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INVERSE CONDEMNATION LITIGATION IN THE 1990s—THE UNCERTAIN LEGACY OF THE SUPREME COURT'S *LUCAS* AND *YEE* DECISIONS

*RICHARD M. FRANK**

> "The attempt to determine when regulation goes so far that it becomes, literally or figuratively, a 'taking' has been called the 'lawyer's equivalent of the physicist's hunt for the quark.' "[1]

No issue of natural resources law has intrigued and bedeviled the United States Supreme Court over the past fifteen years more than inverse condemnation law.[2] During that period, the Court handed down more than twenty decisions in which the Takings Clause of the Fifth and Fourteenth Amendments was central.[3]

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1. Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 199, n.17 (1983) (quoting CHARLES M. HAAR, LAND USE PLANNING 766 (3d ed. 1976)).

2. *See infra* note 10 for a definition of inverse condemnation law.

3. *See, e.g.*, Preseault v. Interstate Commerce Comm'n, 494 U.S. 1 (1990); Pennell v. City of San Jose, 485 U.S. 1 (1988); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); Bowen v. Gilliard, 483 U.S. 587 (1987); First English Evangelical Lutheran

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That the Supreme Court devotes this degree of attention to so-called "takings" jurisprudence is noteworthy given the Court's limited docket and the multitude of other important legal questions which perpetually compete for the Justices' attention. One might logically conclude that the Court's recent, intense scrutiny of takings principles would produce a well-settled and understandable body of law. In fact, nothing could be further from the truth.

The Supreme Court decided two important Takings Clause cases in its 1991-92 Term that perpetuated this exasperating trend.[4] *Yee v. Escondido* and *Lucas v. South Carolina Coastal Council* are a study in contrasts: *Yee* was a unanimous decision of the Supreme Court; *Lucas* typified the far more common pattern in takings cases of a sharply divided Court. *Yee* received little attention from the general media; *Lucas* may well be the most publicized and controversial environmental decision handed down by the Court in several years.

Yet the two decisions share certain common features. Both *Yee* and *Lucas* purport to create "bright line" rules governing certain regulatory takings cases. Any significant level of certainty or stability which might flow from those rules is, however, likely to prove illusory.

This article focuses on what the *Yee* and *Lucas* decisions hold, what Takings Clause issues they leave unresolved and, perhaps most importantly, what key inverse condemnation questions are likely to be the focus of future takings litigation in the muddled wake of *Yee* and *Lucas*.

I. BACKGROUND TAKINGS PRINCIPLES IN A NUTSHELL

The Fifth Amendment to the U.S. Constitution prohibits the taking

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Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987); Hodel v. Irving, 481 U.S. 704 (1987); Federal Communications Comm'n v. Florida Power Corp., 480 U.S. 245 (1987); MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340 (1986); Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211 (1986); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985); Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985); Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); Hodel v. Indiana, 452 U.S. 314 (1981); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981); Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980); Agins v. City of Tiburon, 447 U.S. 255 (1980); PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980); United States v. Clarke, 445 U.S. 253 (1980); Andrus v. Allard, 444 U.S. 51 (1979); Kaiser Aetna v. United States, 444 U.S. 164 (1979); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1977).

4. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992); Yee v. City of Escondido, 112 S. Ct. 1522 (1992).

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of private property for public use without just compensation.[5] Nearly a century ago, the Supreme Court held, under the selective incorporation doctrine and the Fourteenth Amendment, that this "Takings Clause" or "Just Compensation Clause" of the Fifth Amendment applies to limit state and local, as well as federal, government action.[6]

Traditionally, courts construed the Takings Clause to limit only actual, physical seizures of private property by a governmental entity without payment of compensation.[7] Such seizures could either be performed directly, through the sovereign's exercise of its eminent domain power,[8] or indirectly, through actual government occupation of private property by physical seizure, flooding, or destruction.[9] The latter form of "taking" came to be known as "inverse condemnation."[10] Both types of governmental action qualify as so-called "physical takings" that require compensation under the Fifth and Fourteenth Amendments. Such "physical takings" by the government, to the extent they are permanent in nature, are compensable "no matter how minute the intrusion, and no matter how weighty the public purpose behind it . . . ."[11]

This per se rule for physical takings contrasts with the amorphous standards applicable to so-called "regulatory takings." The notion that government regulations could precipitate a compensable taking did not develop until the twentieth century. Many commentators trace the birth of regulatory takings jurisprudence to Justice Oliver Wendell Holmes' now-famous opinion in *Pennsylvania Coal Co. v. Mahon*.[12] In that case, Justice Holmes enunciated the oft-cited maxim that "while

5. U.S. CONST. amend. V, cl. 5.

6. Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226, 241 (1897). *See also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 11-2, at 772 (2d ed. 1988) (finding that the Fourteenth Amendment's due process provision incorporates the right to just compensation).

7. William M. Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694 (1985); *see also Lucas*, 112 S. Ct. at 2892 (majority opinion), 2914-15 (Blackmun, J., dissenting) (noting the original narrow scope of the Fifth Amendment taking provision).

8. TRIBE, *supra* note 6, § 9-2, at 588 n.2, 590.

9. *Id.* § 9-3, at 592.

10. *See* Agins v. City of Tiburon, 447 U.S. 255, 258 n.6 (1980) ("Inverse condemnation is 'a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted.' ") (quoting United States v. Clarke, 445 U.S. 253, 257 (1980)).

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

12. 260 U.S. 393 (1922).

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property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[13]

Determining which government regulations go "too far" and thus require compensation under the Takings Clause is the core issue that has vexed the Supreme Court, and lower federal and state courts, in the 70 years since *Pennsylvania Coal*. The Court admitted as much in its 1978 landmark decision *Penn Central Transportation Co. v. New York City*.[14]

Eschewing the per se standard embraced in physical takings cases, the Court traditionally makes an "*ad hoc*, factual inquiry"[15] in adjudicating regulatory takings cases. The Court has not comprehensively identified the criteria that should be considered in regulatory takings challenges. The closest the Court has come is the *Penn Central* decision, where it identified three seemingly non-exclusive factors relevant to takings claims: (1) the character of the governmental action being challenged; (2) the economic impact of the regulation on the property owner; and (3) the extent to which the regulation "has interfered with distinct, investment-backed expectations" of the property owner.[16]

The so-called "nuisance exception" to the Takings Clause is the final component of the takings doctrine. In a century-long line of cases, the U.S. Supreme Court had rejected a number of constitutionally-based claims to compensation, on the ground that the government invoked its police power to address key public health, safety, and welfare concerns.[17] In those cases, the court deemed the challenged regulation

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13. *Pennsylvania Coal*, 260 U.S. at 415.

14. 438 U.S. 104 (1978). The court stated:

> The question of what constitutes a [regulatory] 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty . . . . [T]his Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.

Id.

15. *Penn Central*, 438 U.S. at 124.

16. *Id.*

17. *See, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 506 (1987) (upholding coal mining subsidence regulation against takings challenge on grounds that "public purposes" justified the regulation); Miller v. Schoene, 276 U.S. 272, 280 (1928) (validating a government directive to cut down infected trees considered a "public nuisance" in order to prevent disease's spread to other properties); Hadacheck v. Sebastian, 239 U.S. 394, 413 (1915) (upholding state statute requiring closure of brickyard in urban area on public welfare grounds); Plymouth Coal Co. v. Pennsylvania, 232 U.S. 531, 540 (1914) (upholding miner safety regulation); Mugler v. Kan-

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valid regardless of its economic impact on the affected private property.[18] The rationale for the nuisance exception is that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community."[19]

It is this constitutional conundrum that the Supreme Court revisited in *Yee* and *Lucas*.

II. *YEE V. CITY OF ESCONDIDO*

A. *Background*

Like many of the takings cases accepted for review by the Supreme Court in recent years, *Yee v. City of Escondido*[20] emanated from the California state courts. In *Yee*, mobile home park owners in the San Diego area claimed that a municipal mobile home rent control ordinance,[21] coupled with the requirements of California's Mobilehome Residency Law,[22] resulted in an unconstitutional taking of private property without compensation under the United States Constitution.[23] The California statute limits park owner's ability to terminate a mobile homeowner's tenancy[24] or to prevent the tenant from selling or assigning his or her leasehold interest in the mobile home.[25] The Escondido rent control ordinance, adopted by voter initiative in 1988, restricts the park owners' ability to impose rent increases.[26]

The park owners in *Yee* argued that the net effect of the two measures was to: (a) inflate artificially the value of a given mobile home in a way that primarily, and unfairly, reflected the value of the underlying real property rather than the mobile home unit itself;[27] (b) deprive the

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sas, 123 U.S. 623, 669 (1887) (upholding compelled closure of brewery on grounds that state may designate alcoholic beverages as public nuisance).

18. *See, e.g.*, *Keystone Bituminous Coal Ass'n*, 480 U.S. at 488, 491-92 (finding that burdens may be placed on private property to prevent a use which would injure the community).

19. Mugler v. Kansas, 123 U.S. at 665.

20. 112 S. Ct. 1522 (1992).

21. ESCONDIDO, CAL., MOBILEHOME RENT CONTROL art. V, § 29-101-108 (1988).

22. CAL. CIV. CODE §§ 798-99.6 (West 1982 & Supp. 1992).

23. *Yee*, 112 S. Ct. at 1527.

24. CAL. CIV. CODE § 798.56 (West Supp. 1992).

25. CAL. CIV. CODE §§ 798.71-.79 (West 1982 & Supp.).

26. ESCONDIDO, CAL., MOBILEHOME RENT CONTROL art. V, § 29-103 (1988).

27. *Yee*, 112 S. Ct. at 1528.

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park owners of the use and occupancy of their real property;[28] and (c) grant the tenant and his or her successors in interest the right to occupy physically and to use the park owners' property indefinitely.[29]

The park owners' ultimate position was that this resulted in a *physical* taking of their property, thus triggering a per se duty of the city to compensate the park owners under the Takings Clause.[30] Their position found explicit support in, and was expressly predicated on, the Ninth Circuit Court of Appeals' earlier decision in *Hall v. City of Santa Barbara*.[31] In *Hall*, the Ninth Circuit struck down a mobile home rent control measure similar to Escondido's on the very grounds advanced by Yee.[32] In *Hall*, the Ninth Circuit found the rent control ordinance to work an uncompensated taking of the mobile home park owner's property by applying established "physical takings" standards,[33] which, as noted above, are far less exacting than those applied in so-called "regulatory takings" cases. The Third Circuit Court of Appeals subsequently adopted the *Hall* rule and rationale.[34]

Conversely, the California state courts had expressly rejected the reasoning and result in *Hall*, adhering to the more conventional "regulatory takings" analysis and explicitly rejecting the Ninth Circuit's "physical takings" theory.[35] The Supreme Court saw *Yee* as an opportunity to resolve this important state-federal judicial conflict in takings

28. *Id.* at 1527.

29. *Id.*

30. *Id.* at 1528.

31. 112 S. Ct. at 1527, *citing Hall*, 833 F.2d 1270, 1281 (9th Cir. 1986) (finding that a local ordinance could effect physical taking of mobile home owners' property), *cert. denied*, 485 U.S. 940 (1988).

32. 833 F.2d at 1280.

33. *Id.* at 1279-80. *See also* Azul-Pacifico, Inc. v. City of Los Angeles, 948 F.2d 575, 588 (9th Cir. 1991) (following *Hall* and holding that city rent control ordinance's vacancy control provision took mobile home park owner's property without just compensation), *reh'g granted and opinion withdrawn and superseded*, 973 F.2d 704 (9th Cir. 1992).

34. *See* Pinewood Estates v. Barnegat Township Leveling Bd., 898 F.2d 347, 353-54 (3rd Cir. 1990).

35. *See* Casella v. City of Morgan Hill, 280 Cal. Rptr. 876 (Cal. Ct. App. 1991); Yee v. City of Escondido, 274 Cal. Rptr. 551 (Cal. Ct. App. 1990), *cert. granted in part*, 112 S. Ct. 294 (1991), *aff'd*, 112 S. Ct. 1522 (1992); *see also* Eamiello v. Liberty Mobile Home Sales, Inc., 546 A.2d 805, 818 (Conn. 1988) (holding that provision permitting tenants to sell mobile home which comported with regulatory standards did not effect a physical taking of mobile home owner's private property), *appeal dismissed*, 489 U.S. 1002 (1989).

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jurisprudence.[36]

B. *The Supreme Court Decision in* Yee

In *Yee*, the Supreme Court unanimously upheld the City of Escondido's mobile home rent control ordinance against a claim that the provision resulted in a physical taking of the mobile home park owners' property.[37] In so doing, the Court rejected the contrary analysis embraced by the Third and Ninth Circuits.[38] The Justices also took the opportunity to reiterate some "bright line" distinctions between regulatory takings and physical takings. The Supreme Court expressly rebuffed the Ninth Circuit's "physical takings" standard in favor of the more traditional "regulatory takings" analysis embraced by the California state courts in *Yee*[39] and similar cases.[40]

Justice O'Connor, writing for the Court, summarily rejected the park owners' argument that the Escondido ordinance effected a physical taking.[41] Accordingly, the Court held that the rent control ordinance represents only a *regulation* of the park owner's property, rather than a physical occupation of the parcel.[42] In so doing, the Court ex-

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36. *Yee*, 112 S. Ct. at 1527.

37. *Id.* at 1531.

38. *See supra* notes 31-34 and accompanying text for discussion of the Third and Ninth Circuits' analysis.

39. *See supra* note 35 and accompanying text for a discussion of the California state courts' position in *Yee*.

40. *Yee*, 112 S. Ct. at 1528.

41. Justice O'Connor stated:

> This argument, while perhaps within the scope of our regulatory taking cases, cannot be squared easily with our cases on physical takings. The government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land . . . .
>
> . . . .
>
> But the Escondido rent control ordinance, even when considered in conjunction with the California Mobile Home Residency Law, authorizes no such thing. Petitioners voluntarily rented their land to mobile home owners . . . . Put bluntly, no government has required any physical invasion of petitioners' property. Petitioners' tenants were invited by petitioners, not forced upon them by the government.

Id.

42. *Id.* at 1529. The distinction is critical: alleged regulatory takings are subject to a weighing and balancing of multifaceted criteria under established Takings Clause jurisprudence. In contrast, governmental physical occupations of property are, with rare exceptions, considered to be *per se* takings of property for which compensation is constitutionally compelled. *See* text accompanying *supra* notes 11, 15-16.

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pressly repudiated the novel, and contrary, approach embraced by the federal courts of appeals in *Hall* and subsequent decisions.

III. *Lucas v. South Carolina Coastal Council*

A. *Background*

Lucas involved a challenge to the 1988 South Carolina Beachfront Management Act.[43] The key regulatory constraints of the Act limit development within critical areas of the beach and dune system by establishing construction setback requirements[44] and limiting reconstruction of dwellings seaward of those setback lines following natural disasters.[45] In the Act, the state declares that the South Carolina coastal dune and beach system serves a host of indispensable public purposes. These include protecting life and property by acting as a storm barrier, providing habitat for endangered species and wildlife generally, and serving as a basis for a tourism industry essential to South Carolina's economy.[46] The Act further declares concern for the critical erosion of South Carolina's beaches,[47] the harm that certain types of construction causes on the dunes system,[48] and the threat that such ecological damage poses to the above-described public purposes.[49]

The plaintiff, Lucas, owned two vacant, oceanfront lots located seaward of the statutorily-prescribed setback lines.[50] As a result, the Act precluded Lucas from constructing any permanent structures other than a small deck or walkway on the lots.[51] Lucas sued the state agency charged with administering the Act, claiming that the Act worked an unconstitutional taking of his property.[52] The trial court agreed that a taking had occurred because the regulation effectively eliminated all economic value of the lots and awarded Lucas $1,232,387.50.[53]

43. S.C. Code Ann. §§ 48-39-250 to 48-39-360 (Law. Co-op Supp. 1992).
44. *Id.* § 48-39-280.
45. S.C. Code § 48-39-290 (Law. Co-op. Supp. 1992).
46. S.C. Code § 48-39-250(1) (Law. Co-op. Supp. 1992).
47. *Id.* § 48-39-250(3).
48. *Id.* § 48-39-250(5), (7).
49. *Id.* § 48-39-250(11).
50. *Lucas*, 112 S. Ct. at 2889.
51. *Id.* at 2889-90 & n.2.
52. *Id.* at 2890.
53. *Id.*

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A divided South Carolina Supreme Court reversed on the ground that the Act fell within the scope of the nuisance exception to the compensation requirement of the Takings Clause.[54] As noted above, no unconstitutional taking occurs and no compensation is required when government acts to prevent private use of property that would cause public harm.[55] Because it was undisputed that the Act was designed to prevent "the great public harm" of the erosion and destruction of the coastal dune and beach system, the South Carolina Supreme Court held that no unconstitutional taking had transpired.[56]

Justices Harwell and Chandler dissented from the state supreme court decision in *Lucas*.[57] They adopted the position previously articulated in Chief Justice Rehnquist's dissent in *Keystone Bituminous Coal Ass'n v. DeBenedictis*:[58] compensation is required whenever landowners are deprived of all economically viable use of their property, regardless of how the proposed use of that property harms the public.[59] The dissent also contended that the "quasi-nuisance" exception is inapplicable when the regulation at issue furthers public purposes beyond prevention of a private harm.[60]

B. *Supreme Court Decision in* Lucas

1. The Majority Opinion

Justice Scalia, writing for the majority in *Lucas*, began by finding that the property owner's takings claim was ripe for adjudication notwithstanding South Carolina's 1990 enactment of legislative amendments which afforded the landowner some future prospect of developing his parcels.[61] Turning to the merits, the Court held that the South Carolina Supreme Court had applied the wrong constitutional standard in ruling for the state of South Carolina.[62] Accordingly, the case

54. Lucas v. South Carolina Coastal Council, 404 S.E.2d 895, 899-900 (S.C. 1991), *rev'd*, 112 S. Ct. 2886 (1992). *See also supra* notes 17-19 and accompanying text for a delineation of the scope of the public nuisance exception.

55. *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 490-91 (1987) (elucidating the evolution of the noxious use and public nuisance exception).

56. *Lucas*, 404 S.E.2d at 898, 901.

57. *Id.* at 902-08 (Harwell and Chandler, JJ., dissenting).

58. 480 U.S. 470, 506-21 (1987) (Rehnquist, C.J., dissenting).

59. *Lucas*, 404 S.E.2d at 906.

60. *Id.*

61. *Lucas*, 112 S. Ct. 2886, 2890-92.

62. *Id.* at 2901.

Washington University Open Scholarship

was reversed and remanded for further state court proceedings to determine whether an unconstitutional taking had in fact occurred.[63]

The more interesting and, ultimately, significant aspects of the *Lucas* decision are how the Court reached the conclusion that the state supreme court had erred, and how it fashioned the new takings test for those relatively rare situations[64] when government regulation results in total elimination of a property's economic value, a "total taking." The majority in *Lucas* established a *presumption* that, in such circumstances,[65] a compensable taking does exist.[66]

As Justice Stevens pointed out in dissent, and despite the majority's implications to the contrary, the Supreme Court had never previously adopted such a sweeping rule.[67] Indeed, the Court's prior takings precedents include numerous cases in which the court rejected compensation claims despite a regulation's perceived elimination of all private use of property.[68]

Justice Scalia's majority opinion did indicate, however, that the presumption of a taking has limits. The Court held that government regulation of real property that totally eliminates economic use will survive

63. *Id.* at 2901-02. The Court expressly declined to decide whether an unconstitutional taking actually had occurred. *Id.* On remand, the South Carolina Supreme Court subsequently found a taking to have transpired and returned the case to the trial court solely for purposes of computing the appropriate amount of damages. Lucas v. South Carolina Coastal Council, 1992 WL 358097 (S.C. 1992).

64. *Id.* at 2894.

65. *Id.* at 2893-95.

66. *Lucas*, 112 S. Ct. at 2895. The court concluded this portion of its decision with the following pronouncement:

> We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial use in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.

Id.

67. *Id.* at 2918-20 (Stevens, J., dissenting). *See also id.* at 2910-12 (Blackmun, J., dissenting) (finding that "[w]hen the government regulation prevents the owner from any economically valuable use of his property, the private interest is unquestionably substantial, but we have never before held that no public interest can outweigh it.").

68. *See, e.g.*, First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 332-33 (1987) (Stevens, J., dissenting in part) (noting that precedent holds that not every diminution in a property's value is compensable); Goldblatt v. Hempstead, 369 U.S. 590, 592 (1962) (finding that a regulation which prevents the beneficial use of property is not unconstitutional when the regulation is a valid exercise of municipal police powers); Miller v. Schoene, 276 U.S. 272, 279 (1928) (holding valid a regulation which did not compensate owners for the value of property but rather destroyed or decreased the market value of the property).

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a takings challenge in at least two related circumstances.[69] The first involves proposed uses of private property which contravene traditional notions and limitations found in state property law.[70] Under this rationale, for example, a property owner whose development proposal is rejected by government regulators on the ground that the owner previously conveyed an open space easement for the parcel to third parties would lack a viable takings claim under *Lucas*.[71]

The second, more controversial limitation on the Court's "total taking" rule relates to the "nuisance exception"[72] relied upon below by the South Carolina Supreme Court. The majority in *Lucas* retained the nuisance exception but circumscribed its future application and use.[73] Scalia's majority opinion found that a regulation which is necessary to forestall "grave threats to the lives and property of others"[74] will pass constitutional muster even if the regulation's impact is to eliminate totally the value of affected private property.[75] In so holding, Scalia

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69. *Lucas*, 112 S. Ct. at 2900-01.

70. *Id.* at 2901. The majority explained as follows:

> In light of our traditional resort to 'existing rules or understandings that stem from an independent source such as state law' to define the range of interests that qualify for protection as 'property' under the Fifth (and Fourteenth) amendments, this recognition that the Takings Clause does not require compensation when an owner is barred from putting land to a use that is proscribed by those 'existing rules or understandings' is surely unexceptional.

Id.

71. Stevens v. City of Cannon Beach, 835 P.2d 940 (Or. Ct. App. 1992), *rev. granted*, 315 Or. 271 (1992), decided only a month after *Lucas*, also demonstrates the application of this rationale. *Stevens* involved an inverse condemnation challenge to the city's denial of a permit to build a seawall which would have facilitated plaintiffs' construction of a beachfront hotel. *Id.* at 941. The Oregon Court of Appeals rejected the takings challenge, finding that under *Lucas* the plaintiffs lacked a property-based right to build the seawall on the dry sand beach area owned by plaintiff. *Id.* The court held that the public previously acquired the right to use the dry sand area under the Oregon state law doctrine of "custom." *Id.* at 942. Accordingly, the court concluded, "the purportedly taken property interest was not part of plaintiffs' estate to begin with." *Id.* at 9423 *citing* State ex rel. Thornton v. Hay, 462 P.2d 671, 678 (Or. 1969).

72. *See supra* notes 17-19 for a discussion of the nuisance exception.

73. Justice Scalia examined the nuisance cases, *see supra* note 17, and, without reversing any of them, seemingly limited their precedential value. 112 S. Ct. at 2896-99.

74. 112 S. Ct. at 2900, n.16.

75. *Id.* at 2900-01 & n.16. *Cf. id.* at 2903-04 (Kennedy, J., concurring in judgment) ("The Supreme Court of South Carolina erred, in my view, by reciting the general purposes for which the state regulations were enacted without a determination that they were in accord with the owner's reasonable expectations and therefore sufficient to support a severe restriction on specific parcels of property.").

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clearly intended to narrow the scope of the nuisance exception beyond that stated in prior Supreme Court decisions.

One of the most notable passages from the majority opinion in *Lucas* is the Court's fashioning of a new, multifaceted constitutional test which lower state and federal courts must now use to assess the applicability of the nuisance exception as part of the required " 'total taking' inquiry."[76] The relevant factors include the following:

> The degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities, the social value of the claimant's activities and their suitability to the locality in question, and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners) alike.[77]

Justice Scalia added a final restriction to both exceptions to the "total taking" presumption: any restriction based on nuisance or state property law limitations must be justified by land use limitations of the type recognized under *pre-existing* state property law.[78] He stated that "[a]ny limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."[79] The Court also opined that the application of state nuisance or property law principles to defeat a takings claim must be "objectively reasonable."[80]

2. Concurring and Dissenting Opinions

Justice Kennedy concurred in the judgment.[81] Kennedy disagreed with the majority regarding the Court's newly-circumscribed nuisance exception.[82] He reasoned that the contours of the nuisance exception

76. 112 S. Ct. at 2901.

77. *Id.* (citations omitted).

78. *Id.* at 2900.

79. *Id.* This passage seems to imply that such restrictions must be creatures of common, i.e., judge-made, law rather than legislation and predicated on well-settled state property and nuisance rules. Yet later in the opinion, Justice Scalia appears to draw back from this absolutist view, noting that "changed circumstances or new knowledge may make what was previously permissible no longer so." *Id.* at 2901 *citing* RESTATEMENT (SECOND) OF TORTS, § 827 cmt. g (1979).

80. 112 S. Ct. at 2902, n.18.

81. *Id.* at 2902-04 (Kennedy, J., concurring in judgment).

82. *Id.* at 2903.

https://openscholarship.wustl.edu/law_urbanlaw/vol43/iss1/5

should be flexible and expansive in allowing police power regulations.[83] Kennedy concluded that the correct standard by which to judge regulations that eliminate all property value is "whether the deprivation is contrary to [the property owner's] reasonable, investment-backed expectations."[84]

Justice Souter wrote a separate statement, finding the writ of certiorari improvidently granted and advocating the dismissal of the writ.[85] Souter predicated this result on the fact that the Court granted the petition for review under the mistaken belief that the Beachfront Management Act deprived Lucas of *all* beneficial use of his property.[86] Souter found insufficient evidence in the record to indicate whether the regulation effected a total taking and the probability that in fact no such taking had occurred precluded the Court's consideration of whether a taking had actually occurred.[87]

Both Justices Blackmun and Stevens wrote lengthy dissents.[88] Each Justice took issue with the Court's threshold conclusion that Lucas' takings challenge was ripe for adjudication[89] and with the majority's substantive takings analysis.[90] Regarding the latter, Justices Blackmun and Stevens disagreed with the majority's interpretation of historic takings precedents,[91] with the categorical presumption of a taking in cases where all economic value is lost,[92] and with the scope of the nuisance

83. *Id.*

84. *Id.* Kennedy believed that this test permits the reasoned coexistence of the takings clause and local police powers. *Id.*

85. 112 S. Ct. at 2925 (Souter, J., concurring).

86. *Id.*

87. *Id.* Souter stated:

> While the issue of what constitutes total deprivation deserves the Court's attention, as does the relationship between nuisance abatement and such total deprivation, the Court should confront these matters directly. Because it can [not] do so in this case . . . the Court should dismiss the instant writ and await an opportunity to face the total deprivation question squarely.

Id. at 2926.

88. *See* 112 S. Ct. at 2904-17 (Blackmun, J., dissenting); 112 S. Ct. at 2917-25 (Stevens, J., dissenting).

89. *Id.* at 2906-09 (Blackmun, J., dissenting), 2917-18 (Stevens, J., dissenting).

90. *See* 112 S. Ct. at 2904-17 (Blackmun, J., dissenting), 2919-25 (Stevens, J., dissenting).

91. *Id.* at 2910-12 (Blackmun, J., dissenting), 2914-17 (Stevens, J., dissenting).

92. *Id.* at 2910-12 (Blackmun, J., dissenting), 2920-22 (Stevens, J., dissenting).

Washington University Open Scholarship

and state property law exceptions articulated by the majority.[93]

IV. INVERSE CONDEMNATION IN THE POST-*LUCAS* AND *YEE* ERA — WHERE DO WE (AND THE COURTS) GO FROM HERE?

For a number of reasons, the short-term impacts of *Yee* and *Lucas* should be relatively limited. First, the Court effectively remanded both cases to their respective state courts for further proceedings. In *Yee*, the Court vitiated the landowners' physical takings challenge to the rent control ordinance at issue.[94] Yet the Court repeatedly indicated that the property owners' takings claim might be viable in a regulatory takings context.[95] Similarly, the Court in *Lucas* remanded the case to the state court for further proceedings, expressly declining to determine whether a taking had transpired on the facts presented.[96]

Second, both *Yee* and *Lucas* involved atypical factual situations which are not likely to recur with any frequency. *Yee* concerned the unique interrelationship between a local rent control ordinance and a California statute governing mobile home occupation. *Lucas* involved what the Court perceived as the somewhat Draconian effect of a statewide beachfront setback requirement that eliminated *all* economic use of the landowner's parcels. Most coastal states have coastal planning and development programs which treat development applications on a case-by-case rather than statewide basis.[97]

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93. 112 S. Ct. at 2912-14 (Blackmun, J., dissenting), 2920-22 (Stevens, J., dissenting).

94. *Yee*, 112 S. Ct. at 1529-31.

95. *Id.* at 1528, 1530-31. Apparently, Mr. and Mrs. Yee took the Court at its word. News accounts report that the couple refiled their takings challenge to the Escondido ordinance the day after the Supreme Court handed down its decision. *See* "Losing attorneys in 'Yee' case take court's advice, file new suit," *Sacramento Daily Recorder*, April 8, 1992, at p. 1, col. 1. The new complaint, contrary to the original version, relied on a purely regulatory taking theory. The court subsequently dismissed the amended complaint on res judicata grounds because the plaintiffs had raised, but not pursued, their regulatory takings claim in the original proceeding. Telephone Interview with Jeffrey Epp, counsel of record for respondent City of Escondido (Oct. 3, 1992).

96. *Lucas*, 112 S. Ct. at 2901-02; *see also supra* note 63.

97. *See, e.g.*, ALASKA STAT. § 46.40.100 (1991) (permitting variances from district coastal management programs and review of denials by state superior courts); CAL. PUB. RES. CODE §§ 30600-627 (West 1986 & Supp. 1992) (requiring permit application for all coastal development from individual owners and allowing review of decisions on permits); CONN. GEN. STAT. ANN. § 22a-109 (West 1985 & Supp. 1992) (providing for filing and review of coastal site plan for each proposed coastline structure); GA. CODE ANN. §§ 12-5-237 to 12-5-247 (Michie 1992) (outlining the development permit application and review process); MASS. ANN. LAWS ch. 131, § 40 (Law. Co-op. 1989 & Supp.

https://openscholarship.wustl.edu/law_urbanlaw/vol43/iss1/5

Third, Justice Scalia was undoubtedly correct when he repeatedly characterized government regulations which *totally eliminate* the economic value of real property as unusual.[98] The far more common situation involves a regulation which arguably diminishes, but does not eliminate, the economic worth of property. Nothing in the *Lucas* decision overtly says that the traditional *ad hoc* balancing approach used in *Penn Central* and other prior regulatory takings cases should not cease to be applied in the latter situation.[99]

While the immediate effects of the *Yee* and *Lucas* decisions are relatively insignificant, the more subtle long-term implications of the decisions are likely to have a substantial impact on courts and litigants. Of the two opinions, *Lucas* seems more pivotal.[100]

A. *The Erosion of Ripeness Principles?*

Both *Yee* and *Lucas* eroded previously-settled principles governing ripeness of takings claims for judicial resolution. The Supreme Court had previously developed a series of formidable procedural barriers to judicial resolution of takings claims.[101] Among them are requirements that, before filing a takings claim in the courts, property owners must:

1992) (same); N.Y. ENVTL. CONSERV. LAW §§ 34-0109, 34-0112 (Consol. 1992) (same); VA. CODE ANN. §§ 28.2-1406 to 28.2-1415 (Michie 1992) (same).

In 1990, South Carolina amended the Beachfront Management Act at issue in *Lucas* to incorporate a variance procedure that might well allow Mr. Lucas to build on his oceanfront lots. *Lucas*, 112 S. Ct. at 2890-91, S.C. CODE ANN. § 48-39-290(D)(1) (Law. Co-op. Supp. 1992).

98. *See* 112 S. Ct. at 2894 (finding that the doctrine that a taking occurs when a regulation eliminates all property value only applies "to the relatively rare situations where the government has deprived a landowner of all economically beneficial uses.").

99. *See* 112 S. Ct. at 2925 (Souter, J., concurring) (noting the continuing viability of the Court's regulatory takings precedent).

100. Many of the key themes of *Lucas* were unnecessary to the Court's ultimate disposition of the case and are therefore dicta. The majority of this dicta is in the footnotes to Justice Scalia's majority opinion. *See, e.g.*, 112 S. Ct. at 2892-93 nn.3-5 (ripeness); *id.* at 2894 n.7 (valuation of "taken" property); *id.* at 2898 n.11-12 (interpretation of legislative intent); *id.* at 2900 n.16 (definition of cognizable nuisances).

101. *See, e.g.*, MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 351-52 (1986) (noting that the Court historically insists on knowing the "nature and extent" of statutorily permitted development before determining whether the statute effects a taking); Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 186-97 (1985) (outlining the numerous prudential barriers to judicial resolution of taking claims); Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (stating that controversy may not be ripe unless landowner actually applies for development permit).

Washington University Open Scholarship

(1) obtain a final judicial determination regarding the challenged measure's applicability to the subject property; (2) pursue at least one meaningful attempt to obtain an administrative variance or similar exemption from the regulation; and (3) avail themselves of reasonably available state compensation procedures.[102]

These ripeness principles indisputably pertain to "as-applied" takings challenges, concerning a regulation's effect as applied to a particular piece of property. It has been less clear whether so-called "facial" challenges to a regulation, which claim that a measure effects an unconstitutional deprivation of property on its face, without reference to a given factual setting, were subject to the same ripeness defenses.[103] In *Yee*, the Supreme Court found the ripeness doctrine somewhat inapplicable to facial takings challenges.[104]

The Court's language may help resolve the confusion over the extent to which ripeness principles apply to facial takings cases. Previously, the Court has admonished that facial takings claims are particularly difficult to prove.[105] However, this aspect of *Yee* may encourage some property owners to forego as-applied takings claims in favor of facial attacks because the latter are, post-*Yee*, largely exempt from the stringent ripeness requirements that the Court has mandated for as-applied

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102. *See* Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985).

103. *Compare* Southern Pac. Transp. Co. v. City of Los Angeles, 922 F.2d 498, 505-07 (9th Cir. 1990) (holding that facial takings claim is unripe until the property owner has determined what compensation is available), *cert. denied*, 112 S. Ct. 382 (1991) *with* Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 938 F.2d 153, 156-57 (9th Cir. 1991) (finding that plaintiffs need not attempt to amend their development plan to overcome ripeness bar to adjudication).

104. *Yee*, 112 S. Ct. at 1532. Addressing the city's threshold argument that petitioners' regulatory takings claim was unripe, Justice O'Connor concluded:

> While . . . a claim that the ordinance effects a regulatory takings as applied to petitioners' property would be unripe [because the landowner had not sought administrative relief in the form of rent increases], petitioners mount a *facial* challenge to the ordinance . . . . As this allegation does not depend on the extent to which petitioners are deprived of the economic use of their particular pieces of property or the extent to which these particular petitioners are compensated, petitioners' facial challenge is ripe.

Id. (citations omitted)

105. *See, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 495 (1987) (finding that property owners "face an uphill battle in making a facial attack on the Act as a taking because of the high burdens of proof they face."). The *Keystone* decision contains good discussion of the key differences between facial and as-applied takings cases. *Id.* at 493-96.

https://openscholarship.wustl.edu/law_urbanlaw/vol43/iss1/5

takings cases.[106]

Lucas represents an even more fundamental reordering of ripeness principles. Traditionally, courts have viewed ripeness as a *jurisdictional* prerequisite.[107] That characterization has important consequences. For example, a court could raise jurisdictional defects sua sponte. Further, ripeness, like other facets of federal subject matter jurisdiction, traditionally has been seen as a non-waivable defect which can be raised for the first time even on appeal.

The majority opinion in *Lucas*, however, seems to transform ripeness principles from a jurisdictional prerequisite to a purely discretionary doctrine. Justice Scalia's opinion on this point[108] is replete with language of judicial weighing and balancing; Scalia ultimately declined to adopt South Carolina's ripeness defense for the simple reason that the state courts previously had refused to do so.[109] The majority concluded with the following statement: "for the reasons discussed we do not think it prudent to apply that prudential [ripeness] requirement here."[110]

It appears that a majority of the Court no longer views the ripeness

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106. The same point is made in *Lucas*, albeit in Justice Blackmun's dissenting opinion: "Facial challenges are ripe when [an] Act is passed; applied challenges require a final decision on the Act's application to the property in question." *Lucas*, 112 S. Ct. at 2907, n.4 (Blackmun, J., dissenting).

107. *See, e.g.*, MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 348, 351-53 (1986) (requiring a final determination of what development is permitted before considering a regulation's constitutionality); Southern Pac. Transp. Co. v. City of Los Angeles, 922 F.2d 498, 502 (9th Cir. 1990) (stating that "[r]ipeness is more than a mere procedural question; it is determinative of jurisdiction), *cert. denied*, 112 S. Ct. 382 (1991); Kinzli v. City of Santa Cruz, 818 F.2d 1449, 1456-57, *modified*, 830 F.2d 968 (9th Cir. 1987) (finding lack of ripeness because landowners failed to get final determination of damages available under inverse condemnation claim), *cert. denied*, 484 U.S. 1043 (1988).

108. *Lucas*, 112 S. Ct. at 2890-92.

109. *Id.*

110. *Id.* at 2892. Justice Kennedy's concurrence takes the same view: "There exists no jurisdictional bar to our disposition, and prudential considerations ought not to militate against it." *Id.* at 2902 (Kennedy, J., concurring in judgement). Justice Stevens agreed in his dissent that ripeness requirements did not impose a jurisdictional bar in *Lucas*: "It is true, as the Court notes, that the argument against deciding the constitutional issue in this case rests on prudential considerations rather than a want of jurisdiction." *Id.* at 2918 (Stevens, J., dissenting). However, Stevens went on to criticize the Court for its failure to exercise "judicial restraint" and its insistence on reaching the merits of the case. *Id.* Only Justice Blackmun's dissent adhered to the traditional view that ripeness in takings cases is a rule of jurisdiction, rather than a matter of judicial discretion. *Id.* at 2906-07 (Blackmun, J., dissenting).

Washington University Open Scholarship

doctrine as a necessary prerequisite to the courts' subject matter jurisdiction, but rather as a jurisprudential standard to be invoked if and when the facts warrant. This reformulation of ripeness principles confers the doctrine with a status akin to that of abstention principles in the federal courts.[111] As a result of *Yee* and *Lucas*, the courts will adjudicate more takings claims on their merits rather than on the threshold procedural ground of ripeness.

B. *The "Denominator" Issue: What is the Relevant Parcel?*

The threshold issue of determining the relevant parcel of land a regulation effects is deceptively complex. A simple example frames the issue. Assume a property owner owns three rural, ten acre parcels. One of those parcels consists of nine acres of developable uplands and one acre of fragile wetlands. Assume further that the landowner seeks to develop solely the one-acre portion of that ten-acre parcel, but a regulating entity refuses to permit development on grounds that the development would destroy a pristine marsh the government seeks to maintain as open space and wildlife habitat. The owner subsequently sues in inverse condemnation alleging a taking. What is the relevant parcel, or "denominator," for the court to assess in determining the economic impact and other relevant takings factors concerning the challenged permit decision? The one acre of wetlands? The entire ten-acre parcel? Or the aggregate thirty acres of the three plots which plaintiff owns?

To a considerable degree, the answer to this question dictates whether a taking has transpired. If, for example, the relevant parcel for purposes of determining a regulation's economic impact is the single acre of wetlands, a court would likely find a total or near total elimination of all economic use.[112] On the other hand, if the court examines the full ten-acre parcel, the regulation merely diminishes the value of the overall parcel and thus triggers the Court's traditional,

111. *See generally* CHARLES A. WRIGHT, LAW OF FEDERAL COURTS § 52 (West 4th ed. 1983) (discussing abstention doctrines). *See also* Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 471-76 (1982) (finding that standing to sue principles implicate both Article III principles and discretionary jurisprudential considerations).

112. Construing the denominator in this fashion would trigger the categorical presumption announced in *Lucas* that regulations effect a compensable taking in far more cases than the "rare" or "extraordinary" situation contemplated in the *Lucas* decision. *See Lucas*, 112 S. Ct. at 2894-95; *see also supra* notes 64-68 and accompanying text for a discussion of the majority's "total" takings doctrine.

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multi-faceted balancing analysis.[113] The likelihood of the property owner prevailing in his or her takings claim is correspondingly and dramatically reduced. If the Court views all three parcels as the relevant denominator, the plaintiff has an even further reduced chance of winning.[114] The Court in *Lucas*[115] spotlighted, but did not decide, this issue.[116]

Federal and state courts are hopelessly split on the denominator issue. The Supreme Court itself has sent mixed signals on the question.[117] Lower federal courts[118] and the state courts also have

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113. *See, e.g.*, Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1977) (finding that determination of whether taking has occurred depends "upon the particular circumstances" of each case).

114. In *Lucas*, Justice Scalia took pains to discredit the latter theory, criticizing the state court decision in *Penn Central* that found no taking based on this analysis. *Lucas*, 112 S. Ct. at 2894, n.7 (discussing Penn. Cent. Transp. Co. v. New York City, 366 N.E.2d 1271, 1276-77 (N.Y. 1977), *aff'd*, 438 U.S. 103, *reh'g denied*, 439 U.S. 883 (1978). However, this discussion is dictum.

115. Since the record before the Court in *Lucas* reflected a finding of total elimination of the subject property's value, discussion of the "denominator" issue in the decision is pure dictum. Yet the fact that Justice Scalia felt compelled to raise the issue and that four other Justices joined in the opinion suggests that the Court is concerned with this aspect of takings law.

116. *Id.* at 2894 n.7. In a lengthy footnote, Justice Scalia's majority opinion observes:

> [The Court's takings jurisprudence] 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. [Citations omitted.] The answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the State's law of property—i.e., whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value.

Id. (citations omitted).

117. *Compare* the discussion from *Lucas*, 112 S. Ct. at 2894, n.7, *with* the following excerpt from Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978):

> '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. . . .

Penn Central, 438 U.S. at 130.

118. *See, e.g.*, American Sav. and Loan Ass'n v. County of Marin, 653 F.2d 364, 372 (9th Cir. 1981) (imposing upon landowner the burden of proof as to whether tracts of land should be analyzed as separate parcels); Zilber v. Town of Moraga, 692 F. Supp. 1195, 1204-05 (N.D. Cal. 1988) (following *Penn Central* to find that entire subject property should be examined in determining whether regulation effected taking); Formanek

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struggled with the problem.[119] Future cases may seize upon Justice Scalia's proposed "reasonable expectations" criterion[120] as a way out of this analytical thicket. However, that proffered test lacks exactitude and predictability.

In the meantime, regulators may refrain from lot splits, phased unit developments, or other actions which could give official credence to a decreased denominator, thereby exposing government to heightened liability under the Takings Clause. Conversely, as Justice Stevens noted, developers and investors may market specialized estates to take advantage of the Court's new rule. The smaller the estate, the more likely that a regulatory change will effect a total taking.[121] In any event, the "denominator" issue promises to be one of the next "hot spots" in regulatory takings law.

C. *A Physical Taking Is a Physical Taking Is a Physical Taking — Or Is It?*

In *Yee* the Supreme Court seemed intent on establishing a bright-line rule applicable in "physical takings" cases and on quashing future attempts by litigants and lower courts to import regulatory takings principles into physical takings jurisprudence. Resigned to the fact that regulatory takings law is convoluted to the point of opacity, the Court appeared determined to keep physical takings law relatively straightforward.[122]

Yee accordingly, provides some welcome clarification in physical

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v. United States, 26 Cl. Ct. 332, 335 (Cl. Ct. 1992) (finding no formula for deciding when a taking occurs and favoring a case-by-case assessment of property values); Ciampitti v. United States, 22 Cl. Ct. 310, 318-20 (Cl. Ct. 1991) (focusing taking inquiry on entire parcel of land, not just regulated portion); Loveladies Harbor, Inc. v. United States, 21 Cl. Ct. 153, 155 (Cl. Ct. 1990) (appeal pending) (making ad hoc valuation inquiry); Deltona Corp. v. United States, 657 F.2d 1184, 1193-94 (Ct. Cl. 1981) (evaluating worth of entire parcel of which regulation took twenty percent), *cert. denied*, 455 U.S. 1017 (1982).

119. *See* Aptos Seascape Corp. v. County of Santa Cruz, 188 Cal. Rptr. 191, 197 (Cal. Ct. App. 1982) *appeal dismissed*, 464 U.S. 805 (1983); American Dredging Co. v. Department of Envtl. Quality, 404 A.2d 42, 43-44 (N.J. Super Ct. App. Div. 1979) (evaluating entire tract for takings review).

120. *See Lucas*, 112 S. Ct. at 2894 n.7.

121. *Id.* at 2919 (Stevens, J., dissenting).

122. At the outset of her opinion for the Court in *Yee*, Justice O'Connor observed that: "[A physical takings] case requires courts to apply a clear rule; [a regulatory takings claim] necessarily entails complex factual assessments of the purposes and economic effects of government actions." *Yee*, 112 S. Ct. at 1526.

takings law. It firmly reestablishes the analytical distinction between physical and regulatory takings that some lower federal courts—and several property rights advocates—tried to blur in previous cases.[123]

However, government regulators should not take too much comfort from the *Yee* decision. Justice O'Connor's majority opinion repeatedly and expressly leaves open the possibility that local rent control ordinances like the one at issue in *Yee* are vulnerable to traditional regulatory takings challenges.[124] As noted above, property owners will simply restyle their physical takings claims as regulatory takings challenges and proceed anew.[125] The net effect is not likely to be less inverse condemnation litigation, but rather a similar or expanded number of cases in which the plaintiffs pursue the same factual grievances in a different analytical format.

Moreover, the line between physical and regulatory takings remains unclear. *Yee* certainly will not eliminate the possibility of confusion over whether the per se rule of physical takings rather than the ad hoc regulatory takings analysis applies to a given property rights controversy. Illustrations appear both in the Court's own prior decisions and in takings cases currently pending in the lower courts.

For example, the Supreme Court in *Kaiser Aetna v. United States*[126] treated the federal government's conditioning of a marina permit upon the private owner's agreement to open the area to the public as a physical taking.[127] In *Nollan v. California Coastal Commission*,[128] the Court gave lip service to the concept that a similar public access condition should—as in *Kaiser Aetna*—be viewed as a physical takings

123. *See, e.g.*, Pinewood Estates v. Barnegat Township Leveling Bd., 898 F.2d 347, 351-53 (3rd Cir. 1990) (applying physical takings analysis to complaint alleging regulatory taking).

124. *See* 112 S. Ct. at 1528 ("The government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land."); *Id.* at 1530 (distinguishing between physical and regulatory takings analysis). Justices Blackmun and Souter wrote a short concurring opinion where they expressly declined to join this dictum. *Id.* at 1534-35 (Blackmun, J., concurring in judgment); *id.* at 1535 (Souter, J., concurring in judgment). Ultimately, the Court in *Yee* refused to consider the park owners' regulatory takings claim, because it was not squarely presented in their petition for certiorari. *Id.* at 1534. Justice O'Connor wrote for the Court: "We leave the regulatory taking issue for the California courts to address in the first instance." *Id.*

125. *See supra* note 94 (discussing *Yee* plaintiffs' refiling of suit on regulatory taking grounds after adjudication by Supreme Court).

126. 444 U.S. 164 (1979).

127. *Id.* at 177-80.

128. 483 U.S. 825 (1987).

Washington University Open Scholarship

case.[129] Yet in *Nollan*, the Court analyzed the case primarily in terms of *regulatory* takings principles.[130]

Other land use controversies even more dramatically demonstrate the sometimes tenuous distinction between physical and regulatory takings claims. Consider, for example, property exactions and in-lieu fees. In many states, developers who seek project approvals must dedicate the land necessary for infrastructure improvements attendant to the proposed development.[131] Is an inverse condemnation challenge to such an exaction scheme a regulatory or physical takings case? Does the analysis vary if, instead of dedicating land in the project area, the developer must provide a comparable amount of off-site property? And does the analysis shift from a physical to regulatory taking if the government compels the developer to pay in-lieu fees instead of actually dedicating land for public use?[132]

The Supreme Court used *Yee* to draw a bright-line distinction between physical and regulatory takings. Whether *Yee* will actually end the confusion between the two categories of inverse condemnation claims is debatable.[133]

D. *Land is Special—and So Are the Rules*

The adage that real property is unique is certainly true when it comes to inverse condemnation law. The Takings Clause, however,

129. *Id.* at 831-32.

130. *Id.* at 834-37.

131. *See, e.g.*, Associated Home Builders v. City of Walnut Creek, 484 P.2d 606, 616-17 (Cal. 1971), *appeal dismissed*, 404 U.S. 878 (1971); *see also* Potomac Greens Assocs. Partnership v. City Council of City of Alexandria, 761 F. Supp. 416, 422 (E.D. Va. 1991) (limiting extent of parking garage to protect groundwater upheld as permissible exercise of municipal authority); *cf.* Furey v. City of Sacramento, 780 F.2d 1448, 1454 (9th Cir. 1986) (holding constitutional a local ordinance requiring developer either to dedicate land or pay in-lieu fees).

132. *See, e.g.*, Commercial Builders of N. Cal. v. City of Sacramento, 941 F.2d 872, 876 (9th Cir. 1991) (holding constitutional under regulatory takings analysis fee payments to provide housing for development workers), *cert. denied*, 112 S. Ct. 1997 (1992); Blue Jeans Equities W. v. City of San Francisco, 4 Cal. Rptr. 2d 114, 117-18 (Cal. Ct. App. 1992) (applying regulatory takings tests to ordinance requiring developers to pay fees to offset costs of increased transit expenses), *cert. denied*, 113 S. Ct. 191 (1992).

133. Despite *Yee*, some inverse condemnation plaintiffs persist in attempts to graft various physical takings principles onto regulatory takings law. *See, e.g.*, Patrick Media Group, Inc. v. California Coastal Comm'n, 11 Cal. Rptr. 2d 824, 836-40 (Cal. Ct. App. 1992) (rejecting claim that special accrual standards for statutes of limitations applicable to physical takings claims should also apply to regulatory takings cases).

https://openscholarship.wustl.edu/law_urbanlaw/vol43/iss1/5

makes no distinction between real and personal property. The Supreme Court's takings precedents include several decisions involving personal property.[134]

Justice Scalia has for some time implied in his opinions that constitutional law does, or at least should, afford special protection to the private ownership and use of real property.[135] Until *Lucas*, Scalia had never explicitly opined that the takings analysis applicable to real property-related claims should be different from and more exacting than that relevant to personal property claims. In *Lucas*, however, Scalia emphasized the property owners' more limited expectations regarding personal property.[136] He suggested that this is true because of "the State's traditionally high degree of control over commercial dealings."[137] Accordingly, Scalia held that personal property owners "ought to be aware of the possibility that new regulation might even render [their] property economically worthless."[138] The majority opinion in *Lucas* further distinguished real and personal property ownership. With respect to land regulation, government's power to enact regulations which eliminate all economic value is far more circumscribed.[139]

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134. *See generally* Bowen v. Gilliard, 483 U.S. 587 (1987) (AFDC benefits); Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) (trade secrets); Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980) (interest earned on interpleader fund); Andrus v. Allard, 444 U.S. 51 (1979) (bird artifacts).

135. Justice Scalia's early dissents suggest as much. *See, e.g.*, Pennell v. City of San Jose, 485 U.S. 1, 19-24 (1988) (Scalia, J., dissenting) (scrutinizing rent regulation alleged to effect taking of landlord's real property); California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 612-14 (1987) (Scalia, J., dissenting) (limiting use of state environmental control regulation). Justice Scalia struck the same note when he authored the Court's opinion in Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987). *See* 483 U.S. at 833-34, 839 n.6 (finding "a right to exclude others from one's property" and rejecting asserted governmental purposes which interfered with such right). *See also* Antonin Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions from the Public-Lands Cases*, 68 MICH. L. REV. 867, 884-86, 919 (1970).

136. *Lucas*, 112 S. Ct. at 2899-2900.

137. *Id.* at 2899.

138. *Id.* The majority in *Lucas* also suggested that while generally applicable government regulations which destroy the value of land might pass constitutional muster, measures directed specifically and exclusively at land use would be subject to a more exacting constitutional standard. *Id.* at 2899, n.14.

139. *Id.* at 2900. The court stated:

> In the case of land, however, we think the notion pressed by [South Carolina] that title is somehow held subject to the 'implied limitation' that the State may subsequently eliminate all economically viable use is inconsistent with the historical

Washington University Open Scholarship

Past Supreme Court decisions implicitly afforded real property higher protection vis-a-vis the Takings Clause than that given to personal property rights.[140] *Lucas* formalizes that "two-track" regulatory takings analysis and makes takings jurisprudence that much more obtuse. The majority opinion in *Lucas* strongly suggests that the "total takings" presumption, that a taking has transpired where a regulation effectively deprives an owner of substantially all economic use of her real property, is inapplicable to inverse condemnation claims with respect to personal property interests. A less exacting, pre-*Lucas* constitutional standard will likely continue to be applied in the latter instance.

E. *Development: Privilege or Right?*

Traditionally, the premise of land use law was the largely implicit assumption that land development is a benefit conferred by the government, not an intrinsic personal right.[141] The notion that property ownership involves a "bundle" of rights, of which the opportunity to develop is but one, is a closely related traditional maxim.[142]

Both philosophies appear somewhat obsolete in the post-*Lucas* era. Justice Scalia began eroding the former principle in his majority opinion in *Nollan v. California Coastal Commission*:[143] "[T]he right to

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compact recorded in the Takings Clause that has become part of our constitutional culture.

Id.

140. In two recent cases, government regulation prevented the owner from alienating his property. In Hodel v. Irving, 481 U.S. 704, 717 (1987), the Court found that a federal statute which absolutely prevented Native Americans from devising fractional interests in tribal land violated the Fifth Amendment. An earlier case, Andrus v. Allard, 444 U.S. 51, 53-54 (1979), involved a federal statute which proscribed the commercial transfer of bird artifacts. There the Court rejected the owner's inverse condemnation claim, stating that "loss of future profits — unaccompanied by any physical property restriction — provides a slender reed upon which to rest a takings claim." *Id.* at 66.

141. *See, e.g.*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 389 (1926) ("[The village's] governing authorities, presumably representing a majority of its inhabitants and voicing their will, have determined . . . that the course of such development shall proceed within definitely fixed lines.").

142. *See, e.g.*, Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 130-31 (1978) (explaining that the Court considers regulation's effects on a parcel of land when adjudicating a takings case); Andrus v. Allard, 444 U.S. 51, 65-66 (1979) (finding that abrogation of a single property right does not amount to a taking because the Court views property rights in the aggregate).

143. 483 U.S. 825 (1987).

https://openscholarship.wustl.edu/law_urbanlaw/vol43/iss1/5

build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a 'governmental benefit.' "[144] He repeated this theme in *Lucas*. The strongest statement of this philosophy is found in the following passage: "[O]ur prior takings cases evince an abiding concern for the productive use of, and economic investment in, land . . . ."[145]

This perspective lacks any substantial recognition of the constitutional significance of non-developmental property rights,[146] the focus of several recent Supreme Court decisions.[147] Indeed, one of Justice Stevens' most persuasive criticisms of the majority opinion in *Lucas* focuses on this omission.[148]

The *Lucas* majority's philosophy on this point evinces a more utilitarian, development-oriented philosophy toward land use than that demonstrated in earlier Supreme Court precedents. It will be most interesting to see whether this more utilitarian, economics-driven philosophy will eclipse the conservationist, multiple-use ethic articulated in some of the Court's earlier decisions.[149]

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144. *Id.* at 834 n.2.

145. *Lucas*, 112 S. Ct. at 2895 n.8.

146. The Court, in response to Justice Stevens' dissent, paid lip service to noneconomic interests in land. *Id.* The Court cited *Loretto*, a physical takings case, in support of this point. *Id.*

147. *See, e.g.*, Hodel v. Irving, 481 U.S. 704 (1987) (right to possess and devise property); Kaiser Aetna v. United States, 444 U.S. 164 (1979) (right to exclude others); Andrus v. Allard, 444 U.S. 51 (1979) (same).

148. "This highlights a fundamental weakness in the Court's analysis: its failure to explain why only the impairment of '*economically* beneficial or productive use' [citation omitted] of property is relevant in takings analysis . . . . [T]he Court offers no basis for its assumption that the only uses of property cognizant under the Constitution are *developmental* uses." *Lucas*, 112 S. Ct. at 2919, n.3 (Stevens, J., dissenting).

149. Much of Justice Scalia's jurisprudential philosophy towards environmental law — and many other legal fields — appears to be heavily influenced by the so-called "Chicago School" of jurisprudence. That view holds that free market economic principles can and should be applied in resolving legal disputes to a far greater degree than has traditionally been the case. *See generally* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (3rd ed. 1986). For a specific application of these principles to real property law and the Takings Clause, see RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985). In recent years, Justice Scalia in particular has applied economic principles to resolve a wide variety of questions coming before the Court. *See, e.g.*, City of Burlington v. Dague, 112 S. Ct. 2638 (1992) (rejecting application of multiplier to enhance attorney's fees awardable under federal fee-shifting statutes).

Washington University Open Scholarship

F. *What Does "Economic Use" Mean, Anyway?*

This raises the related question of the appropriate constitutional standard in regulating takings analysis. The Supreme Court has been notoriously slipshod regarding this key question. Before *Lucas* and *Yee*, the most oft-recited formulation of the relevant criteria was that announced in the Court's 1977 decision in *Penn Central*: "The economic impact of the regulation on the claimant . . . , the extent to which the regulation has interfered with distinct investment-backed expectations [and] the character of the governmental action."[150] The Court alternatively stated the standard as whether a given regulation "does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land . . . ."[151]

In *Lucas*, the Court opted for the latter formulation with respect to cases presenting a "total" regulatory taking.[152] But the majority did so with a seeming disregard for linguistic precision. Justice Scalia did not hew precisely to the *Agins v. Tiburon* "denies an owner economically viable use of his land" formulation; instead, he used a variety of terms throughout the majority decision. Operative phrases include "all economically beneficial or productive use of land,"[153] "deprivation of beneficial use;"[154] "preventing developmental uses;"[155] "sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle;"[156] "deprives land of all economically beneficial use;"[157] "eliminate all economically valuable use;"[158] and "all economically productive or beneficial uses of land."[159]

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150. *Penn Central*, 438 U.S. at 124. *See also supra* note 16 and accompanying text for the *Penn Central* test. The Court approved the multifaceted *Penn Central* formula in a number of subsequent regulatory takings cases. *See* Bowen v. Gilliard, 483 U.S. 587, 606 (1987); Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 224-25 (1986).

151. Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (citations omitted). Subsequent Supreme Court takings decisions have quoted and relied upon the *Agins* formulation. *See, e.g.*, Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 (1987) (determining validity of limitations on use of private property which substantially further legitimate government interests).

152. *See, e.g.*, *Lucas*, 112 S. Ct. at 2893 (quoting *Agins*, 447 U.S. at 260).

153. *Id.* at 2893.

154. *Id.* at 2894.

155. *Id.* at 2895.

156. *Id.*

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

158. *Id.* at 2900.

159. *Id.* at 2901.

https://openscholarship.wustl.edu/law_urbanlaw/vol43/iss1/5

It is unclear whether the Court intended these somewhat disparate phrases to be interchangeable. For a Court which generally places great importance on legal precision, plain meaning and strict construction, the answer to this question is surprisingly, and uncomfortably, uncertain. The Court's primary purpose is to provide clear guidance to lower federal and state courts on key constitutional questions; this intellectual sloppiness or deliberate obfuscation is less than helpful.

G. *The End of Judicial Deference in Takings Cases*

Judicial deference to administrative decision-making is a fundamental precept of judicial review. The judiciary's oft-stated reluctance to second-guess agency expertise and the harsh reality of crowded court dockets provide the basis for this longstanding principle.[160] Courts regularly and explicitly decline to act as super-zoning boards.[161] Now-established principles of judicial review, such as the substantial evidence standard and the abuse of discretion rules, have arisen from this philosophy.[162] With some exceptions, the Supreme Court has vocally propounded this philosophy.[163]

That level of judicial restraint generally extends to the Court's examination of constitutional questions. Because the Court does not view Fifth Amendment property rights cases as dealing with "fundamental" constitutional rights,[164] the generally-applicable standard of review is whether a particular governmental regulation is rationally related to a

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160. *See, e.g.*, BERNARD SCHWARTZ, ADMINISTRATIVE LAW § 10.1 (3rd ed. 1984).

161. Williams v. City of Columbia, 906 F.2d 994, 996 (4th Cir. 1990) (discouraging zoning variance applicants from filing suit in federal court on grounds that such actions would have the effect of "converting federal courts into super-zoning boards"); Raskiewicz v. Town of New Boston, 754 F.2d 38, 44 (1st Cir. 1985) (finding that federal review should not be readily granted where the state offers administrative and judicial remedies for the controversy), *cert. denied*, 474 U.S. 845 (1985); Barnes County v. Garrison Diversion Conservancy Dist., 312 N.W.2d 20, 25 (N.D. 1981) ("It is not the function of the judiciary to act as a super board, substituting its judgment for that of the administrator whose decision is being reviewed.").

162. SCHWARTZ, *supra* note 160, § 10.1.

163. *See, e.g.*, Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 558 (1978) ("The fundamental policy questions appropriately resolved in Congress and in the state legislatures are *not* subject to re-examination in the federal courts under the guise of judicial review of agency action.").

164. *See, e.g.*, St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 77 (1936) (Brandeis, J., concurring) (finding that a more liberal test applies in evaluating property cases than in cases involving personal liberty interests).

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legitimate governmental purpose.[165] This standard seems to be of progressively declining relevance in inverse condemnation cases. *Lucas* continues the recent Supreme Court trend of giving short shrift to legislative findings in land use takings litigation in favor of exacting judicial scrutiny of a challenged regulation's actual effect upon a property owner.

Justice Scalia's earlier opinions reveal considerable skepticism toward government findings and justifications for land use decisions that hamper private property rights.[166] That philosophy bore full flower in *Lucas*. The Court's opinion gives little credence to the legislative findings upon which South Carolina sought to justify its beachfront development restrictions.[167] The Court's decision thus reflects more interest in a land use measure's actual *impact* on private property than the government's stated *justification* for the regulation, or identification of the ills the measure is intended to address.[168]

The Supreme Court may be moving toward—or have already reached—a sort of "intermediate scrutiny" standard for Takings Clause litigation. That standard is less exacting than the "compelling state interest" test the Court utilizes in fundamental rights cases. But the new takings test is certainly more difficult for government to meet than the rational relationship standard the Court traditionally applies in assessing the constitutionality of other types of economic regulation, including land use measures challenged under the Takings Clause.[169]

The "burden of proof" in takings cases seems to be shifting—de jure or de facto—from the property owner to the government defendant.[170] While the plaintiff clearly retains the threshold obligation to prove the

165. City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976); *see generally* TRIBE, *supra* note 6, § 8-7 (discussing the Court's reluctance to interfere in economic regulations).

166. *See, e.g.*, Nollan v. California Coastal Comm'n, 483 U.S. 825, 841 (1987) (demanding demonstration of a substantial government objective "where the actual conveyance of property is made a condition to the lifting of a land-use restriction.").

167. *Lucas*, 112 S. Ct. at 2897-98 & nn.11-12.

168. This may simply reflect the current Court's greater interest in the "economic impact" criterion of traditional takings analysis than in the "character of the governmental action" component — at least in the case of a "total taking." *See generally Penn Central*, 438 U.S. 104, 124 (1978).

169. This may be analogous to the "intermediate scrutiny" standard the Court has recently fashioned in certain equal protection cases. *Cf.* TRIBE, *supra* note 6, § 16-24 (discussing the intermediate scrutiny standard as applied to illegitimacy discrimination).

170. The dissenters in *Lucas* recognized and criticized this shift in the applicable standard of judicial review. *Lucas*, 112 S. Ct. at 2909 (Blackmun, J., dissenting).

https://openscholarship.wustl.edu/law_urbanlaw/vol43/iss1/5

economic loss occasioned by the regulation,[171] as well as the nature and scope of the private property interest claimed, there no longer appears to be a presumption of constitutionality. Thus, the government bears at least partial responsibility to prove the legality of its actions. This may prove to be the most enduring legacy of *Lucas*.

H. *The Amorphous Parameters of the State Property Law and Nuisance Exceptions*

Perhaps no facet of the Court's *Lucas* opinion is so controversial, so important, and so likely to spawn future takings controversies as the majority's discussion of the state property law and nuisance exceptions to the Takings Clause's compensation requirement. Unfortunately, this portion of the *Lucas* decision is oblique and obscure.[172]

It seems apparent that Justice Scalia intended to narrow the scope of the so-called "nuisance exception" which the Court reaffirmed as recently as 1987 in *Keystone*.[173] The Court neither overruled nor even criticized its earlier opinion in *Keystone*, however. This will undoubtedly produce confusion for lower courts and litigants in future cases.

More notable is the likely impact of the Court's declaration in *Lucas* that reliance on property or nuisance law principles to overcome a total takings claim "must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."[174] The majority repeatedly stressed that those restrictions must rest on state *common law* principles, rather than legislation.[175]

These statements will likely result in the Balkanization of takings jurisprudence. With respect to government defenses to claims of a total taking, reviewing courts must refer to and rely upon property and nuisance principles of the particular state where the claim arises.[176]

171. *Id.* at 2893 n.6.

172. For a more detailed discussion of this topic, see Richard M. Frank, *Regulating Land and Resources in the Post-*Lucas *Era: The Impact of California's Nuisance and Real Property Law*, in LAND USE FORUM (Continuing Education of the Bar, forthcoming Winter 1993).

173. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 491-92 (1985). *Keystone* was a 5-4 decision with Chief Justice Rehnquist, Justice Scalia, Justice Powell, and Justice O'Connor dissenting.

174. *Lucas*, 112 S. Ct. at 2900.

175. *Id.* at 2900-01.

176. Courts will probably utilize this analysis in adjudicating "partial" takings claims where it is claimed that government regulation reduces, but does not eliminate,

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Accordingly, fifty separate bodies of takings law will develop across the nation. Given the dissimilarities in nuisance and other property law principles among the states, the disparities in resulting inverse condemnation decisions are likely to be great.

Compounding the confusion is Justice Scalia's explicit embrace of certain specific criteria for adjudicating the validity of government reliance on the nuisance defense.[177] While the opinion suggests that state nuisance law "ordinarily entail[s]" application of the criteria that Scalia cites,[178] the majority simultaneously recognizes the diversity of state law approaches to the subject.[179] The reconciliation of these principles, and the degree to which common law nuisance principles have now been "constitutionalized," is unclear.

The *Lucas* opinion exhibits other uncertainties in this area. What constitutes a "background" principle of state nuisance and property law for purposes of takings analysis? One firmly established when a given state was admitted to the Union? Or one articulated by the state courts at the turn of this century? One articulated a decade ago? And does the answer to this question depend on whether the state in which the takings claim arises is Alaska rather than Delaware?

Further, what is one to make of Justice Scalia's oblique acknowledgement that "changed circumstances or new knowledge may make what was previously permissible no longer so . . . "?[180] This language seems inconsistent with Scalia's earlier-stated reliance on long-settled nuisance and property law concepts.[181] How the lower courts can reconcile these seemingly disparate passages from this key portion of the *Lucas* opinion is problematic.

A final uncertainty involves the circumscribed role of legislative bodies in identifying and addressing hazards to public health, safety, and welfare occasioned by various uses of private property. *Lucas* dictates that state and local lawmakers cannot develop new legal theories to justify restrictions on private property use that would otherwise effect a

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the value of private property. However, the majority opinion is not explicit on this point.

177. *See supra* note 79 and accompanying text (discussing Scalia's explanation of the proper application of the nuisance doctrine).

178. *Lucas*, 112 S. Ct. at 2901.

179. *Id.*

180. *Id.* (citing RESTATEMENT (SECOND) OF TORTS, § 827 cmt. g. (1977)).

181. *See supra* note 179.

https://openscholarship.wustl.edu/law_urbanlaw/vol43/iss1/5

taking.[182] But what of the more likely situation where the legislature passes a statute or ordinance that merely codifies longstanding common law principles?[183] Is such legislation wholly irrelevant to takings analysis? If not, how should the courts view it?

A central shortcoming of this portion of the Court's analysis is that state property law—and especially common law nuisance principles—continually evolves to reflect social changes, technological advances, and newly-discovered hazards. Freezing state law property and nuisance principles at some indeterminate date in the past—as the *Lucas* majority may be dictating—ignores this ineluctable fact.[184]

I. *Procedural Implications of* Lucas *and* Yee

The important procedural implications of *Lucas* and *Yee* should not be overlooked. First, these decisions, especially *Lucas*, will undoubtedly spawn additional regulatory takings litigation against federal,

182. 112 S. Ct. at 2900.

183. For example, California courts repeatedly characterize state legislation which creates detailed coastal development permit and planning programs as simply representing an exercise of government's traditional power to regulate nuisances. *See* Leslie Salt Co. v. San Francisco Bay Conservation & Dev. Comm'n, 200 Cal. Rptr. 575, 583-584 (Cal. Ct. App. 1984); CEEED v. California Coastal Zone Conservation Comm'n, 118 Cal. Rptr. 315, 323-324 (Cal. Ct. App. 1974).

184. The *Lucas* majority's conclusion on this point drew criticism from the other Justices. In his concurring opinion, Justice Kennedy observed:

> The common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent society. The State should not be prevented from enacting new regulatory initiatives in response to changing conditions . . . . The Takings Clause does not require a static body of state property law . . . .

112 S. Ct. at 2903 (Kennedy, J., concurring) (citation omitted). Justice Blackmun was even more blunt in dissent, stating: "There is nothing magical in the reasoning of judges long dead." *Id.* at 2914 (Blackmun, J., dissenting).

Many commentators criticize this aspect of the Court's decision:

> [The] new rule allows government to regulate if it follows common-law notions of harm set out by judges 200 years ago but prevents today's legislators and judges, operating with new information and better scientific understanding of environmental risks, from making their own judgment about what uses of property are harmful to neighbors and common resources . . . . Scalia's opinion invites a constant stream of court challenges about whether modern regulations on wetlands, coastal protection, endangered species and forest management comport with common-law understandings of how property use can be restricted. It's good for lawyers, but it will unduly hamper government as it struggles to keep communities safe and the environment livable.

Editorial, "Scalia's 18th century world," SACRAMENTO BEE, July 6, 1992, p. B12, col. 1.

Washington University Open Scholarship

state, and local governments.[185] This is true for two principal reasons. First, the Court's newly-articulated, fact-specific regulatory takings standard will require case-by-case adjudication. Second, *Lucas* continues a Supreme Court trend of giving short shrift to legislative findings in land use takings cases in favor of judicial scrutiny of a challenged regulation's actual effect upon a property owner.[186]

These factors also suggest that a growing number of such inverse condemnation actions will not be susceptible to resolution by pretrial motions, as has traditionally been the case. Takings claims and adjudications will more likely require a full adjudication on the merits because of the demise of threshold procedural defenses such as statute of limitations and ripeness. The increased burden on crowded state and federal court dockets will be significant.

If past experience is any guide, many property owners will press their takings claims in the federal, as opposed to state, courts. Owners predicate this preference on: (1) a belief that federal judges are more sensitive to alleged state intrusions on federally-conferred constitutional rights than their state brethren; and (2) the fact that, from the property owner's standpoint, the most favorable inverse condemnation decisions emanate from the federal courts.[187]

Yet regulatory takings cases filed in federal court against state and local governments are not likely to stay there. Ripeness principles allow federal courts to avoid deciding many regulatory takings cases on their merits: both *Yee* and *Lucas* signal a change in that trend.[188]

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185. While *Yee* will discourage physical takings claims, that decision implies that regulatory takings claims of the type advanced in *Lucas* should meet with considerably greater success. *See supra* notes 123-24 and accompanying text (discussing *Yee*'s potential impact). If past experience is any guide, plaintiffs will assert the latter form of inverse condemnation claim with respect to a wide, sometimes novel, array of claimed property interests. *See, e.g.*, Nixon v. United States, 978 F.2d 1269 (D.C. Cir. 1992) (holding that Government's retention of former President's presidential papers effects a Fifth Amendment taking of private property).

186. *See supra* notes 167-69 and accompanying text for discussion of this aspect of *Lucas*.

187. The United States Claims Court and the Federal Circuit Court of Appeals spearheaded the latter trend. *See, e.g.*, Hendler v. United States, 952 F.2d 1364, 1377 (Fed. Cir. 1991) (holding that the EPA's placement of groundwater wells or private property to mitigate groundwater pollution from nearby toxic waste site effected a taking); Formanek v. United States, 26 Cl. Ct. 332, 335-40 (Ct. Cl. 1992) (ruling that denial of development permit for purely private property constituted a taking).

188. *See supra* notes 101-11 and accompanying text for analysis of the effects of *Yee* and *Lucas* on ripeness principles.

https://openscholarship.wustl.edu/law_urbanlaw/vol43/iss1/5

However, many federal courts may invoke the abstention doctrine, ensuring that state courts adjudicate such takings claims,[189] because *Lucas* compels a court to examine and apply state common law principles. Federal judges may be uncomfortable addressing those issues in the first instance. Accordingly, and predictably, federal judges will exercise their discretion and decline federal court jurisdiction over those cases in favor of state court adjudication, using abstention as the procedural means to that end.

I. CONCLUSION

The short-term impact of *Yee* and *Lucas* should be minimal. Both cases dealt with relatively unusual factual situations that should not recur with any great frequency. Neither case can accurately be described as a clear-cut "win" for either private property rights or advocates of government regulation.

The enduring legacy of the opinions rests on the broad themes they strike, and in the new course they set for inverse condemnation law. *Lucas* in particular evinces heightened sensitivity to private property rights, and increased skepticism towards government's professed justifications for police power measures that affect such rights.

One can confidently predict that the legacy of *Yee* and *Lucas* will be more, not less, regulatory takings litigation. Most plaintiffs will wind up pursuing their claims in the state courts. Pretrial motions will resolve relatively few takings claims because of the detailed, fact-specific inquiry now mandated by the Court.

Far less certain is how state and federal courts will strike the substantive balance between private property rights and government's exercise of the police power. Again, *Lucas* in particular identifies key sub-issues of takings jurisprudence, such as the "denominator issue," the proper meaning of "economic use," and the scope of the state nuisance and property law exception without resolving them.[190]

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189. *Cf.* In re Eastport Associates v. City of Los Angeles, 935 F.2d 1071, 1075-77 (9th Cir. 1991). For a detailed discussion of federal court abstention principles, *see* WRIGHT, *supra* note 111, § 52.

190. The first reported inverse condemnation decisions handed down after *Yee* and *Lucas* bear witness to the limited precedential value of those cases. For example, in Reahard v. Lee County, 968 F.2d 1131 (11th Cir. 1992), the Eleventh Circuit Court of Appeals expressly refrained from issuing its opinion until the Supreme Court issued its *Lucas* decision. *Id.* at 1134. Nonetheless, the Court of Appeals proceeded to ignore the *Lucas* decision, articulating its own, multifaceted criteria that the court believed essential to a proper takings analysis. *Id.* at 1136. These criteria go beyond those identified

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Takings jurisprudence was a muddle before the Supreme Court handed down *Yee* and *Lucas*, and a muddle it remains. In theory, the Supreme Court should provide clear guidance and direction to lower courts, litigants and the public regarding important constitutional questions. The Court's failure to realize those critical objectives with respect to recent Takings Clause jurisprudence represents a desultory legacy.

in *Lucas* or, indeed, any previous Supreme Court decision. *Id. See also* Wilson v. Commonwealth of Massachusetts, 597 N.E.2d 43, 46 (Mass. 1992) (finding that *Lucas* did not assist in the resolution of the question whether government may bar property use which harms state and adjoining owners' interests).

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