court), the opinion goes farther than is necessary in bowing to the mantra of judicial balancing. For example, Plager stated in a footnote that the *Lucas* opinion "gives the government a defense based on nuisance limitations that inhere in the owner's title."<sup>48</sup> This defense, he said, "incorporates a degree of balancing."<sup>49</sup> But the point of the *Lucas* nuisance analysis is that a property owner's title is, and always has been, limited by the law of nuisance.<sup>50</sup> The property owner has no claim to that which is not part of the property in question. Because the property owner's legal title does not include the right to be a nuisance, there is simply no claim to be made against the government, and there is nothing for a court to balance.

Presumably, what Judge Plager had in mind, in linking the *Lucas* nuisance defense to balancing, is the traditional common-law process

---

45. *San Diego Gas & Elec.*, 450 U.S. at 652 (Brennan, J., dissenting).

46. The distinction between regulatory impact and physical occupation is real if, under the regulation in question, the property owner retains the right to exclude third parties (including the government). Justice Scalia made this point in an exchange with the counsel for plaintiff in the *Dolan* case. Recognizing that Mrs. Dolan could not develop the flood plain area prior to the imposition of the easement at issue in the case, Justice Scalia asked "what is it that she wanted to do that she cannot do now?" Seeking to clarify his query, Justice Scalia went on to ask: "[A]fter she complied with the condition for the . . . permit, would the public have had access to the greenway?" Mrs. Dolan's counsel answered "yes," to which Justice Scalia said: "[T]hat's one thing she . . . could do now and couldn't do afterwards, which is keep other people out. . . . Which is pretty important." OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE THE SUPREME COURT OF THE UNITED STATES, *Florence Dolan v. City of Tigard*, Mar. 23, 1994, at 9-10.

47. Balancing tests have gradually invaded many areas of constitutional law as the Supreme Court, since the New Deal, has sought to validate expanding governmental powers. Rather than accept constitutional guarantees of individual rights as absolutes, the Court has compromised even First Amendment rights by insisting that individual rights must give way to government action when the government's interests are sufficiently important. By this approach, constitutional interpretation becomes an exercise in judicial legislation. See James L. Huffman, *Dolan v. City of Tigard: Another Step in the Right Direction*, 25 ENVTL. L. 143 (1995).

48. *Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1565 n.10 (Fed. Cir. 1994), cert. denied, 115 U.S. 898 (1995).

49. *Id.*

50. See *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2901 (1992) ("The use of these properties for what are now expressly prohibited purposes was always unlawful.")



by which nuisance law has been defined over the centuries.<sup>51</sup> But this is clearly not the sort of balancing that the Supreme Court has employed in takings jurisprudence and most other areas of constitutional law. While the definition of specific nuisances has evolved over time, the concept of a nuisance has remained constant.<sup>52</sup> Constitutional balancing, however, requires courts to somehow draw a boundary between individual rights, on the one hand, and the police power of the state, on the other. The nuisance defense of *Lucas* should not be understood to mean that the police power of the state is coterminous with the common law of nuisance. The fact that nuisance law constitutes a defense to a takings claim does not mean that a particular regulation is necessarily within the state's constitutional powers. This distinction should be clear to a court whose takings jurisdiction is limited to those cases in which the claimant has not otherwise challenged the validity of the regulation or law in question.<sup>53</sup>

Having demonstrated the economic equivalence of physical occupation and total loss of economic use, the Federal Circuit was then faced with deciding whether the Court of Claims correctly found that Florida Rock suffered a total diminution in value, and therefore, a categorical taking. Judge Plager was not satisfied with the lower court's finding, which had discounted evidence of significant remaining value notwithstanding the Corps' denial of the § 404 permit.<sup>54</sup> For this reason, the case was remanded to the Court of Claims a second time.<sup>55</sup> Because the evidence suggested that, on reconsideration and in light of the Federal Circuit's guidance, the lower court might well find some remaining economic value, Judge Plager addressed the question not discussed in *Florida Rock II* of "what residual fair market value would

---

51. See Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 720-721 (1973); Louise A. Halper, *Nuisance, Courts and Markets in the New York Court of Appeals, 1850-1915*, 54 ALBANY L. REV. 301, 304-06 (1989).

52. The evolution that characterizes the common law is usefully understood as a reflection of changing conceptions based upon a constant principle. For a general discussion of this theme in the context of various forms of legal rules, see Charles P. Curtis, *A Better Theory of Legal Interpretation*, 3 VAND. L. REV. 407, 420-26 (1950).

53. 28 U.S.C. § 1500 (1988 & Supp. V 1993). The Federal Circuit's decision in *Loveladies Harbor* was delayed pending the resolution of a jurisdictional challenge under this statute. *Loveladies Harbor, Inc. & Loveladies Harbor, Unit D., Inc. v. United States*, 27 F.3d 1545 (Fed. Cir. 1994).

54. Judge Plager pointed out that "[a] speculative market may exist in land that is regulated as well as in land that is not, and the precise content of regulations at any given time may not be particularly important to those active in the market." *Florida Rock*, 18 F.3d at 1566. If the precise content of regulations is not important to land speculators, it is either because the particular regulations have little impact on land value or because it is anticipated that the regulations will be easily changed. However, when speculation is based upon an anticipated ability to influence future regulations, we have created unfortunate incentives to use the regulatory system to gain market advantage. Correctly applied, the Takings Clause should be an obstacle to such regulation.

55. *Id.* at 1565.

be 'adequate' to forestall a taking determination."<sup>56</sup> Should the Court of Claims determine "that there was *some* (but not a total) reduction in the overall market value of plaintiff's property as a result of the regulatory imposition, the question will then be posed: does that reduction constitute a taking of property compensable under the Fifth Amendment?"<sup>57</sup>

This question has troubled courts ever since Justice Holmes' unfortunate declaration in *Pennsylvania Coal Co. v. Mahon*<sup>58</sup> that a regulation results in an unconstitutional taking when it goes "too far."<sup>59</sup> Courts have struggled with this vague prescription for nearly three quarters of a century without guidance, except the portion of diminution found acceptable in other cases.<sup>60</sup> Judge Plager undertakes to address this important issue by asking, first, "whether a regulation must destroy a certain proportion of a property's economic use or value in order for a compensable taking of property to occur," and second, "how to determine, in any given case, what that proportion is."<sup>61</sup> The latter question goes to the problem of proof, which, in this case, has been remanded to the lower court. The first question, however, goes to the heart of what could be a revolution in takings jurisprudence.

Clearly, under *Lucas*, a total diminution of economic value goes too far, but Judge Plager found no definitive indication in the Fifth Amendment, or in Supreme Court caselaw, of whether and when a less-than-total diminution goes too far.<sup>62</sup> With respect to the Fifth Amendment, he noted that "[n]othing in the language of the Fifth Amendment compels a court to find a taking *only* when the Government divests the total ownership of the property; the Fifth Amendment prohibits the uncompensated taking of private property without reference to the owner's remaining property interests."<sup>63</sup> With respect to Supreme Court precedent, Plager cited Justice Stevens' objection in *Lucas* that it would be arbitrary for "[a] landowner whose property is diminished in value 95% [to] recover[ ] nothing, while an owner whose property is diminished 100% recovers the land's full

---

56. *Id.*

57. *Id.* at 1568. The circuit court opinion makes clear that, based upon the evidence in the record, this is the finding the lower court should reach.

58. 260 U.S. 393, 415 (1922).

59. *Id.* at 415.

60. In *Hadacheck v. Sebastian*, 239 U.S. 394, 405 (1915) the Court found no taking when there was an 88% diminution in value. In *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926) the Court upheld a 75% diminution. In *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 592 (1962), the Court upheld what the lower court found to be a total loss of value. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 593 n.3 (2d ed. 1988).

61. *Florida Rock*, 18 F.3d at 1568.

62. *Id.*

63. *Id.*

value,'<sup>64</sup> and Justice Scalia's response that "Stevens' analysis 'errs in its assumption that the landowner whose deprivation is one step short of complete is not entitled to compensation.'<sup>65</sup>

Returning to his earlier criticism of the distinction between physical occupation and regulatory imposition, Judge Plager pointed out that "[n]o such conceptual problem seems to exist when the taking is by physical occupation."<sup>66</sup> Plager said that no one will question that compensation would be due to the owner of a 100-acre tract whether the government took five or ninety-five acres for a public park.<sup>67</sup>

Logically, the amount of just compensation should be proportional to the value of the interest taken as compared to the total value of the property, up to and including total deprivation, whether the taking is by physical occupation for the public to use as a park, or by regulatory imposition to preserve the property as a wetland so that it may be used by the public for ground water recharge and other ecological purposes.<sup>68</sup>

While neither the Fifth Amendment, nor logic, suggests a distinction between partial physical takings and partial regulatory takings, courts have struggled with the latter, at least since Justice Holmes' observation in *Pennsylvania Coal* that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."<sup>69</sup> Judge Plager suggested that one solution to this problem would be to deny compensation in all regulatory takings cases on the theory that the only appropriate remedy is invalidation of the offending regulation. Plager's convincing rejection of the distinction between physical occupation and regulatory imposition is sufficient basis to discard this approach, and, as Plager pointed out, this option was clearly rejected in *First English Evangelical Lutheran Church v. Los Angeles*,<sup>70</sup> in which the Supreme Court recognized that "[t]he Fifth Amendment 'is designed "not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking."'<sup>71</sup> Short of a finding that property has been taken for a non-public use,<sup>72</sup> the Takings

---

64. *Florida Rock*, 18 F.3d at 1569 (citing *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2919 (1992) (Stevens, J., dissenting)).

65. *Id.* (citing *Lucas*, 112 S. Ct. at 2894 n.8).

66. *Id.*

67. *Id.*

68. *Id.*

69. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

70. 482 U.S. 304 (1987).

71. *Florida Rock*, 18 F.3d at 1570 (quoting *Preseault v. ICC*, 494 U.S. 1, 11 (1990) (quoting *First English*, 482 U.S. at 315)).

72. Since the Supreme Court's decision in *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984), the public use limitation merely requires that the relevant legislative body have concluded that the statute in question is pursuant to a public use.

Clause does not impose limits on the scope of the government's regulatory power.<sup>73</sup>

Because compensation, not invalidation of an offending law or regulation, is the appropriate remedy when there has been a total diminution of economic value, and because "[n]othing in the Fifth Amendment limits its protection to only 'categorical' regulatory takings, . . . there remains . . . the difficult task of resolving when a partial loss of economic use . . . has crossed the line from a noncompensable 'mere diminution' to a compensable 'partial taking.'" <sup>74</sup> Noting that "[t]he trial court will find itself with little direct case law guidance," <sup>75</sup> Judge Plager again deferred to the "classic exercise of judicial balancing of competing values."<sup>76</sup> But what followed indicates that Plager understands that the problem cannot be adequately resolved by judicial balancing, classic or not.

Plager quoted from three Supreme Court opinions as illustrations of judicial balancing in the face of regulatory takings claims.<sup>77</sup> He repeated language from *Penn Central* about the relevance of economic impact on the claimant and the extent of the claimant's investment-backed expectations.<sup>78</sup> This would seem to be the stuff of balancing. But from *Agins v. City of Tiburon*<sup>79</sup> and *First English*, he quoted language that has little to do with balancing and much to do with the principles that ought to guide interpretation of the Fifth Amendment. Judge Plager quoted the *Agins* Court's statement that a judicial finding of a taking reflects "a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest."<sup>80</sup> He also quoted *First English* for the proposition that "[i]t is axiomatic that the Fifth Amendment's just compensation provision 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.'" <sup>81</sup> If the purpose of the Fifth Amendment is to prevent majoritarian government from imposing the costs of public benefits on a few individuals, the courts must find a standard that assures that in every case the constitutional purpose is served. The balancing approach of *Penn Central* effectively abandons the constitutional purpose to judicial lawmaking.

---

73. "It is necessary that the Government act in a good cause, but it is not sufficient. The takings clause already assumes the Government is acting in the public interest." *Florida Rock*, 18 F.3d at 1571.

74. *Id.* at 1570.

75. *Id.*

76. *Id.*

77. *Id.* at 1570 n.27.

78. *Florida Rock*, 18 F.3d at 1570 n.28 (citing *Penn Central*, 438 U.S. at 125).

79. 447 U.S. 255 (1980).

80. *Id.* at 260.

81. *First English*, 482 U.S. at 318-19 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

Notwithstanding his apparent deference to balancing, Judge Plager recognized that another approach is necessary if the courts are serious about interpreting the Fifth Amendment so that it achieves the purpose articulated in *Agins* and *First English*. With reference to the third prong of the *Penn Central* test, which looks to the character of the government action, Plager cautioned that it "should not be read to suggest that when Government acts in pursuit of an important public purpose, its actions are excused from liability."<sup>82</sup> To do so, said Plager, "would eviscerate the plain language of the Takings Clause."<sup>83</sup> But inherent in the idea of balancing is the implication that governments will incur less liability to compensate as their purposes become more important. A moment's reflection on the foregoing statement will suggest another reason to be skeptical of the use of a balancing test to determine the extent of constitutionally protected property rights. The more important the public purpose, presumably the greater the public benefit, from which should follow a greater rather than a lesser willingness and obligation to compensate.<sup>84</sup>

Although he purports to set forth an improved approach to balancing, Judge Plager recognized the roots of a solution to the "too far" problem that has bedeviled the courts since *Pennsylvania Coal*. Odd as it may seem, those roots are firmly planted in the very opinion that led courts into the regulatory takings thicket. In *Pennsylvania Coal*, Justice Holmes articulated the concept of "reciprocity of advantage."<sup>85</sup> It is a concept that is directly responsive to the constitutional objectives stated in *Agins* and *First English*. The idea is that some regulations impose comparable costs and benefits on the same people, often the population in general, but sometimes particular segments of the population. In these cases, affected property owners will bear some of the costs of a regulation, but they will also experience some of the benefits. It is under these circumstances that Holmes would conclude that a regulation has not gone too far. A regulation has gone too far when it violates the principle stated in *Agins* and *First English*, such as when the costs of broadly experienced public benefits are imposed arbitrarily on particular individuals.

Judge Plager stated that "[w]hen there is reciprocity of advantage, . . . the claim that the Government has taken private property has

---

82. *Florida Rock*, 18 F.3d at 1571.

83. *Id.*

84. Within a constitutional jurisprudence of judicial balancing, a general presumption of legislative validity makes sense when the public purpose is very important. For example, a judge might reasonably conclude that speech can be limited when the survival of the Constitution is in imminent peril. However, because compensation can constitutionally remedy invasions of property rights, there is no need to make this difficult choice when regulations take private property. "Both the public purposes and the rights of the property owner, to the extent those rights are reflected in the market value of the property, can be served without sacrificing one to the other." Huffman, *supra* note 47, at 145 n.18.

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

little force: the claimant has in a sense been compensated.”<sup>86</sup> Plager was right to focus on Holmes’ idea of the reciprocity of advantage, but a better understanding of that idea was proposed several years ago by Professor Richard Epstein.<sup>87</sup> The fact that burdened property owners experience reciprocal advantages does not change the impact on their property. If a particular regulation results in a taking when there are no reciprocal benefits, it makes no sense to conclude that there is not a taking when reciprocal benefits exist. It does make sense to acknowledge that in both instances there is a taking, but in the latter there is compensation.<sup>88</sup> What remains is to determine only whether the compensation is just. As with other judicial standards for defining the constitutional relationship between the state and the individual, the reciprocity of advantage approach to “adjusting the benefits and burdens of economic life to promote the common good”<sup>89</sup> does not require mathematical precision. At best it will be a rough guide, but rough justice is better than injustice. It does not require complex calculations to know when the government is “allocating to some number of individuals, less than all, a burden that should be borne by all[.]”<sup>90</sup>

Judge Plager’s analysis will permit the courts to understand the “too far” problem in the context of the limited democratic government established by the Constitution. When significant numbers of people are impacted by government regulation, the majority will constrain itself. But when only a few are impacted, the only protection against majoritarian tyranny are constitutional guarantees of individual rights. The Takings Clause, as Judge Plager has interpreted it, is a constraint on the unavoidable tendency of democratic government to take from the few to provide benefits for the many.

Judge Plager concluded with the acknowledgement that there may be cases in which economic value is lost but there is no taking. The logic of most of his argument, however, does not permit this result. By rejecting the distinctions between physical and regulatory takings and between total and partial diminutions of economic value, Plager has persuasively and correctly demonstrated that the Fifth Amendment “prohibits the uncompensated taking of private property with-

---

86. *Florida Rock*, 18 F.3d at 1570.

87. RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985) [hereinafter EPSTEIN, *TAKINGS*]. See also James L. Huffman, *A Coherent Takings Theory At Last: Comments on Richard Epstein's PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN*, 17 ENVTL. L. 153 (1986).

88. In light of Senator Joseph Biden’s disparaging comments about Professor Epstein’s book during Justice Clarence Thomas’ confirmation hearing, it is not surprising that Judge Plager might be hesitant to rely upon Epstein. These comments notwithstanding, Epstein has offered one of the most coherent analyses of the takings problem. See Huffman, *supra* note 87.

89. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

90. *Florida Rock*, 18 F.3d at 1571.

out reference to the owner's remaining property interests."<sup>91</sup> Although Judge Nies, in dissent, contends that "the majority theory of a 'partial' taking . . . conflicts with current Supreme Court precedent,"<sup>92</sup> Judge Plager has in fact done a masterful job of drawing upon Supreme Court case law to bring much-needed reason to the muddled area of regulatory takings law.

## II. *LOVELADIES HARBOR V. UNITED STATES*

Loveladies purchased 250 acres in 1958.<sup>93</sup> By the time Congress enacted the Clean Water Act<sup>94</sup> in 1972, Loveladies had developed and sold 199 acres.<sup>95</sup> To develop the remaining 51 acres, Loveladies needed permission from both the Corps and the New Jersey Department of Environmental Protection ("NJDEP").<sup>96</sup> Loveladies spent several years in negotiation and litigation with the State of New Jersey before finally reaching a settlement in 1981, pursuant to which Loveladies agreed to grant a conservation easement affecting 38.5 acres to the state in return for a permit to fill and develop the remaining 12.5 acres.<sup>97</sup> Loveladies then sought the requisite § 404 permit from the Corps.<sup>98</sup> Pursuant to its administrative procedures, the Corps sought the views of the NJDEP which stated that although it had granted a state permit under the terms of the settlement agreement, it did not find the project to be in compliance with the state's requirements.<sup>99</sup> The NJDEP further opined that a denial of the federal permit would be appropriate.<sup>100</sup> In May 1982, the Corps denied the permit.<sup>101</sup>

Loveladies then brought an action in the Federal Court of Claims seeking compensation for property taken in violation of the Fifth Amendment.<sup>102</sup> After a trial on the merits, the court found for Love-

91. *Id.* at 1568.

92. *Id.* at 1574 (Nies, C.J., dissenting).

93. *Loveladies Harbor v. United States*, 28 F.3d 1171, 1174 (Fed. Cir. 1994), *reh'g, en banc, denied*, 1994 U.S. App. LEXIS 28462 (Fed. Cir. Sept. 29, 1994).

94. Federal Water Pollution Control Act, 33 U.S.C. 1251-1387 (1988 & Supp. V 1993).

95. *Id.*

96. *Id.*

97. *Id.* See *In re Loveladies Harbor, Inc.*, 422 A.2d 107 (N.J. Super. App. Div. 1980), *cert. denied*, 427 A.2d 588 (N.J. 1981). Because one of the 12.5 acres was already filled, the permit application was for 11.5 acres. *Loveladies Harbor*, 28 F.3d at 1174.

98. *Loveladies Harbor*, 28 F.3d at 1174.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* Prior to filing its claim in the Court of Claims, Loveladies challenged the Corps' permit denial in Federal District Court under the Administrative Procedures Act. The District Court held against Loveladies in a decision affirmed on appeal. *Loveladies Harbor, Inc. & Loveladies Harbor, Unit D, Inc. v. Baldwin*, Civ. No. 82-1948 (D.N.J. Apr. 3, 1984), *aff'd* 751 F.2d 376 (3d Cir. 1984). The takings claim was filed after the District Court decision and before the decision on appeal. The govern-

ladies and awarded \$2,658,000 plus interest in compensation.<sup>103</sup> The government appealed to the Federal Circuit, which, after the resolution of a jurisdictional challenge,<sup>104</sup> affirmed the lower court's finding for Loveladies.<sup>105</sup>

Judge Plager began his opinion for the Federal Circuit by reaffirming a point he had made in *Florida Rock*.<sup>106</sup> "What is not at issue," wrote Plager, "is whether the Government can lawfully prevent a property owner from filling or otherwise injuring or destroying vital wetlands."<sup>107</sup> Although he went on to assert "that every effort must be made individually and collectively to protect our natural heritage,"<sup>108</sup> his point in stating what is not at issue is, or should be, that the Takings Clause requires compensation for property taken pursuant to otherwise legitimate governmental action.<sup>109</sup> Whether a government action is otherwise legitimate depends upon existing constitutional and statutory authorization, not upon the judge's perception of the importance of the government's objectives.

The question in *Loveladies*, said Judge Plager, is "when the Government fulfills its obligation to preserve and protect the public interest, may the cost of obtaining that public benefit fall solely upon the affected property owner, or is it to be shared by the community at large."<sup>110</sup> Plager's opinion in *Florida Rock* had addressed and answered this same question by quoting language from *Agins* and *First English* that expressly states that the purpose of the Fifth Amendment is to assure that the costs of public benefits are borne by the public rather than by selected individuals.<sup>111</sup> As in *Florida Rock*, Plager gave extensive lip service to the concept of judicial balancing,<sup>112</sup> but prop-

---

ment eventually moved for dismissal of the appeal in the takings case on the basis of a lack of jurisdiction. The Federal Circuit, sitting *en banc*, denied the government's motion and the appeal on the merits was ordered to proceed. *Loveladies Harbor, Inc. & Loveladies Harbor, Unit D, Inc. v. United States*, 27 F.3d 1545 (Fed. Cir. 1994).

103. *Loveladies Harbor*, 28 F.3d at 1174-75 (citing *Loveladies Harbor, Inc. & Loveladies Harbor, Unit D, Inc. v. United States*, 21 Ct. Cl. 153 (1990)).

104. *See supra* note 106.

105. *Loveladies Harbor*, 28 F.3d at 1183.

106. 18 F.3d 1560, 1570 (Fed. Cir. 1994), *cert. denied*, 115 S. Ct. 898 (1995) ("The Fifth Amendment 'is designed 'not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.'") (quoting *Preseault v. ICC*, 494 U.S. 1, 11 (1990) (quoting *First English Evangelical Lutheran Church v. Los Angeles*, 482 U.S. 304, 315 (1987))).

107. *Loveladies Harbor*, 28 F.3d at 1175.

108. *Id.*

109. As Judge Plager stated in *Florida Rock*, 18 F.3d at 1570, the Supreme Court's decision in *First English Evangelical Lutheran Church v. Los Angeles*, 482 U.S. 304, 315 (1987), makes clear that compensation for loss, not invalidation of an offending regulation, is the remedy for violation of the Takings Clause.

110. *Loveladies Harbor*, 28 F.3d at 1175.

111. *See supra* text accompanying notes 80-81.

112. Judge Plager describes the problem as "balancing the legitimate claims of the society to constrain individual actions that threaten the larger community, on the one



erly concluded that the role of the court is "to implement and enforce . . . public policy as it appears in . . . the words of the Constitution and the controlling pronouncements of the Supreme Court."<sup>113</sup> In performing that judicial role, Judge Plager concluded that the Supreme Court has, in fact, reduced the role of judicial balancing in takings cases by making a significant modification to the *Penn Central* test.<sup>114</sup>

As background for his explanation of the effect of *Lucas* on the *Penn Central* balancing test, Judge Plager provided a brief history of the Supreme Court's regulatory takings jurisprudence.<sup>115</sup> In the early period following *Pennsylvania Coal*, two issues emerged: (1) whether "objective legal criteria" or "*ad hoc* inquiry" would be the basis for finding a regulatory taking, and (2) whether the appropriate remedy for a regulatory taking is "a *post hoc* declaration of invalidity" or an order for compensation based on the conclusion that the restraint is otherwise valid.<sup>116</sup>

Not until 1978, according to Plager, did the Supreme Court attempt to answer the first question, by articulating three criteria relevant to determining whether a regulation has gone "too far."<sup>117</sup> The first of these criteria, "the character of the governmental action," was then interpreted to require an assessment of the asserted governmental interest,<sup>118</sup> and the relationship between the government's objective and the means used to achieve that objective.<sup>119</sup> The second criterion, "economic impact of the regulation on the claimant,"<sup>120</sup> became "a threshold requirement that the plaintiff show a serious financial

---

side, and, on the other, the rights of the individual and our commitment to private property as a bulwark for the protection of those rights." *Loveladies Harbor*, 28 F.3d at 1175.

113. *Id.*

114. *Id.* at 1179.

115. *Id.* at 1175-78.

116. *Id.* at 1176.

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

118. *Id.* (citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1014 (1984)).

119. *Id.* (citing *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987)). Some commentators and courts have interpreted *Nollan* as adding a nexus requirement to the already confusing takings jurisprudence. For example, the briefs in *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994), were dominated by this understanding of *Nollan*. While the *Nollan* opinion does discuss the relationship between the challenged regulation and its purpose, it offers no explanation for the relevance of this connection to the requirements of the takings clause. As indicated above, *supra* note 28, the legitimacy of a government regulation is irrelevant to whether or not compensation is required by the Fifth Amendment. A regulation unrelated to its (constitutional) purpose may either lack constitutional authorization or violate due process. If so, it is invalid. In such cases, compensation of affected property owners may be required by the Takings Clause, but compensation will not make the regulation valid. Nor does compensation for takings that result from legitimate regulations make those regulations invalid. The nexus requirement has nothing to do with takings law. Rather, it has to do with whether government has the constitutional authority to regulate and whether it has implemented such authority in conformance with due process.

120. *Loveladies Harbor*, 28 F.3d at 1176.

loss,<sup>121</sup> requiring a denial of “economically viable use” of affected property.<sup>122</sup> The third criterion, “interference with distinct investment-backed expectations,” was interpreted to require that affected property have been acquired “in reliance on a state of affairs that did not include the challenged regulatory regime.”<sup>123</sup>

The second issue that had persisted since *Pennsylvania Coal*—the appropriate remedy—was not answered in *Penn Central* because no taking was found in that case.<sup>124</sup> Not until *First English*, said Judge Plager, did the Supreme Court “finally and definitively” conclude that because “[t]he Constitution . . . requires just compensation for a regulatory taking from the date it occurs until the date of the regulation’s rescission or amendment,”<sup>125</sup> a *post hoc* declaration of invalidity is not adequate.<sup>126</sup>

Thus, concluded Judge Plager, takings law at the time *Loveladies* was decided in the Federal Court of Claims required monetary compensation for regulatory takings of property.<sup>127</sup> A regulatory taking would be found if:

- (1) there was a denial of economically viable use of the property as a result of the regulatory imposition;
- (2) the property owner had distinct investment-backed expectations; and
- (3) in the balance between the property owner’s right to own and use the property without unwarranted governmental interference on the one hand, and on the other, the public interest asserted by the Government in support of the regulatory imposition, the liberty interest of the property owner should prevail.<sup>128</sup>

After the Court of Claims decision and before the Federal Circuit decision in *Loveladies*, the Supreme Court issued its opinion in *Lucas*. That decision, according to Judge Plager, reflected a fundamental change in takings law.<sup>129</sup> Rather than “clarify how courts were to balance public interest claims against liberty claims of private property owners,”<sup>130</sup> as many observers expected, the *Lucas* court, in Plager’s words, “recast the issue.”<sup>131</sup>

The question, said the Court, was not one of balance between competing public and private claims. Rather the question is simply one of basic property ownership rights: within the bundle of rights which

---

121. *Id.* at 1177.

122. *Id.* (citing *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)).

123. *Id.* (citing *Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal.*, 113 S. Ct. 2264, 2291-92 (1993)).

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 1178-79.

129. *Id.* at 1179.

130. *Id.* at 1178.

131. *Id.* at 1179.

property lawyers understand to constitute property, is the right or interest at issue, as a matter of law, owned by the property owner or reserved to the state?<sup>132</sup>

If Judge Plager's interpretation of *Lucas* is correct, the effect is to replace judicial balancing with the more appropriate judicial task of determining the nature of a claimant's property rights and the extent to which a regulation interferes with those rights. Thus, after *Lucas*, a regulatory taking exists if:

- (1) there was a denial of economically viable use of the property as a result of the regulatory imposition;
- (2) the property owner had distinct investment-backed expectations; and
- (3) it was an interest vested in the owner, as a matter of state property law, and not within the power of the state to regulate under common law nuisance doctrine.<sup>133</sup>

A comparison of the third factor of Judge Plager's summary of pre-*Lucas* takings law with the third factor of his summary of post-*Lucas* takings law evidences what Plager described as a "sea change."<sup>134</sup> It removes "from regulatory takings the vagaries of the balancing process, . . . [and] substitute[s] instead a referent familiar to property lawyers everywhere. . . ."<sup>135</sup> Despite his recurrent deference to balancing as a continuing aspect of takings law, Judge Plager's interpretation of *Lucas* will eliminate the uncertainties of judicial balancing and substitute the promise "of predictability for both property owners and regulators."<sup>136</sup>

Having provided a revised description of regulatory takings law after *Lucas*, Judge Plager returned to the specific takings claim in *Loveladies*.<sup>137</sup> Whether the court should apply Judge Plager's revised three-part test depends, in the first instance, upon whether there has been a total or partial diminution of economic value.<sup>138</sup> If the loss of economic value is total, it is a categorical taking under *Lucas* and there is no need to resort to the three-part regulatory taking test.<sup>139</sup> But this determination, which "depends on what is the specific property that was affected by the permit denial,"<sup>140</sup> is not readily apparent on the facts of *Loveladies*. If the relevant parcel for the purpose of preregulation valuation is the 12.5 acres for which a fill permit has been denied, then there is probably a total loss of economic use and therefore a categorical taking. However, if the relevant parcel for the

---

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 1180.

138. *Id.*

139. See *Lucas v. South Carolina Coastal Council*, 112 S. Ct 2886, 2900 (1992).

140. *Loveladies Harbor*, 28 F.3d at 1180.

purpose of preregulation valuation is the original 250 acres that Loveladies acquired in 1952, or the 51 acres that it still owned at the time of permit denial, then there is probably a partial diminution of economic value and the revised three-part test will apply. With reference to *Keystone Bituminous Coal v. DeBenedictis*,<sup>141</sup> Judge Plager called this "the denominator problem."<sup>142</sup>

On the facts in *Loveladies*, Judge Plager concluded that because the claimant no longer owns 199 acres of the original parcel, and because the State of New Jersey has acquired an easement in 38.5 of the remaining acres,<sup>143</sup> the denominator is the 12.5 acres for which the permit was denied.<sup>144</sup> Because the denominator is the same as the numerator, there has been a total loss of economic value, a categorical taking, and no basis for the application of the revised three-part test.<sup>145</sup> Indeed, Judge Plager's extensive discussion of the post-*Lucas* approach to regulatory takings when there is a partial diminution of economic value is far more relevant to *Florida Rock* than to *Loveladies Harbor*. This may help to explain why Chief Judge Nies's separate opinion in *Florida Rock* seems to be dissenting from the majority opinion in *Loveladies Harbor*.<sup>146</sup> In light of Judge Plager's persuasive demonstration that there is no principled difference between physical invasions and regulatory takings, and his abandonment of the partial diminution analysis of earlier Supreme Court decisions, he might properly have concluded in *Loveladies Harbor* that the denominator problem is nonexistent. A taking is a taking, whether of a portion or of all of a person's property.

### III. IMPLICATIONS FOR FEDERAL ENVIRONMENTAL REGULATION

Together, *Florida Rock* and *Loveladies Harbor* constitute a rare effort by a lower federal court to independently articulate a rational understanding of regulatory takings law. Rather than continue the tradition of trying to understand recent Supreme Court decisions in the context of the incoherent precedent of the last half century,<sup>147</sup> Judge Plager has gone beyond the Supreme Court's recent piecemeal adjustments to takings doctrine to offer a comprehensive approach

141. 480 U.S. 470 (1987).

142. *Loveladies Harbor*, 28 F.3d at 1180.

143. Justice Scalia, ever willing to call a spade a spade, would probably refer to this easement acquisition by New Jersey as extortion. See *Nollan*, 483 U.S. at 837 (quoting *J.E.D. Assocs., Inc. v. Atkinson*, 432 A.2d 12, 14-15 (N.H. 1981)).

144. *Loveladies Harbor*, 28 F.3d at 1181.

145. *Id.* at 1182.

146. Chief Judge Nies was not on the panel in *Loveladies Harbor*.

147. See Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Joseph Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964); James L. Huffman, *Avoiding the Takings Clause Through the Myth of Public Rights: The Public Trust and Reserved Rights Doctrines at Work*, 3 J. LAND USE & ENVTL. L. 171 (1987).

rooted in the purpose of the Fifth Amendment's Takings Clause. But contrary to Chief Judge Nies's contention in her *Loveladies Harbor* dissent, Judge Plager has not exceeded his role as judge on an inferior court. To the contrary, Plager has taken his role seriously by carefully interpreting both the Constitution and the Supreme Court's opinions. Takings jurisprudence can only benefit from such clear and thoughtful analysis.

In sum, the *Florida Rock* and *Loveladies Harbor* decisions make clear that the traditional distinction between physical and regulatory takings is of limited relevance, and therefore that the distinction between partial and total diminution in economic value is without logical foundation. Although Judge Plager was cautious about his critique of judicial balancing in the context of takings cases, his analysis suggests that balancing is no longer appropriate to takings law and should also contribute to a skepticism about constitutional balancing tests in general. The implications for environmental regulation are therefore significant.

This does not mean, as Judge Plager has emphasized in both opinions,<sup>148</sup> that a revived Takings Clause will limit the regulatory powers of government. Rather it only requires compensation when property has been taken by the otherwise constitutional exercise of government powers. This limit has always been understood when government physically occupies private property. The *Florida Rock* and *Loveladies Harbor* opinions make clear that the limit also applies when government regulates private property. While most environmental interests insist that an extension of the compensation requirement to regulatory takings will make it impossible for government to regulate, there is no reason to assume that the costs of regulatory takings will be more prohibitive than the costs of physical takings. In either case, the government must determine whether the public benefits of its actions justify the associated costs. As Judge Plager pointed out by quoting from both *Agins* and *First English*, if the government does not bear those costs, they will be borne unfairly and disproportionately by particular individuals.<sup>149</sup> Like the external costs of private action that often justify environmental regulation, the impacts on private property of government regulation impose real costs whether borne by the government or by particular individuals. Under the Constitution, government may be required to incur the costs of authorized regulations. The Fifth Amendment merely limits government's options for passing those costs on to property owners.

In some regulatory settings, the indirect costs of regulations in the form of limitations on the use and value of property are widely shared as are the benefits of the regulation. From the point of view of property owners, there is a reciprocity of advantage to such regulations.

---

148. See *supra* notes 106-07.

149. See *supra* notes 80-81.

Many zoning and building code regulations fall into this category. Normally the courts have concluded that there is no taking in such cases because of the reciprocal benefits to affected property owners.<sup>150</sup> A better explanation is that there has been a taking followed by implicit compensation,<sup>151</sup> which may or may not be adequate.

In other regulatory settings, the indirect costs of regulations in the form of limitations on the use and value of property are borne by discrete individuals whose property rights do not entitle them to engage in the regulated activity. This does not necessarily mean that regulated property owners acted illegally prior to the limiting regulation: Rather, they may have acted with the assumed knowledge that the government could impose regulations or that a neighbor might bring a private action in trespass or nuisance. Many pollution regulations would fall into this category. This is what Judge Plager, relying on *Lucas*, called the nuisance defense.<sup>152</sup> Correctly understood, it is not an defense, rather it is a recognition that a regulation that forbids property owners from doing what they had no legal right to do in no way infringes on the owner's property rights. In such cases, there is no taking.

In still other regulatory settings, the indirect costs of regulations in the form of limitations on the use and value of property are borne by discrete individuals whose property rights do entitle them to engage in the regulated activity, but there are no compensating reciprocal benefits. In such cases, there has been a taking and just compensation is due. The nature of the sought-after public benefit in these cases often makes them directly analogous to physical takings in which the government routinely resorts to eminent domain. In the context of contemporary environmental regulations, the most significant examples are wetlands and endangered species protection. In both situations, the focus of the government's regulatory effort is discrete parcels of land constituting wetlands or endangered species habitat.

If followed in subsequent Federal Circuit opinions, and if not turned back by the Supreme Court, Judge Plager's "sea change" in takings jurisprudence will have a significant impact on the future of environmental regulation. While most environmentalists will bemoan the anticipated consequences, the results may well prove beneficial for both individual liberty and the environment.

---

150. See, e.g., *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978); *Agins v. City of Tiburon*, 447 U.S. 255, 262-63 (1980).

151. It does not follow, however, that major governmental initiatives can go forward only if cash or other property is explicitly transferred to persons whose property has been taken. The Constitution speaks only of "just" compensation, not of the form it must take. In principle, therefore, the state may provide compensation in whatever form it chooses. This proposition indicates the importance of implicit in-kind compensation.

EPSTEIN, TAKINGS, *supra* note 87, at 195.

152. *Florida Rock*, 18 F.3d at 1565 n.10.

