

February 2018

## The Law of Taking Elsewhere and, One Suspects, in Maine

Orlando E. Delogu

*University of Maine School of Law*

Follow this and additional works at: <https://digitalcommons.mainerlaw.maine.edu/mlr>



Part of the [Constitutional Law Commons](#), and the [Property Law and Real Estate Commons](#)

---

### Recommended Citation

Orlando E. Delogu, *The Law of Taking Elsewhere and, One Suspects, in Maine*, 52 Me. L. Rev. 323 (2018).

Available at: <https://digitalcommons.mainerlaw.maine.edu/mlr/vol52/iss2/4>

This Article is brought to you for free and open access by the Journals at University of Maine School of Law Digital Commons. It has been accepted for inclusion in Maine Law Review by an authorized editor of University of Maine School of Law Digital Commons. For more information, please contact [mdecrow@maine.edu](mailto:mdecrow@maine.edu).

# THE LAW OF TAKING ELSEWHERE AND, ONE SUSPECTS, IN MAINE

*Orlando E. Delogu*

I. INTRODUCTION .....	324
II. THE CATEGORICAL TAKINGS .....	329
III. CRITICAL FACTORS IN A REGULATORY TAKING ANALYSIS .....	330
A. <i>The Governmental (Public) Purpose or State Interest Factor</i> .....	330
B. <i>The Economically Viable Use or Diminution in Value Factor</i> .....	331
C. <i>The Distinct (Reasonable) Investment-Backed Expectations         Factor</i> .....	333
D. <i>The Nexus Factor</i> .....	334
E. <i>The Proportionality Factor</i> .....	335
F. <i>The Armstrong Factor</i> .....	336
G. <i>The Avoiding a Harm as Opposed to Acquiring a Benefit Factor</i> ....	338
H. <i>The Whole or Relevant Parcel Factor (a.k.a., the "Denominator"         Parcel Factor)</i> .....	339
IV. SOME OTHER CONSIDERATIONS IN A TAKING ANALYSIS .....	343
V. THE CONSEQUENCES OF FAILING TO GRASP THE FULL RANGE OF FACTORS AND OTHER CONSIDERATIONS IN REGULATORY TAKING CASES .....	348
VI. CONCLUSION .....	353

# THE LAW OF TAKING ELSEWHERE AND, ONE SUSPECTS, IN MAINE

Orlando E. Delogu\*

If emerging national trends with respect to taking law, including the rationale and principles underlying these trends, are ignored, we may not like the consequences.

## I. INTRODUCTION

The debate as to the meaning of the Taking Clause in the Fifth Amendment of the United States Constitution seems unending. This short, almost cryptic constitutional provision, "nor shall private property be taken for public use, without just compensation,"<sup>1</sup> has over the years given rise to both court challenges and philosophical debate aimed at parsing out the meaning and parameters of this language.<sup>2</sup> As the need for regulatory controls (imposed by every level of government) has increased,<sup>3</sup> the number of challenges and the stridency of the debate has also increased. Moreover, these challenges have increasingly found their way to the United States Supreme Court.<sup>4</sup>

---

\* Professor of Law, University of Maine School of Law; B.S., 1960, University of Utah; M.S., 1963, J.D., 1966, University of Wisconsin.

1. U.S. CONST. amend. V.

2. Some of the earliest cases include *Reagan v. Farmers Loan & Trust Co.*, 154 U.S. 362 (1894) (sustaining the state's power to impose reasonable railroad rates against a taking challenge, but striking down the rates immediately before it); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) (recognizing the legitimacy of regulation, defining a regulatory taking, and striking down the subsidence control immediately before the court); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (sustaining zoning ordinance against a taking challenge and recognizing the need for police power regulations and that such regulations might impinge on property rights). See also, RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985) [hereinafter EPSTEIN, *TAKINGS*]; *Institute of Bill of Rights Law Symposium Defining Takings: Private Property and the Future of Government Regulation*, 38 WM. & MARY L. REV. 749-1195 (1997); Laura S. Underkuffler-Freund, *Takings and the Nature of Property*, 9 CANADIAN J.L. & JURIS. 161 (1996); Douglas W. Kmiec, *At Last, the Supreme Court Solves the Takings Puzzle*, 19 HAR. J.L. & PUB. POL'Y 147 (1995); Richard A. Epstein, *Takings: Descent and Resurrection*, 1987 SUP. CT. REV. 1; John A. Humbach, *Economic Due Process and the Takings Clause*, 24 PACE ENVTL. L. REV. 311 (1987); Charles L. Siemon, *Of Regulatory Takings and Other Myths*, 1 J. LAND USE & ENVTL. L. 105 (1985); John A. Humbach, *A Unifying Theory for the Just Compensation Cases: Takings, Regulation and Public Use*, 34 RUTGERS L. REV. 243 (1982); Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971).

3. Environmental and land use controls which existed to some extent prior to 1970 were expanded significantly during the 1970s and 1980s. These controls were perceived as necessary, in many cases long overdue, and for the most part continue today. They protect many aspects of the public's health, safety, and general welfare. Most, when challenged, have been sustained. But these controls do impinge to a greater degree than was historically the case on private landowner prerogatives. It is this higher degree of interference with traditional private property rights that has (in recent years) fueled the increasing debate and much of the case law that would parse out the meaning of the Constitution's Taking Clause.

4. See, e.g., *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 119 S. Ct. 1624 (1999) (sustaining holding below that repeated denials of development proposals that seemingly met all existing state and local laws constitutes a regulatory taking); *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (holding that even when "nexus" is found a regulation to be valid must also be

Originally, this clause was only applied to a physical taking by government, but this obvious and literal meaning of the clause was at an early date deemed to be a too narrow view of the Taking Clause and is today regarded as revisionist in its approach.<sup>5</sup> Over one hundred years ago the United States Supreme Court recognized that police power regulations may also, if too extreme, give rise to a Fifth Amendment taking, a constructive taking, of the regulated property. That is the clear holding of *Reagan v. Farmers' Loan & Trust Co.*<sup>6</sup> and the landmark case, *Pennsylvania Coal Co. v. Mahon*.<sup>7</sup> In *Pennsylvania Coal*, the Court (dealing with state legislation that regulated the mining of coal in order to prevent the subsidence of surface lands) stated that, "[I]f regulation goes too far it will be recognized as a taking."<sup>8</sup> Since *Pennsylvania Coal* this so-called regulatory taking strand of taking jurisprudence has been confirmed time and again by the United States Supreme Court<sup>9</sup> and (notwithstanding the views of some scholars)<sup>10</sup> has been as-

"proportional"—that is, the burden imposed on a landowner must be commensurate with the harm his development will give rise to); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (holding that a regulation that reduces the value of land to zero constitutes a regulatory taking); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (holding that for a regulation to be valid, there must be a reasonable relationship, "nexus," between the activity contemplated by the private land owner and the regulation imposed); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987) (holding that a temporary regulatory taking required the payment of just compensation); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987) (sustaining Pennsylvania's present surface land subsidence law); *Agins v. Tiburon*, 447 U.S. 255 (1980) (rejecting a facial challenge to a zoning ordinance); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978) (sustaining the city's historic district ordinance against a taking challenge).

5. See William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694 (1985) [hereinafter Treanor, *Original Significance*]; William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995) [hereinafter Treanor, *Original Understanding*]. Professor Treanor now seems to concede the point that a taking may arise in other than physical taking settings. In a recent law review article, he states: "More than one hundred years have passed since the Supreme Court . . . established the principle that regulations can run afoul of the Takings Clause . . ." William Michael Treanor, *The Armstrong Principle, The Narratives of Takings and Compensation Statutes*, 38 WM. & MARY L. REV. 1151 (1997) [hereinafter Treanor, *The Armstrong Principle*].

6. 154 U.S. 362 (1894).

7. 260 U.S. 393 (1922).

8. *Id.* at 415.

9. See, e.g., *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978). In this case, the Court, citing *Pennsylvania Coal*, notes that "a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a taking." *Id.* at 127. In *Lucas v. South Carolina Coastal Council*, which also cited *Pennsylvania Coal*, the Court noted that:

If . . . the uses of private property were subject to unbridled, uncompensated qualification under the police power, 'the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed].' These considerations gave birth in that case to the oft-cited maxim that, 'while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.'

*Lucas v. South Carolina Coastal Council*, 505 U.S. at 1014 (citing *Pennsylvania Coal*, 260 U.S. 393, 415 (1922)) (alteration in original).

10. See Treanor, *Original Significance*, *supra* note 5; Treanor, *Original Understanding*, *supra* note 5; Treanor, *The Armstrong Principle*, *supra* note 5; J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 *ECOLOGY L.Q.* 89 (1995).

simulated into the taking jurisprudence of every state.<sup>11</sup> In short, the concept of regulatory taking is a fixed part of taking jurisprudence. It is both the more interesting and the more difficult dimension of this jurisprudence. The physical taking cases have become the easier part of the constitutional mandate.<sup>12</sup>

This Article focuses on regulatory takings—what we know, what we don't know, and what seems likely (in the nation and in Maine) in this area of taking law. It will draw most heavily on recent United States Supreme Court case law, but other federal and state cases, and both federal and state legislation (some proposed, some enacted) aimed at clarifying the Fifth Amendment's mandate will also be examined. The purpose of the Article is to suggest that the Taking Clause is alive and well, that its meaning is not as obscure as some would suggest.<sup>13</sup> Though there is not universal agreement as to all of the factors that must be examined in a regulatory taking analysis, nor the weight to be given any one factor (or group of factors) in such an analysis, there is general agreement that taking questions involve several important factors, and that each must be accorded weight. There is also agreement on the need to balance competing public and private rights as they exist in any individual setting, particularly one potentially subject to a taking challenge.<sup>14</sup>

It should also be noted in this introduction that extreme views with respect to takings have not fared well in the courts. The extremes consist of two groups—

---

11. See, e.g., *Seven Islands Land Co. v. Maine Land Use Regulation Comm'n*, 450 A.2d 475 (Me. 1982). In this case, the Maine Supreme Judicial Court, sitting as the Law Court, approvingly cites the "if regulation goes too far" language of *Pennsylvania Coal*, and then notes that, "whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely upon the particular circumstances [in that] case." *Id.* at 482 (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)) (alteration in original).

12. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (holding that the placing of cable equipment on private property pursuant to state statute was a small but very real physical occupation of the property that required payment of just compensation); see also *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992) (reinforcing the *Loretto* holding). The only live issue that sometimes arises in physical taking cases involves the meaning and measurement of "just compensation." See Glynn S. Lunney, Jr., *Compensation for Takings: How Much Is Just*, 42 CATH. U. L. REV. 721 (1993); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967).

13. See, e.g., Richard J. Lazarus, *Counting Votes and Discounting Holdings in the Supreme Court's Takings Cases*, 38 WM. & MARY L. REV. 1099 (1997); Glynn S. Lunney, Jr., *A Critical Reexamination of the Takings Jurisprudence*, 90 MICH. L. REV. 1892 (1992); Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles, Part I—A Critique of Current Takings Clause Doctrine*, 77 CAL. L. REV. 1299 (1989), *Part II—Takings as Intentional Deprivations of Property Without Moral Justification*, 78 CAL. L. REV. 53, 58 (1990) ("But despite this chaos, there seems to be a general pattern to the results reached by the Court in its takings decisions. One can often predict how the Court will ultimately rule in a takings case . . .").

14. See, e.g., James E. Brookshire, *The Delicate Art of Balance—Ruminations on Change and Expectancy in Local Land Use*, 38 WM. & MARY L. REV. 1047 (1997); see also, *K & K Constr., Inc. v. Dep't of Natural Resources*, 575 N.W.2d 531 (Mich. 1998). Lower Michigan courts had found a taking; Michigan's highest court remanded because the relevant parcel for purposes of a taking inquiry had not been correctly defined. More important, the high court recognized that this was not a categorical taking case, and, therefore, upon remand the taking question required a "balancing analysis." *Id.* at 539. The court went on to identify many of the factors that must be weighed in that analysis.

property rights absolutists, on one hand, who see all regulation as a compensable taking,<sup>15</sup> and on the other hand, over-zealous land use planners and/or environmentalists who would regulate property rights almost to the point of extinction.<sup>16</sup> Both groups have been active in Maine over the last several years. Both have

---

15. See, e.g., EPSTEIN, TAKINGS, *supra* note 2. In that piece, Epstein argues that all governmental actions, regulations, and intrusions on a property owner's use or control of (his/her) private property (except nuisance abatement, narrowly defined) trigger a Fifth Amendment duty to pay; government's only alternative is to forebear. See also *Proceedings of the Conference on Takings of Property and the Constitution*, 41 U. OF MIAMI L. REV. 49 (1986); Richard A. Epstein, *A Last Word on Eminent Domain*, 41 U. OF MIAMI L. REV. 253 (1986); Richard A. Epstein, *The Seven Deadly Sins of Takings Law: The Dissents in Lucas v. South Carolina Coastal Council*, 26 LOY. L.A. L. REV. 955 (1993) (wherein the author points out the fallacies (in his view) of both the majority and dissenting Justices' reasoning in *Lucas* and by extension other recent taking cases). Cf. Rene Erm II, *The "Wise Use" Movement: The Constitutionality of Local Action on Federal Lands under the Preemption Doctrine*, 30 IDAHO L. REV. 631 (1994); Patrick Austin Perry, *Law West of the Pecos: The Growth of the Wise Use Movement and the Challenge to Federal Public Land-Use Policy*, 30 LOY. L.A. L. REV. 275 (1996); Niki Christopher, *Cattle Ranch with Park Rangers: The Battle for a Tallgrass Prairie National Park in Kansas*, 18 STAN. ENVTL. L.J. 211, 241 (1999) ("Wise Use ideologists believe that the Fifth Amendment's prohibition against taking of private land for public use without just compensation applies to any regulation that diminishes the value of the land, or impairs the owner's ability to use the land in any way, and that it mandates compensation at fair market value.").

16. Examples of actual and proposed over-regulation can certainly be found in Maine. For example, William Hardy, a resident of the Town of Bowdoin, who, faced with the Town's shoreland zoning ordinance and the Maine State Department of Environmental Protection's (DEP) guidelines with respect to such lands, could not build even one single family home on the 50 acre parcel he owned. See Dieter Bradbury, *DEP May Loosen Wetland Laws*, ME. SUNDAY TELEGRAM, Dec. 20, 1992, at B1. In a similar vein, the *Maine Sunday Telegram* reported the plight of Frank Carroll who owned 320 acres of gravel rich property in Newfield, Maine. See Tux Turkel, *Pine Barrens Hold Up Permit*, ME. SUNDAY TELEGRAM, Mar. 10, 1991, at B1. Unfortunately for Carroll, the property was classified as "pine barren" a rare and environmentally significant land type. Maintaining that it could have denied Carroll's application to develop the gravel resource outright, the DEP indicated it would conditionally approve development of 30 acres. Carroll saw the conditions as stringent and unworkable; the Natural Resources Council of Maine (NRC) saw the DEP's concession to Carroll as unwarranted and threatened suit. Interestingly, no public or private agency offered to buy Carroll's supposedly unique land which throughout the regulatory proceedings he indicated he was willing to sell. See *id.* A third example of over-zealous regulation (albeit only a proposal) is found in the Natural Resources Council of Maine's fall 1990 newsletter, MAINE GROWTH MANAGEMENT NEWS. In response to Maine's growth control legislation, ME. REV. STAT. ANN. tit. 30-A, §§ 4301- 4349 (1996), originally adopted in 1989, the NRC called for literally hundreds of Maine towns to concentrate new development in village centers by adopting 20 acre minimum lot size requirements in significant portions of each town. See *Facing the Future in Deerfield: The Implications of Three Different Land Use Strategies*, MAINE GROWTH MANAGEMENT NEWS (Natural Resources Council of Maine, Augusta, Me.), Fall 1990, at 4-6. Millions of acres would have been affected by these lot size minimums, which in a sidebar article the NRC argued would not be a taking. See *Finding Common Ground: Private Property Rights and Growth Management*, MAINE GROWTH MANAGEMENT NEWS (National Resources Council of Maine, Augusta, Me.), Fall 1990, at 7. More recently, in February 1997, several members of the Maine Legislature tendered LD 1198, which would bar all new residential or commercial structures in an area encompassing 4.5 million acres of Maine forest land (almost one-quarter of the entire state). See L.D. 1198 (118th Legis. 1997). Private landowners would have been left with whatever economic returns existing structures, primitive recreation, and forest management activities would provide. Proponents of the legislation argued this would not be a taking; the bill was not adopted.

pushed their respective agenda with ardor and a rhetoric that evidences little understanding of current taking law.<sup>17</sup> But of the two extremes, the over-zealous environmentalist, planner, bureaucrat and/or regulator, by virtue of his/her status and position coupled with their duty to know and apply present taking law, would seem the more ominous. These over-zealous protectors of the landscape utilizing the paradigm of *Pennsylvania Coal*, invariably assert that proposed or challenged regulations (regulations that are often incredibly stringent on their face) do not go "too far," and thus do not require payment of compensation.<sup>18</sup> They seem never to have seen a regulation they did not like and were not prepared to defend.

This Article will argue that such doggedness disserves us in many ways. As a practical matter, it is unlikely to move today's courts. Courts in recent years, particularly the United States Supreme Court, when faced with either of the extremes noted, have adopted a more balanced middle ground position on the question of what constitutes a regulatory taking. There is every indication they will adhere to this approach for some time to come—over-zealousness simply erodes credibility. More important, the lack of moderation in some regulators (and those who advise them) threatens, excites to feverish activity, and gives credibility to the property rights absolutists. Spokespersons for these views can be counted on to spearhead further rounds of taking litigation, and worse, they will seek passage of stringent

---

17. Property rights absolutists in Maine have been active (with some success) in each of the last four legislative sessions. See An Act To Protect Private Property, L.D. 672 (116th Legis. 1993) (died between houses, June, 1993); An Act to Require the State and Political Subdivisions to Pay Property Owners when Regulations Lower the Value of Property by More Than 50%, L.D. 170 (117th Legis. 1995) (Ought Not To Pass report accepted, July 1995); An Act to Protect Constitutional Property Rights and to Provide Just Compensation, *renamed*, Resolve, Establishing the Study Commission on Property Rights and the Public Health, Safety, and Welfare, L.D. 1217 (117th Legis. 1995) (passed, Resolves 1995, ch. 45); An Act to Implement the Recommendations of the Study Commission on Property Rights and the Public Health, Safety, and Welfare Establishing a Land Use Mediation Program and Providing for Further Review of Rules, L.D. 1629 (117th Legis. 1995) (enacted, P.L. 1996, ch. 537); Resolution Proposing an Amendment to the Constitution of Maine to Affirm the Rights to Private Property, L.D. 475 (118th Legis. 1997) (Ought Not To Pass report accepted, May, 1997); An Act to Require Compensation for Loss of Property Value Due to State or Local Regulation, L.D. 1257 (118th Legis. 1997) (Ought Not To Pass report accepted, May 1997); An Act Requiring Compensation for Loss of Property Value Due to State or Local Regulation, L.D. 470 (119th Legis. 1999) (held over, May, 1999); An Act Regarding Regulations and Compensation to Property Owners, L.D. 2121 (119th Legis. 1999) (held over, May, 1999). Though these measures have in general been perceived as unwise, and an oversimplistic and unwarranted approach to taking issues and 100 years of taking case law, they have generated considerable discussion. There has almost certainly been some chilling affect on the regulatory process, and a mediation mechanism available to landowners claiming a regulatory taking (albeit a limited and temporary one) now exists. See ME. REV. STAT. ANN. tit. 5, § 3341 (West Supp. 1999).

18. They also frequently point to the laudable character of the ends that would be served by the regulation and/or they point out the paucity of tax resources that makes use of the spending power to achieve the ends sought politically and practically impossible. But neither of these factors override or repeal Fifth Amendment mandates. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) ("We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."). The same view was expressed more recently by Justice Scalia in *Nollan v. California Coastal Commission*, 483 U.S. 825, 841-42 (1987).

new legislative initiatives<sup>19</sup> aimed at protecting property rights—initiatives that, if adopted, would set the cause of necessary and reasonable regulation back for many years to come.

In short, a more accurate understanding and acceptance of current taking law by those who would protect us is more likely (than is the rhetoric of the extremes) to preserve regulatory credibility in judicial forums and continued public acceptance of reasonable regulations. Such understanding and acceptance will not end, but is more likely to blunt, the litigation and legislative strategies of the absolutists.

## II. THE CATEGORICAL TAKINGS

Before getting to the heart of this Article, it seems sensible to note and dispose of the two so-called *per se* or categorical classes of taking recognized to date by the United States Supreme Court. Neither arose frequently in the past, and highlighted as they have been by the Court, one can only believe that they will arise infrequently (more often by mistake than for any other reason) in the future. The first involves statutes or regulations (of any type) that give rise to a physical invasion of private property—this is a taking *per se*. The leading case is *Loretto v. Teleprompter Manhattan CATV Corp.*,<sup>20</sup> a case that found a taking where a state statute, without compensation, required property owners to provide physical space (albeit small) for cable equipment.<sup>21</sup> This holding was reinforced in *Lucas v. South Carolina Coastal Council*.<sup>22</sup> The *Lucas* Court noted: “[N]o matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation.”<sup>23</sup>

The second type of categorical or *per se* taking arose and was laid out in the *Lucas* case.<sup>24</sup> As the Court notes, it occurs “where regulation denies all economically beneficial or productive use of land.”<sup>25</sup> In such cases, “when the owner of

---

19. Quite apart from legislative initiatives we have seen in Maine, *supra* note 17, other states and the Congress of the United States have considered property rights legislation. Detailed examination of these legislative initiatives is beyond the scope of this Article, but other scholars have catalogued and examined the pros and cons of these proposals in some detail. See, e.g., Underkuffler-Freund, *supra* note 2, at 162 & n.10; Treanor, *The Armstrong Principle*, *supra* note 5, at 1152 & nn.7-10; Ann L. Renhard Cole, *State Private Property Acts: The Potential for Implicating Federal Environmental Problems*, 76 TEX. L. REV. 685 (1998); Mark W. Cordes, *Leapfrogging the Constitution: The Rise of State Takings Legislation*, 24 ECOLOGY L.Q. 187 (1997); E. Donald Elliott, *How Takings Legislation Could Improve Environmental Regulation*, 38 WM. & MARY L. REV. 1177 (1997); Carol M. Rose, *A Dozen Propositions on Private Property, Public Rights, and the New Takings Legislation*, 53 WASH. & LEE L. REV. 265, 287-97 (1996); Robert C. Ellickson, *Takings Legislation: A Comment*, 20 HARV. J.L. & PUB. POL'Y 75 (1996).

20. 458 U.S. 419 (1982).

21. See *id.* at 421.

22. 505 U.S. 1003 (1992).

23. *Id.* at 1015.

24. See *id.* at 1015-19.

25. *Id.* at 1015. Justice Scalia recognizes that the central question that grows out of *Pennsylvania Coal*—when does a regulation go too far—has never been fully answered. He acknowledges that it will not be answered in any detail by *Lucas*, which deals only with an extreme situation (a situation where regulation reduces the value of land to zero). But Justice Scalia makes clear that when that extreme is reached, we have gone too far—there is a categorical or *per se* taking. See *id.* at 1015-16.



real property has been called upon to sacrifice *all* economically beneficial uses . . . he has suffered a [categorical] taking."<sup>26</sup>

### III. CRITICAL FACTORS IN A REGULATORY TAKING ANALYSIS

#### A. *The Governmental (Public) Purpose or State Interest Factor*

Perhaps the most widely recognized and frequently cited requirement for a regulation to be found valid (not a taking, or a violation of due process) is that it "substantially advance legitimate state interests."<sup>27</sup> A leading New York case, *French Investment Co. v. City of New York*,<sup>28</sup> put it in very similar terms: "A zoning ordinance is unreasonable [a taking] . . . if it encroaches on the exercise of private property rights without substantial relation to a legitimate governmental purpose. A legitimate governmental purpose is, of course, one which furthers the public health, safety, morals or general welfare."<sup>29</sup>

In fact, establishing a legitimate governmental purpose has not proven to be a particularly difficult requirement for governmental regulators to meet. When controls that were adopted in good faith are challenged, public officials are usually able to demonstrate that some aspect (often more than one) of the public's health, safety, or general welfare is actually being served by the measure in question. The key to such a showing is often a comprehensive plan and/or empirical data that clearly demonstrates the need for, and rationality of, the control in the particular setting. But when a public purpose cannot be found or is at best a makeweight—when the avowed public purpose is really only a mask designed to hide impermissible or more cynical governmental motives—courts have not been reluctant to strike the offending regulation down. For example, the court in *National Land & Investment Co. v. Kohn*<sup>30</sup> noted that:

A zoning ordinance whose primary purpose is to prevent the entrance of newcomers in order to avoid future burdens, economic and otherwise, upon the administration of public services and facilities cannot be held valid . . . the general welfare is not fostered or promoted by a zoning ordinance designed to be exclusive and exclusionary.<sup>31</sup>

---

26. *Id.* at 1019. See also *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169 (Fed. Cir.), cert. denied, 502 U.S. 952 (1991) (holding that provisions of the Surface Mining Control and Reclamation Act, as applied to plaintiff's property, prevented all beneficial use of the property and, under the rationale of *Pennsylvania Coal*, constituted a taking). The Court noted that "the diminution in value [of Whitney coal] was total," and the statute "goes too far." *Id.* at 1172, 1174. On the taking issues presented, this case anticipated almost completely the reasoning and holding of *Lucas*.

27. *Agins v. Tiburon*, 447 U.S. 255, 260 (1980).

28. 385 N.Y.S.2d 5 (1976).

29. *Id.* at 10.

30. 215 A.2d 597 (Pa. 1965).

31. *Id.* at 612. Similar views have been expressed in many jurisdictions. See *Southern Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713, 730 (N.J. 1975) (striking down Mt. Laurel's zoning ordinance and holding that zoning to keep tax rates down and to keep out certain types of housing was impermissible, and "contrary to the general welfare"); *Beck v. Town of Raymond*, 394 A.2d 847, 852 (N.H. 1978) (striking down a regulation that sharply limited the number of building permits that could be issued in any given year and noting

The finding of a valid public purpose, a legitimate state interest, does not end a taking inquiry. A challenged regulation may have cleared an essential first hurdle, but several other factors must now be examined and weighed before a final determination can be made as to whether the challenged control is reasonable, or gives rise to a regulatory taking.

*B. The Economically Viable Use or Diminution in Value Factor*

The second essential factor in a taking analysis, the idea that property ownership includes an economic element, the right to a reasonable economic return from the property, is of long standing. In *Reagan v. Farmers' Loan & Trust Co.*,<sup>32</sup> the Court recognized the need for, and legitimacy of, reasonable regulation, but pointedly noted:

This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretence of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property . . . .<sup>33</sup>

In a similar vein, the Court in *Agins v. City of Tiburon*<sup>34</sup> noted that: "The application of a general zoning law to a particular property effects a taking if the ordinance . . . denies an owner economically viable use of his land . . ." <sup>35</sup> More recent United States Supreme Court taking cases, *Lucas*,<sup>36</sup> *Dolan*,<sup>37</sup> *City of Monterey*,<sup>38</sup> cite *Agins* and reaffirm the principle laid out above without reservation.

Notwithstanding the Supreme Court's assertion that property owners are entitled to a reasonable economic return, the Court has never fashioned an approach

---

that the ordinance's "apparent primary purpose is to prevent the entrance of newcomers in order to avoid burdens upon public services and facilities. This alone is not a valid public purpose."); *United States v. City of Black Jack*, 508 F.2d 1179, 1187 (8th Cir. 1974) (striking down racially discriminatory zoning and holding that no governmental interest "is in fact furthered by the zoning ordinance"); *Barnard v. Zoning Bd. of Appeals of the Town of Yarmouth*, 313 A.2d 741 (Me. 1974). In sustaining the denial of a variance, the *Barnard* court sounded a warning: "However, we are mindful that zoning has been used frequently for ends which while ostensibly within the traditional objectives of zoning—protection of health, safety, morals and general welfare—are in fact unrelated to those purposes." *Id.* at 745. The court made clear that when it finds this to be the case it will follow the lead of other jurisdictions and strike down such zoning. In sum, challenges to police power controls whether premised on a taking theory, an alleged violation of due process, or an assertion that they exceed the scope of enabling legislation, will succeed (the offending ordinance will be struck down) when public purpose requirements are not met, and/or when "legitimate state interests" cannot be found.

32. 154 U.S. 362 (1894).

33. *Id.* at 398 (quoting *Stone v. Farmers' Loan & Trust Co.*, 116 U.S. 307, 331 (1886)).

34. 447 U.S. 255 (1980).

35. *Id.* at 260. The *Agins* court cites approvingly *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). See also *French Inv. Co. v. City of New York*, 385 N.Y.S.2d 5 (1976). The *French* court held that "a zoning ordinance is unreasonable [a taking] . . . if it renders the property unsuitable for any reasonable income productive or other private use for which it is adapted and thus destroys its economic value, or all but a bare residue of its value." *Id.* at 10.

36. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

37. *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

38. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 119 S. Ct. 1624 (1999).

that precisely answers the question—what level of return is reasonable?<sup>39</sup> Or put the other way—what diminution in value (level of economic loss) that is less than total constitutes a taking? One suspects the Court has eschewed a formulaic approach to these questions because no precise formula can take into account all of the variables; indeed such an approach might be more misleading than helpful.<sup>40</sup> The Court has been content to recognize that the magnitude of economic injury is only one factor, albeit an important one, in an overall taking analysis that of necessity involves many factors. However, in *Lucas*, Justice Scalia did indicate (in dicta) that greater precision with respect to loss of value may today be warranted; he also seemed to suggest that diminution in value (when it is significant) is a weighty factor that would justify a taking finding, unless countervailing factors

---

39. Courts have said that regulation that leads to the loss of some theoretical optimum or maximum income return from the use of a property does not constitute a taking. *See, e.g., Andrus v. Allard*, 444 U.S. 51 (1979). In sustaining regulations limiting commercial transactions in bird parts protected by federal legislation against a taking challenge, the Court noted: "It is, to be sure, undeniable that the regulations here prevent the most profitable use of appellees' property. Again, however, that is not dispositive. When we review regulation, a reduction in the value of property is not necessarily equated with a taking." *Id.* at 66. *See also Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978). In affirming lower court holdings that had sustained New York's historic preservation ordinance against a taking challenge, the Court approvingly noted: "The Appellate Division concluded that all appellants had succeeded in showing was that they had been deprived of the property's most profitable use, and that this showing did not establish that appellants had been unconstitutionally deprived of their property." *Id.* at 120. A leading Maine taking case takes a similar position. *See Seven Islands Land Co. v. Maine Land Use Regulation Comm'n*, 450 A.2d 475 (Me. 1982). In note 10 of its opinion, the Law Court, drawing on *Allard*, notes:

The opportunity to use property for future profit is not such a fundamental attribute of ownership. The "loss of future profits . . . provides a slender reed upon which to rest a taking claim. Prediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform."

*Id.* at 482, n.10 (quoting *Andrus v. Allard*, 444 U.S. 51, 66 (1979)).

40. On one hand, cases can certainly be found where regulations have imposed significant economic losses on individual property owners but, other factors being present, a taking was *not* found. *See, e.g., Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (no taking where regulations reduced the value of the property approximately 90%); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (no taking where zoning regulation reduced the value of the property by approximately 75%); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) (precise valuations before and after regulation are not given, but the facts of the case indicate that the diminution in value was very large—no taking). On the other hand, there are cases where regulations gave rise to only slight (often negligible) diminutions in individual property value, but a taking was found nonetheless. *See, e.g., Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (the value of the lateral easement taken by the regulation was small compared to the full value of the house and lot, but the absence of a relationship ("nexus") between the regulation and the developer's activity was held to be a taking); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (the value of the portion of the structure occupied by the cable equipment was small compared to the full value of the building, but the physical occupation itself constituted a taking); *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (the value of burdens (exactions) imposed on developers relative to the full value of a proposed development is often small, but the Court required "proportionality"; i.e., that the burden imposed on a particular developer be commensurate with the harm his development will give rise to). In short, there does not appear to be any arithmetical (bright-line) cutoff with respect to diminutions in value occasioned by regulation that would signal when there is, and when there is not, a taking—too many other factors are involved. Courts have long recognized this fact.

which would justify the regulation are present.<sup>41</sup> Scalia is not alone in these views. Other federal and state courts have taken this position in a growing body of holdings on this point.<sup>42</sup>

### C. *The Distinct (Reasonable) Investment-Backed Expectations Factor*

Quite apart from the "economically viable use or diminution in value" factor, courts at least since *Penn Central Transportation Co. v. New York City*<sup>43</sup> have recognized a second separate economic dimension in their taking analysis: the degree to which the challenged regulation has affected the investment-backed expectations of the property owner. The *Penn Central* Court's reasoning is instructive:

In engaging in these essentially ad hoc, factual inquiries, [a taking analysis] the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with *distinct investment-backed expectations* are, of course, relevant considerations.<sup>44</sup>

The Court went on to find that the historic district ordinance in question in *Penn Central* did not effectuate a taking in large part because the original use expectations of the property owner had not been upset by the regulatory scheme.<sup>45</sup> The Court concluded: "[T]he New York City law does not interfere . . . with what must be regarded as Penn Central's primary expectation [to continue to use the property as a railroad terminal] concerning use of the parcel."<sup>46</sup> In other factual settings the converse must also be regarded as a possibility; a regulation might so curtail a property owner's reasonable investment-backed expectations that a taking is found.

41. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016-19 & nn.7-8 (1992).

42. See, e.g., *Formanek v. United States*, 26 Cl. Ct. 332, 341 (1992) (holding that a regulation that reduced the value of a property from \$933,921 to \$112,000 was a taking); *Florida Rock Indus. Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994). Although the *Florida Rock* case was remanded to the court of claims to determine the present fair market value of the land, the Federal Circuit made clear that in its view, significant diminutions in value that are less than total might well give rise to a taking. See *id.* at 1572-73. A Maine district court case, decided by Judge Saufley, who is now an Associate Justice on the Maine Supreme Judicial Court, employed similar reasoning, although the form of the regulatory control (an order to make improvements as opposed to a regulatory limitation) is different from the usual case. See *City of Portland v. Tracy-Causser Assoc., Inc.*, No. 91-LU-006 (Me. Dist. Ct. 9, S. Cum., Oct. 20, 1993) (Saufley, J.). The court noted that:

The required expenditure of \$100,000 or more to prevent further deterioration of an historic building which cannot be rented, nor inhabited in any way even with the required expenditure, is found to be "inordinately burdensome." As the Supreme Court reiterated after its analysis of taking law to date in *Lucas*, a "state, by *ipse dixit*, may not transform private property into public property without compensation . . ."

. . . .

. . . [T]he city's order requiring repairs to the building affects an unconstitutional taking of defendant's property . . .

*Id.* at 8-10 (citations omitted). But see *Wyer v. Board Of Envtl. Protection*, 2000 ME 45, 747 A.2d 192 (finding no taking in a setting where the diminution in value was 50%).

43. 438 U.S. 104 (1978).

44. *Id.* at 124 (emphasis added).

45. See *id.* at 136.

46. *Id.* See also *id.* at 138 n.36.

A case in point is *Formanek v. United States*,<sup>47</sup> wherein the court recognized that it "must further consider the owners' investment-backed expectations."<sup>48</sup>

It is beyond question that the property was purchased for the sole purpose of industrial development. Mr. Formanek and his partners were not aware of the unique nature of the property nor did they ever intend to purchase a nature conservancy. The court finds that the dramatic reduction in the property's value as a result of the permit denial *combined with the government's interference with the plaintiffs' investment-backed expectations*, constitutes a taking.<sup>49</sup>

A recent Michigan case, *K & K Construction, Inc. v. Department of Natural Resources*,<sup>50</sup> also saw the diminution in value factor and the investment-backed expectations factor as two separate and distinct factors. The case was remanded because the relevant parcel for purposes of a taking analysis had not been correctly determined below;<sup>51</sup> the court also recognized it was not dealing with a categorical taking case.<sup>52</sup> Upon remand the court required that a balancing analysis be used; some of the factors in the balance were identified: "(1) the character of the governmental action, (2) the economic effect of the regulation on the claimant, and (3) the extent to which the regulation interfered with distinct investment-backed expectations."<sup>53</sup> Although the court's descriptive language differs slightly from the language used in this Article, the factors the court would examine to determine whether a taking has occurred closely parallel the taking analysis factors laid out to this point.

#### D. The Nexus Factor

This fourth factor in a taking analysis was driven home by Justice Scalia's reasoning in *Nollan v. California Coastal Commission*,<sup>54</sup> but it has roots in earlier state court taking cases which require regulations to bear some relationship to (to be made necessary by) what a developer is doing.<sup>55</sup> A nexus analysis is prepared to assume that a valid governmental purpose exists. In *Nollan*, the provision of a pathway along the foreshore is almost certainly a valid governmental undertaking.

47. 26 Cl. Ct. 332 (1992).

48. *Id.* at 340.

49. *Id.* at 340-41 (emphasis added). It will almost always be the case that a regulation which interferes with a property owner's reasonable investment-backed expectations will also give rise to a significant diminution in the value of the property, but this fact should not obscure the point the court is making: these are separate factors in a taking analysis. Whether either factor standing alone would support a finding that there is a taking is problematic, but their combined and mutually reinforcing effect in *Formanek* seems to amply support the court's finding of a taking.

50. 575 N.W.2d 531 (Mich. 1998).

51. *See id.* at 533.

52. *See id.* at 539.

53. *Id.* at 539-40.

54. 483 U.S. 825 (1987).

55. *See J.E.D. Assoc., Inc. v. Town of Atkinson*, 432 A.2d 12 (N.H. 1981) (holding that the town's zoning ordinance was a taking). The ordinance contained a blanket requirement that developers dedicate 7.5% of their total land or pay a fee in lieu of dedication for park and open space purposes, without regard to the actual needs of the town or the nature of the development. The court referred to this as "an out-and-out plan of extortion." *Id.* at 14. *See also French Inv. Co. v. City of New York*, 385 N.Y.S.2d 5 (1978) (arguing in favor of the need for zoning ordinance requirements that bear a "substantial relation" to governmental purposes). The *French* court's further observation that there must be a "reasonable relation" between means and ends makes a similar point. *Id.* at 10.

The diminution in value caused by the regulation may well be slight. The nexus factor focuses on the relationship between what the property owner-developer is undertaking and the requirements that the regulation imposes. The Nollans were building a house—one that might impair a scenic view. Justice Scalia pointed out that there are any number of conditions that the regulating authority might have imposed relative to the height, the positioning of the building on the lot, fencing, even a requirement that the Nollans provide a viewing area, that would almost certainly have been sustainable.<sup>56</sup> Though not mentioned, conditions addressing any and all safety aspects of the structure or that would have guarded against erosion during construction would also seem permissible.

But conditions of this type were not imposed by the California Coastal Commission; one can only assume that the design plan of the Nollans made such conditions unnecessary. Instead, development approval and issuance of the required building permit was conditioned on the Nollans granting an easement of lateral passage along the high tide line of their property for use by the public. Justice Scalia bluntly points out that the imposition of such a condition is unrelated to what the Nollans are doing (building a house), and thus is constitutionally impermissible—it is a taking.<sup>57</sup> In other words, to be constitutional, conditions imposed by a regulatory body must ameliorate a harm, be made necessary by, or grow out of the proposed development. If they do not, there is no nexus. The “restriction [condition] is not a valid regulation of land use ‘but an out-and-out plan of extortion.’”<sup>58</sup> Strong language perhaps, but *Nollan* does give us one more useful factor in determining when regulation goes “too far” and thus becomes a regulatory taking.

#### E. The Proportionality Factor

This fifth factor in the array of factors courts draw upon in a regulatory taking analysis has been given prominence by yet another recent United States Supreme Court case, *Dolan v. City of Tigard*.<sup>59</sup> Proportionality analysis, like nexus analysis, is prepared to assume that a valid governmental purpose exists. It is prepared to assume that any cost or diminution in value (standing alone) caused by the regulation would not rise to the level of a taking; it also assumes that nexus requirements are met. Proportionality, according to the *Dolan* analysis, begins where nexus leaves off;<sup>60</sup> it raises questions of scale and (un)fairness with respect to demands made of a developer in the context of obtaining development approval.<sup>61</sup>

---

56. See *Nollan v. California Coastal Comm'n*, 483 U.S. at 836.

57. See *id.*

58. 483 U.S. at 837 (quoting *J.E.D. Associates, Inc. v. Atkinson*, 432 A.2d 12, 14 (1981)).

59. 512 U.S. 374 (1994).

60. See *id.* at 386-88.

61. A homely example may be helpful. If a proposed retail expansion would, on the basis of reasonable planning judgments, give rise to a need for five to seven additional off-street parking spaces, police power regulations could undoubtedly address this need; public purpose and nexus requirements are almost self-evidently met. The key question is: how many off-street parking spaces could the regulation require? A regulation that required the developer to build a new parking garage, or to provide 100 new spaces, or even 50 spaces, would seem to go “too far”; it would rise to the level of a taking under *Dolan*’s proportionality reasoning. But a requirement that 5, 10, even 15 spaces be provided would seem sustainable; it is proportional to the need created and such a requirement is unlikely to give rise to significant added costs and/or diminutions in value so as to constitute a taking on this basis.

The *Dolan* Court, after finding nexus in the case before it, put the issue this way: "The second part of our analysis requires us to determine whether the degree of the exactions demanded by the city's permit conditions bear the required relationship to the projected impact of petitioner's proposed development."<sup>62</sup> The Court would then reject standards that are either "too lax" or unduly "exacting" with respect to this relationship.<sup>63</sup> It settled on a standard that requires "a showing of a reasonable relationship" between the need the development gives rise to and the regulatory requirement imposed.<sup>64</sup> Summing up its point, the *Dolan* Court said: "We think a term such as 'rough proportionality' best encapsulates what we hold to be the requirement of the Fifth Amendment."<sup>65</sup> Finally, the Court casts the burden of demonstrating the reasonableness of any required dedication (and one must believe any fee in lieu of a required dedication) on the enacting government. The Court noted that: "No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."<sup>66</sup> This aspect of the Court's opinion sparked sharp dissent, but the majority was not dissuaded; it no doubt believed that an enacting government is in the best position to demonstrate the reasonableness of its regulation. If it does, there is no taking; if it can not do so, proportionality requirements are not met—there is a regulatory taking.

#### F. The Armstrong Factor

This sixth factor in a regulatory taking analysis draws its name from the leading case that laid out its underlying rationale, *Armstrong v. United States*.<sup>67</sup> In

62. *Dolan v. City of Tigard*, 512 U.S. at 388.

63. *See id.* at 389.

64. *Id.* at 390-91. Here again the United States Supreme Court draws on the reasoning of, and cites approvingly, a number of state highest court holdings. *See, e.g.*, *Jordan v. Menominee Falls*, 137 N.W.2d 442 (Wis. 1965) (holding that subdivision controls that require land dedications and/or fees for schools, parks, and playgrounds that the subdivision in whole or in part creates a need for, are a valid exercise of police power, and that where the value of such dedications and fees fall well below actual public expenditures for these facilities, reasonableness requirements are met); *Collis v. Bloomington*, 246 N.W.2d 19 (Minn. 1976). The Minnesota court's reasoning is particularly apt.

A municipality could use dedication regulations to exact land or fees from a subdivider far out of proportion to the needs created by his subdivision in order to avoid imposing the burden of paying for additional services on all citizens via taxation. To tolerate this situation would be to allow an otherwise acceptable exercise of police power to become grand theft. But the enabling statute here prevents this from occurring by authorizing dedication of only a "reasonable portion" of land for the purposes stated.

*Id.* at 26. *See also* *College Station v. Turtle Rock Corp.*, 680 S.W.2d 802 (Tex. 1984) (holding that on remand the trial court must determine whether there is a reasonable connection between the increased population arising from the subdivision development and the park and recreation land dedications required by the ordinance).

65. *Dolan v. City of Tigard*, 512 U.S. at 391.

66. *Id.*

67. 364 U.S. 40 (1960). *See also* William Michael Treanor, *The Armstrong Principle*, *supra* note 5; John J. Costonis, *Presumptive and Per Se Takings: A Decisional Model For The Taking Issue*, 58 N.Y.U. L. REV. 465 (1983). Costonis, in addressing some due process considerations in a taking analysis, refers to this factor as the "just share" principle and traces its roots to cases that predate *Armstrong*. *Id.* at 486-87.

brief, the narrow issue raised by *Armstrong* is whether a regulation falls on too few property owners and thus gives rise to a taking or impacts a reasonable class of property owners (if not all property owners in a jurisdiction) and thus is sustainable, at least with respect to this dimension of a taking analysis. The *Armstrong* Court put it succinctly: "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."<sup>68</sup> This consideration was a central issue in the previously cited *Penn Central*<sup>69</sup> case, a case that had challenged New York City's historic preservation ordinance that by definition impacted a relatively small group of property owners (those who owned historic properties) more than the general class of property owners in the city.<sup>70</sup> The majority in *Penn Central* acknowledged the validity of *Armstrong*,<sup>71</sup> but they implicitly concluded that the ordinance fell on a large enough class of property owners to withstand a taking challenge.<sup>72</sup> Justice Rehnquist's dissent in the case, concurred in by two other members of the Court, rather elaborately lays out the opposite view. On the rationale of *Armstrong* they would have found a taking. "Appellees have imposed a substantial cost on less than one-tenth of one percent of the buildings in New York City for the general benefit of all its people. It is exactly this imposition of general costs on a few individuals at which the 'taking' protection is directed."<sup>73</sup> The dissent then cites *Armstrong* and several other United States Supreme Court cases that elaborate the underlying principle.<sup>74</sup> The significance of this factor in a taking analysis is underscored by the fact that all nine of the *Penn Central* justices advert to *Armstrong*; the majority would draw the line defining an appropriately burdened group at a different point than would the dissenters, but the entire Court understands the fairness, equal protection, and taking principles at stake.

---

68. *Armstrong v. United States*, 364 U.S. at 49. See also *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *supra* notes 54-56 and accompanying text. Justice Scalia makes clear in *Nollan* that had he not decided the case (found the regulation to be a taking) on "nexus" grounds, he might well have reached the same result applying the reasoning of *Armstrong*. In a footnote, he states: "If the Nollans were being singled out to bear the burden of California's attempt to remedy these problems [beachfront access], although they had not contributed to it more than other coastal landowners, the State's action, even if otherwise valid, might violate either the incorporated Takings Clause or the Equal Protection Clause." *Nollan v. California Coastal Comm'n*, 483 U.S. at 835 n.4. Scalia then cites *Armstrong* and several other United States Supreme Court cases that have embraced this principle. See *id.*

69. See *supra* notes 43-46 and accompanying text.

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

71. See *id.* at 123.

72. See *id.*

73. *Id.* at 147 (Rehnquist, J., dissenting).

74. See *id.* at 148-50.



*G. The Avoiding a Harm as Opposed to Acquiring a Benefit Factor*

Many would argue that the significance of this long-standing factor in a taking analysis<sup>75</sup> has been eroded, if not rejected outright, by the Supreme Court's reasoning in *Lucas v. South Carolina Coastal Council*. Justice Scalia, writing for the majority, notes "that the distinction between regulation that 'prevents harmful use' and that which 'confers benefits' is difficult, if not impossible, to discern on an objective, value-free basis."<sup>76</sup> In a footnote he says that skillful staff can almost always fashion a harm-avoiding justification for even the most stringent regulation;<sup>77</sup> he then reasons that if this alone becomes the touchstone for avoiding a taking claim, the protections of *Pennsylvania Coal*<sup>78</sup> become a nullity. In short, Justice Scalia sees the harm-benefit dichotomy as little more than a semantic game that should not deflect us from a more penetrating taking analysis. Justice Scalia's logic is certainly correct. But experience and common sense, not logic, is likely to lead many courts (notwithstanding the semantic risks) to continue to examine (as one of many factors to be examined) whether the regulation in question primarily addresses real risks and/or public safety issues in a manner that seeks to avoid harm, or seems primarily aimed at creating and/or acquiring some type of public benefit.<sup>79</sup> Controls of the first type will more readily withstand a taking chal-

75. An important state taking case, *Just v. Marinette County*, 201 N.W.2d 761 (Wis. 1972), sustaining stringent shoreland controls against a taking challenge, traced the roots of this factor to the early writings of ERNST FREUND, *THE POLICE POWER* (1904) and 1 CHARLES A. RATHKOPF, *THE LAW OF ZONING AND PLANNING* (1956) (particularly Vol. 1, ch. 6, § 6.6). See *Just v. Marinette County*, 201 N.W.2d at 767. The *Just* court, quoting Professor Freund, lays out the factor as follows:

"It may be said that the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful . . . [sic] From this results the difference between the power of eminent domain and the police power, that the former recognizes a right to compensation, while the latter on principle does not." Thus the necessity for monetary compensation for loss suffered to an owner by police power restriction arises when restrictions are placed on property in order to create a public benefit rather than to prevent a public harm.

*Id.* (alteration in original). See also Lynda J. Oswald, *The Role of the "Harm/Benefit" and "Average Reciprocity of Advantage" Rules in a Comprehensive Takings Analysis*, 50 VAND. L. REV. 1449 (1997).

76. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1026 (1992).

77. See *id.* at 1025 n.12.

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

79. Though the categories of "harm avoiding" and "benefit acquiring" are neither self-defining nor mutually exclusive, it is often possible from the facts, the record, and the legislative history of the regulatory control in question to determine the primary motivational consideration(s) underlying a challenged control. For example, regulations addressing land uses in a two or five-year flood plain or on steep slopes prone to heavy rains and flash-flooding speak for themselves. The dangers are real, and though the controls could be characterized as acquiring a floodway or greenbelt benefit, common sense and experience suggests that the controls are primarily aimed at harm avoidance. See *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 258 Cal. Rptr. 893 (Ct. App. 1989). The United States Supreme Court had used this case as a vehicle for holding that a temporary taking must be compensated. See *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987). On remand, California's Court of Appeal found there was no taking; it noted: "The zoning regulation challenged in the instant case involves [the] highest of public interests—the prevention of death and injury. Its enactment was prompted by the loss of life in an earlier flood. And its avowed purpose is to prevent the loss of lives in future floods." *First English Evangelical Lutheran Church v. County of Los Angeles*, 258 Cal. Rptr. at 904. In the court's view, the harm-avoiding character of the regulation was self-evident.

lenge; controls of the latter type are, and should be, more vulnerable to such a challenge.

*H. The Whole or Relevant Parcel Factor (a.k.a., the "Denominator" Parcel Factor)*<sup>80</sup>

This eighth factor in a regulatory taking analysis is increasingly being focused upon by courts, regulators, and property owners. To date, it has not received the attention or the refinement that its importance in a regulatory taking analysis would seem to dictate.<sup>81</sup> The question put simply is—when regulation gives rise to a diminution in value, what is the tract or parcel of land (and, of course, the value of that tract) against which the diminution is to be measured? To respond the whole tract or parcel, begs the question. What is the whole parcel in settings where land

On the other hand, regulations that talk generally about landslide risks and steep slopes but that require a vast area of more or less developable land to remain in its natural condition without opportunity for the landowner to meet reasonable development conditions and/or to ameliorate whatever real harms exist also speak for themselves. Harm avoidance here is a make-weight; common sense and experience suggest that a public benefit (open space) is being taken under the guise of police power control. See *Corrigan v. City of Scottsdale*, 720 P.2d 528 (Ariz. Ct. App. 1985). In *Corrigan*, regulations barred all development on over 3,500 acres of plaintiff's land; Arizona's intermediate appellate court, while purporting not to be examining legislative motives, nonetheless noted:

This evidence tended to show that the primary motivation in proposing the ordinance was to preserve the McDowell Mountains in their natural state for the benefit of all residents of the City. Distilled, *Corrigan's* argument is that the primary purpose of the ordinance is to obtain a permanent mountain preserve for the public without cost.

*Id.* at 532-33. The court went on to find the transferable development rights scheme outlined in the zoning controls to be a taking. See *id.* at 539. From the standpoint of harm/benefit analysis, both cases seem correctly decided.

80. See Michelman, *supra* note 12. Michelman was probably the first scholar to put the taking analysis in the form of a fraction, the numerator is the value removed by a regulation, the denominator being the full value of the unregulated parcel. See *id.* at 1192. But in his next breath Michelman recognized "[t]he difficulty . . . of how to define the 'particular thing' [parcel] whose value is to furnish the denominator of the fraction." *Id.* In *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987), the United States Supreme Court recognized this same difficulty; the Court noted:

Because our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property "whose value is to furnish the denominator of the fraction."

*Id.* at 497 (citing Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1192 (1967)).

81. This point was recognized most recently by Justice Scalia in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" [parcel] 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.

*Id.* at 1016 n.7. Though the United States Supreme Court has still not given us the degree of clarity that might be desired on this point, lower federal and state courts addressing the whole or relevant (the denominator) parcel problem, have improved the tools enabling this parcel to be defined with increasing fairness and accuracy, particularly in more complex settings.

is subdivided and resubdivided over time, or where larger more developable parcels are assembled by acquiring individual holdings one at a time over a period of time? The general rule applicable in straightforward settings where the landowner acquired and holds a single tract of land is beguilingly simple—taking analysis focuses on the single tract characterizing it “the whole parcel.” The diminution in value caused by a regulation is measured against the value of this whole parcel, and weighing this factor along with others, a taking may or may not be found. Courts in many jurisdictions have proceeded along these lines.<sup>82</sup> The United States Supreme Court, in *Penn Central Transportation Co. v. New York City*, has embraced this view.

“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 . . . on the nature and extent of the interference with rights in the parcel as a whole . . . .<sup>83</sup>

But the straightforward case can quickly become infinitely more complicated if a range of not uncommon variables is introduced. For example, when contiguously held land has been acquired a tract at a time and/or developed and sold off in stages over a number of years but now faces new regulatory controls that will sharply reduce allowable future development (controls that are arguably a taking), is the whole or relevant parcel for examining the taking question the remaining

82. See, e.g., *Seven Islands Land Co. v. Maine Land Use Regulation Comm'n*, 450 A.2d 475 (Me. 1982) (sustaining stringent cutting regulations in deer yard areas against a taking challenge). The court did not focus on the 550, plus or minus, acres subject to regulation but on the 25,000 acres of abutting and contiguous land owned by the plaintiffs. See *id.* at 482-83. In *Moskow v. Commissioner of the Department of Environmental Management*, 427 N.E.2d 750 (Mass. 1981), the court, in sustaining wetlands controls, did not focus on the 55% of the parcel that was designated wetland and could not be built upon, but on plaintiff's entire parcel which allowed anywhere from one to four residential structures to be built. See *id.* at 753. In *Zealy v. City of Waukesha*, 548 N.W.2d 528 (Wis. 1996), the court sustained wetlands conservancy regulations against a taking challenge. In doing so, it did not focus on the more stringently regulated 8.2 acre portion of a parcel encompassing a total of 10.4 acres; instead, the court focused on the entire parcel and pointedly noted that the remaining 2.2 acres were zoned for commercial and residential use having significant economic value. See *id.* at 533-34. This case is also noteworthy for its thorough discussion of a range of federal and state cases exploring the relevant parcel issue. See *id.* at 532-34.

83. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 130-31 (1978). The same point is made in *Andrus v. Allard*, 444 U.S. 51 (1979) (sustaining provisions of the Eagle Protection Act against a taking challenge). In *Allard*, the Court noted:

[A] significant restriction has been imposed on one means of disposing of the artifacts. But the denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full “bundle” of property rights, the destruction of one “strand” of the bundle is not a taking, because the aggregate must be viewed in its entirety.

*Id.* at 65-66. This was the approach taken in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. at 497, where legislation aimed at preventing surface subsidence was sustained against a taking challenge. The Court, citing both *Penn Central* and *Allard*, did not focus on the 2% of underground coal that would be left in place by the regulation but on the entire mineral estate subject to regulation. See *id.* at 496; see also *Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal.*, 508 U.S. 602, 643-44 (1993) (citing the “whole parcel” reasoning of *Penn Central* in a setting that did not involve land use issues).

undeveloped portion of the property?<sup>84</sup> Or, is the whole or relevant parcel the largest tract that may have existed at some point in the past?<sup>85</sup> When contiguously held land has been acquired a tract at a time, cannot an argument be made that each acquired tract is entitled to be treated separately for purposes of a taking analysis—after all, in a transactional sense each parcel is separate? Is not this argument strengthened if the individual and separately acquired tracts are separated by man-made or natural barriers (roads, utility rights-of-way, railway lines, rivers)?<sup>86</sup> And is not this argument strengthened further if the individual and separately acquired tracts are subject to different and economically more or less valuable zoning controls—controls that may have been enacted (or amended) at different times?

None of these questions admit of any quick, simple, or self-evident answer. The questions only underscore what many courts have recognized, i.e., that defining the so-called relevant or denominator parcel for the purpose of beginning a taking analysis (once we are beyond the most simple settings) is a difficult and an inherently factual inquiry in which reasonable balances must be struck. Courts have also recognized that this determination is an essential first step in any taking analysis. On this latter point, a recent Michigan case, *K & K Construction, Inc. v. Department of Natural Resources*,<sup>87</sup> noted:

Before we decide whether the regulations imposed on plaintiffs' property constitute a taking, we must first address an important preliminary matter. The first step in our analysis is to determine which parcel or parcels owned by plaintiffs are relevant for the taking inquiry. The determination of what is referred to as the 'denominator parcel' is important because it often affects the analysis of what economically viable uses remain for a person's property after the regulations are imposed.<sup>88</sup>

Turning then to an array of factual inquiries that would facilitate the delineating of the relevant or denominator parcel, the *K & K* court approvingly drew upon *Ciampitti v. United States*.<sup>89</sup> The *Ciampitti* court noted:

---

84. See *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1179-82 (Fed. Cir. 1994) (focusing on the remaining undeveloped parcel of land, not the larger 250-acre tract it had once been a part of, and finding a taking).

85. See *Sibson v. State*, 336 A.2d 239, 241 (N.H. 1975) (holding there was not a taking and reasoning that although wetland regulations applied to the entire remaining four-acre parcel, development that had already taken place on the larger original parcel had in the aggregate provided the landowner with reasonable economic return). Another layer of complexity in these types of settings is readily apparent—would not the whole or relevant parcel for purposes of a taking analysis be affected by time-frame factors? In settings where the assembling, development, and sale of tracts began thirty or more years ago, long before the present controls could have been anticipated, the relevant parcel would almost certainly be different from settings where the whole development activity unfolded over the last twelve to eighteen months when the shape of present controls was either actually or constructively known to the developer.

86. Here again, the real world can be expected to give rise to an added layer of complexity—the character of barriers could alter the concept of contiguosity; thus, the parcel that would be looked to in a taking dispute is subject to wide variation. Is the road a narrow dirt track or an interstate highway with the nearest access point several miles away? Is the waterbody an intermittent stream or a permanent waterbody of considerable width? Is the utility right-of-way a line of telephone poles or a 100-yard-wide energy transmission corridor?

87. 575 N.W.2d 531 (Mich. 1998).

88. *Id.* at 535-36.

89. 22 Cl. Ct. 310 (1991).

In the case of a landowner who owns both wetlands and adjacent uplands, it would clearly be unrealistic to focus exclusively on the wetlands, and ignore whatever rights might remain in the uplands. . . . Factors such as the degree of contiguity, the dates of acquisition, the extent to which the parcel has been treated as a single unit, the extent to which the protected lands enhance the value of remaining lands, and no doubt many others would enter the calculus.<sup>90</sup>

In short, a growing number of courts have recognized that in more complex settings the whole or relevant parcel (the denominator parcel), can only be determined by looking at and fairly (reasonably) balancing an array of variables. No pat or formulaic approach seems possible. The *Ciampitti* court apparently shares this view:

The effect of a taking can obviously be disguised if the property at issue is too broadly defined. Conversely, a taking can appear to emerge if the property is viewed too narrowly. The effort should be to identify the parcel as realistically and fairly as possible, given the entire factual and regulatory environment.<sup>91</sup>

To reiterate a point made at the outset of this section—all parties (regulators, property owners, courts) are increasingly focusing on this factor in a taking analysis; they must because regulations are becoming more numerous and land holdings more complex. The whole parcel approach is overly simplistic—it leaves too many questions unanswered. It seems safe to predict that an increasing body of case law will emerge on this point—and even if no magic bullet or bright line test defining the relevant or denominator parcel in more complex settings is produced, this case

90. *Id.* at 318. The same sort of searching factual inquiry to determine the denominator parcel is required in *East Cape May Associates v. New Jersey Department of Environmental Protection*, 693 A.2d 114 (N.J. 1997). Overturning a lower court finding that there was a taking, the appellate court noted:

Determining the takings denominator in the present case requires a much more complete factual record than now exists. What entities own or owned the property west of Pittsburgh Avenue? What part of it, if any, do those entities still retain? When did they build on it and when were any parts of it disposed of? What is the relationship of East Cape May to the entities which own or owned the property west of Pittsburgh Avenue? When and for what consideration was the land on either side of Pittsburgh Avenue acquired? When, why, and for what consideration was the property east of Pittsburgh Avenue transferred to its present ownership? What part of the property west of Pittsburgh Avenue was subject to wetlands controls or other governmental restrictions while it was owned by East Cape May's principals or transferors? What is the current municipal zoning of the property? Is there any difference in the zoning applicable to the land east and west of Pittsburgh Avenue? Was development restricted to the western tract in anticipation of the more stringent regulations applicable to the eastern part? The answers to all of these questions may affect the formulation of the rule for the definition of the "property" which is relevant to East Cape May's claim that its property has been deprived of all viable economic uses.

*Id.* at 128-29. See also *Tabb Lakes, Ltd. v. United States*, 10 F.3d 796 (Fed. Cir. 1993) (holding that it was unnecessary at that time to resolve the question of whether all five sections of the subdivision, or something less, is the relevant parcel for a taking analysis). The *Tabb Lakes* court does make clear though that "[t]he quantum of land to be considered is not each individual lot containing wetlands or even the combined area of wetlands." *Id.* at 802.

91. *Ciampitti v. United States*, 22 Cl. Ct. at 318-319.

law<sup>92</sup> will refine our thinking with respect to this aspect of taking questions and thus contribute to fairer outcomes overall.<sup>93</sup>

#### IV. SOME OTHER CONSIDERATIONS IN A TAKING ANALYSIS

Though not always specifically alluded to when taking cases are decided, there are a number of what are characterized here as "other considerations" that seem to color judicial thinking and the outcome of particular cases. The first of these is whether the challenge is a "facial" or an "as applied" challenge.<sup>94</sup> It is simply a fact that courts are more skeptical of, and less likely to sustain, facial challenges. That does not mean they never succeed—they sometimes do,<sup>95</sup> but the burden on

---

92. A recent case, *District Intown Properties Limited Partnership v. District of Columbia*, No. 98-7209 (1999), 1999 U.S. App. LEXIS 32701 (D.C. Cir. Dec. 17, 1999), underscores this point. Here the appeals court sustained the lower court's holding that there was no taking. Both courts purported to frame the taking question by looking at the whole parcel, but in defining that parcel the D.C. Circuit noted that an original tract (including an apartment house) had been acquired in 1961. They pointed out that no effort to subdivide that tract had occurred until 1988 (more than 25 years later) and that the subdivided lots were fully contiguous. They examined the extent to which the restricted lots benefited the developed lot, and finally, they pointed out that the owners (1961) "primary" investment-backed expectations were not diminished by present regulations which fully contemplated continuation of the apartment house use. Moreover, at the time the original parcel was purchased, precursors of the present regulations were in place. In sum, after a lengthy, site specific inquiry, examining many of the questions the *Clampitti* and *East Cape May* cases suggested be examined, the whole parcel in this case was fairly defined, and this resulted in a finding that there was no taking.

93. Some scholars are more pessimistic with respect to our ability to define the denominator parcel; they see the need and agree that it must be done in each taking case but feel that the courts have been part of the problem, not part of the solution. See, e.g., Raymond R. Coletta, *The Measuring Stick of Regulatory Takings: A Biological and Cultural Analysis*, 1 U. PA. J. CONST. L. 20 (1998). Coletta concludes by noting:

The economics of diminution demand a clear measuring stick. Without a workable and consistent definition of "relevant parcel," the diminution calculus becomes merely a tool for enterprising judges to manipulate decisions toward their own jurisprudential leanings. Courts have failed to clearly delineate, or even reach general consensus about, the unit of property against which economic impact is to be measured for regulatory takings purposes. Seven decades of discourse have produced a wealth of cases and provides little more than individualized position papers on a myriad of possible alternatives. Lack of direction by, and misdirection within, the Supreme Court has compounded the problem by creating a climate of confusion and a general lack of accountability.

*Id.* at 83.

94. Other scholars have commented on the distinction between facial and as applied challenges to governmental regulation. See Peterson, *Part I, supra* note 13, at 1360-62; Peterson, *Part II, supra* note 13, at 120-23; Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235 (1994).

95. See, e.g., *Hodel v. Irving*, 481 U.S. 704 (1987) (sustaining as a taking a facial challenge brought by potential heirs of Native American lands to an act of Congress that would have cut off the transfer of small parcels of such lands, returning same to the tribe); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (sustaining a facial challenge brought by building owner to statute authorizing Teleprompter to place equipment on the building—held, physical occupation is a taking); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) (sustaining a facial challenge brought by outdoor advertising companies to a billboard ordinance that barred most non-commercial signs—held, invalid on First Amendment grounds).

the plaintiff is always more difficult. In *Keystone Bituminous Coal Ass'n v. DeBenedictis*,<sup>96</sup> the United States Supreme Court, after a lengthy discussion distinguishing facial taking challenges from "as applied challenges,"<sup>97</sup> put it most succinctly: "Petitioners thus face an uphill battle in making a facial attack on the Act as a taking."<sup>98</sup> Perhaps the most frequently cited Supreme Court case addressing these issues is *Hodel v. Virginia Surface Mining & Reclamation Ass'n*.<sup>99</sup> In reversing a lower court holding that had found a taking on the basis of a facial challenge to the Surface Mining Control and Reclamation Act of 1977, Justice Marshall (speaking for a Court that was unanimous on this point) noted: "[T]he court below ignored this Court's oft-repeated admonition that the constitutionality of statutes ought not to be decided except in an actual factual setting that makes such a decision necessary."<sup>100</sup> After citing a number of supportive Supreme Court cases, the *Hodel* Court elaborated its reasoning:

These "ad hoc factual inquiries" must be conducted with respect to specific property, and the particular estimates of economic impact and ultimate valuation relevant in the unique circumstances.

Because appellees' taking claim arose in the context of a facial challenge, it presented no concrete controversy concerning either application of the Act to particular surface mining operations or its effect on specific parcels of land. Thus, the only issue properly before the District Court and, in turn, this Court, is whether the 'mere enactment' of the Surface Mining Act constitutes a taking.<sup>101</sup>

Beyond the obvious benefits of placing particularized facts before a court, "as applied" taking challenges almost always provide a record—the actions of the property owner, the responses of the regulating body, the regulator's interpretations of the pertinent statutes and/or regulations, and the sequencing and timing of events. All of these facts will be before a court. Having this information narrows and

96. 480 U.S. 470 (1987).

97. *Id.* at 493-96. In its discussion the *Keystone* Court cited a number of other cases on point. See, e.g., *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981) (rejecting a facial challenge to the Surface Mining Control and Reclamation Act of 1977); *Agins v. City of Tiburon*, 447 U.S. 255 (1980) (rejecting a facial challenge to a zoning ordinance); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). In sustaining the plaintiffs' "as applied" taking challenge in *Kaiser Aetna*, Justice Rehnquist commented on the utility and the necessity of individual fact-based inquiries when dealing with taking questions; he noted that:

[T]his Court has generally "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." Rather, it has examined the "taking" question by engaging in essentially ad hoc, factual inquiries that have identified several factors—such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action—that have particular significance.

*Id.* at 175 (citation omitted) (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)). These factors and particularized injuries can seldom be addressed in broad facial challenges to regulatory measures.

98. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. at 495.

99. 452 U.S. 264 (1981).

100. *Id.* at 294-95.

101. *Id.* at 295.

sharpens the taking question; it facilitates the judicial determination of whether (even in the particularized setting) a taking has occurred. Moreover, when an "as applied" taking is found, a court and the regulating body are both aware that the larger legislatively fashioned regulatory framework remains intact. The inherent tensions between coordinate branches of government will have been kept at the lowest possible level. This is not to suggest that "as applied" taking challenges are easy or are likely to succeed—that would overstate the point being made. All taking challenges are difficult; the burdens on plaintiffs are considerable, but it is fair to say that "as applied" challenges have a better chance of success than facial challenges.

The second of the "other considerations" that should be addressed involves differentiating between the wide range of police power justifications for regulatory controls, i.e., recognizing that there is a hierarchy of health, safety, and general welfare considerations that underlie regulatory measures.<sup>102</sup> Though exceptions can no doubt be found, it seems generally correct to note that courts, when called upon to resolve taking questions (when they are engaged in balancing public and private interests), are less likely to find a taking in situations where the challenged regulation would avoid a harm, or where the risk potential is great. Conversely, when the harm and/or risk potential is low a challenged regulation (particularly if stringent) may more readily be found to be a taking. Put another way, when a challenged regulation addresses values that are high on the hierarchy of public values a taking is less likely to be found; and again, the converse is true—a taking will more readily be found when stringent regulations address public values of lower priority.

---

102. Though not often explicitly discussed, the case by case balancing test that courts engage in to decide a taking case implicitly recognizes that not all harms (not all public values) are of equal weight. See, e.g., *Agins v. City of Tiburon*, 447 U.S. 255 (1980), where the Court notes that: "Although no precise rule determines when property has been taken, the question necessarily requires a weighing of private and public interests." *Id.* at 260-61 (citation omitted). In *Gilbert v. State*, 266 Cal. Rptr. 891 (1990), the court found there was not a taking, but referencing *Agins*, went on to conjecture whether "there is a hierarchy of public purposes such that certain public safety programs might be treated differently from other legitimate regulatory activities." *Id.* at 904 n.14. In *Countryman v. Schmit*, 673 N.Y.S.2d 521 (Sup. Ct. 1998), the plaintiff prevailed on non-taking grounds, but in its discussion the court noted: "[A]esthetic factors . . . rate well down in the hierarchy of public purposes." *Id.* at 527 (quoting *Rochester Tel. Corp. v. Village of Fairport*, 84 A.D.2d 455, 458 (N.Y. App. Div. 1982)). There is also scholarly comment very much on point. See Charles L. Siemon, *Who Owns Cross Creek?*, 5 J. LAND USE & ENVTL. L. 323 (1990). Siemon's principle 3 notes: "The extent to which the police power may limit private use of private property without going 'too far' varies according to the significance of the public purpose to which the regulation is directed." *Id.* at 362 (emphasis omitted). He goes on: "It appears from reading the case law that the willingness of the courts to find that a regulation has gone 'too far' declines as the importance of the purpose increases." *Id.* Finally, he observes:

Within the range of valid public purposes are purposes which are more significant and purposes which are less significant, and the standard of how far is "too far" varies according to the significance of the purpose involved. At one end of the spectrum are public health purposes involving life-threatening diseases or other hazards—"matters of necessity." At the other end are purposes that reflect little more than a community preference for a particular quality-of-life factor . . . ."

*Id.* at 364.



Perhaps the most articulate judicial recognition of this hierarchy of police power interests is found in the California Court of Appeal's disposition of the remanded (from the United States Supreme Court) *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles* case.<sup>103</sup> After laying out the facts and the unique procedural posture of the case, the court noted:

If there is a hierarchy of interests the police power serves—and both logic and prior cases suggest there is—then the preservation of life must rank at the top. Zoning restrictions seldom serve public interests so far up on the scale. More often these laws guard against things like “premature urbanization” or “preserve open spaces” or contribute to orderly development and the mitigation of environmental impacts. When land use regulations seek to advance what are deemed lesser interests such as aesthetic values of the community they frequently are outweighed by constitutional property rights.<sup>104</sup>

The court went on to note:

The zoning regulation challenged in the instant case involves this highest of public interests . . . [I]ts avowed purpose is to prevent the loss of lives in future floods. . . .

We need not address the ultimate question—is the public interest at stake in this case so paramount that it would justify a law which prohibited *any* future occupancy or use of appellant's land. . . . [T]he zoning limitation in the instant case [though stringent] is nowhere near as Draconian.<sup>105</sup>

Finally on this point, it seems appropriate to observe that the concept of a hierarchy of police power interests more accurately explains some early United States Supreme Court cases, for example, *Hadacheck v. Sebastian*,<sup>106</sup> *Miller v. Schoene*,<sup>107</sup> *Goldblatt v. Town of Hempstead*,<sup>108</sup> that some scholars had argued stood for the proposition that there was an unwritten nuisance exception to the taking clause. Other scholars had long doubted that any such exception ever existed, and *Lucas v. South Carolina Coastal Council*<sup>109</sup> seems to bear out the latter view. But how to explain the above cited, and similar, cases? Put quite simply, each represents a setting or situation in which the risk factor is high, and the danger potential is great; in other words, the public interest value being served is high in the hierarchy of police power interests. It is so high in each of these cases, that the police power regulation that was being challenged (though stringent) was sustained. There was no taking, not because of any nuisance exception to the Taking Clause, but because the hierarchy principle has implicitly and sometimes explicitly operated for a very long time.

The last of the “other considerations” that affects taking analyses involves the sequencing and timing of events which underlie conflicts between what a property

---

103. 258 Cal. Rptr. 893 (Ct. App. 1989).

104. *Id.* at 904 (citations omitted).

105. *Id.* A complete reading of the court's analysis on the hierarchy of police power interests, including its case and law review citations, is instructive.

106. 239 U.S. 394 (1915).

107. 276 U.S. 272 (1928).

108. 369 U.S. 590 (1962).

109. 505 U.S. 1003 (1992). See in particular Justice Scalia's discussion of the three previously cited cases and the so-called nuisance exception at 1022-24.

owner wants to do with his land and a regulation that would block that undertaking, a regulation the property owner would characterize as a taking.<sup>110</sup> Whether a court couches its analysis in an examination of the reasonableness of the property owner's (investment-backed) expectation<sup>111</sup> or characterizes the property owner's right as "vested,"<sup>112</sup> make no mistake, it is the timing and sequencing of the respective actions of property owner and government that are being focused upon. A recent federal court case that spoke to these issues was *Loveladies Harbor, Inc. v. United States*.<sup>113</sup> In finding a regulatory taking the court pointed out that:

It is important to note that Loveladies purchased the property with the intent to develop it long before these particular state and federal regulatory programs came into effect. Furthermore, the state did not include in its original conditions for development of the property any restrictions on the filling of the 12.5 acres at issue here. The fill restrictions did not arise until long after the development project was undertaken.<sup>114</sup>

---

110. At a more abstract level, the relationship between property rights and the time continuum was explored in *Symposium: Time, Property Rights, and the Common Law*, 64 WASH. U. L.Q. 661 (1986). The lead article in the Symposium that the other papers responded to was authored by a scholar familiar to many who examine taking issues. See Richard A. Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 WASH. U. L.Q. 667 (1986).

111. See William C. Leigh & Bruce W. Burton, *Predatory Governmental Zoning Practices and the Supreme Court's New Takings Clause Formulation: Timing, Value, and R.I.B.E.* [Reasonable Investment Backed Expectations], 1993 BYU L. REV. 827 (1993). These authors assert (and most scholars agree) that the "[M]arket value [of land] is driven by land use laws to a very material extent." *Id.* at 842. It follows then that the reasonableness of an investment-backed expectation must turn on the timing of events. When was the land in question purchased? When were the controls that now block development put in place? If a property owner purchases land with an eye to development before a present set of land use controls is put in place, reasonable development proposals, predicated on whatever (presumably more limited) controls existed at the time of purchase, should be realizable; subsequently enacted controls that would block development are more readily open to taking challenge. In the scenario outlined, as long as the property owner's development proposals are reasonable, his/her expectations that they can be (will be) realized are also reasonable. Alternatively, a property owner who purchases land after stringent (but otherwise sustainable) land use controls are in place—controls which shaped the purchase price of the land and delineated a range of development options—will find a taking argument more difficult to sustain when, and if, a development proposal is submitted and rejected because it exceeds the parameters of the controls in place. The fact that the property owner's development proposals on their face or in other settings might be deemed reasonable, or that the proposed development is more economically advantageous to the property owner is irrelevant. In the scenario outlined, the property owner can have no realistic expectation that his or her vision for development can be (will be) realized—he or she was on notice to the contrary; the reasonableness of expectation essential to finding a taking simply does not exist. See also *supra* Part III.C.

112. See Douglas W. Kmiec, *Inserting the Last Remaining Pieces into the Takings Puzzle*, 38 WM. & MARY L. REV. 995 (1997). Kmiec's discussion, which attempts to weave taking theories (including the 'reasonable investment backed expectations' factor), vested rights theories, and coming to the harm principles into a workable whole, is insightful. See *id.* at 1022-26. A finding that a property owner's right has 'vested' in effect finesses the taking question, but has the same practical effect as a finding that the regulation being challenged effects a taking—the property owner gets to go forward on the basis of the pre-existing regulatory framework. See generally, Orlando E. Delogu, *Land Use and Vested Rights: Mixed Law & Policy Issues*, 41 LAND USE LAW & ZONING DIGEST, Jan. 1989, at 3; John J. Delaney & Emily J. Vains, *Recognizing Vested Development Rights as Protected Property in Fifth Amendment Due Process and Takings Claims*, 49 WASH. U.J. URB. & CONTEMP. L. 27 (1996).

113. 28 F.3d 1171 (Fed. Cir. 1994).

114. *Id.* at 1183.

At another point in its opinion, the *Loveladies* court, focusing on the opposite circumstance, quite correctly stated:

In legal terms, the owner who bought with knowledge of the restraint could be said to have no reliance interest, or to have assumed the risk of any economic loss. In economic terms, it could be said that the market had already discounted for the restraint, so that a purchaser could not show a loss in his investment attributable to it.<sup>115</sup>

In other words, where this is the case, a taking would not readily be found. In this same vein, the holding of the court in *Ciampitti v. United States*<sup>116</sup> is pertinent; on these timing issues the court found there was no taking in part because, "Ciampitti had knowledge of the difficulty attendant upon developing wetlands well before any of the purchases at issue."<sup>117</sup> Finally on this point, it should be pointed out that the timing and sequencing of events was an important factor in *Lucas v. South Carolina Coastal Council*. Justice Scalia, speaking for the Court, recounts the history of Lucas's dealings with the property: Lucas purchased the lots at issue in the litigation in 1986. Justice Scalia also recounts South Carolina's history of coastal zone regulation, including the dates of passage of pertinent acts; he concludes by noting:

No portion of the lots, which were located approximately 300 feet from the beach, qualified as a "critical area" under the 1977 Act; accordingly, at the time Lucas acquired these parcels, he was not legally obliged to obtain a permit from the Council in advance of any development activity. His intention with respect to the lots was to do what the owners of the immediately adjacent parcels had already done: erect single-family residences. He commissioned architectural drawings for this purpose.

The Beachfront Management Act [enacted in 1988] brought Lucas's plans to an abrupt end.<sup>118</sup>

Though this case ultimately turned on other factors,<sup>119</sup> the inferences of the Court on the points being discussed here seem clear—Lucas's development plans and expectations were reasonable; had his economic loss been less than total, a taking might well have been found, as it subsequently was in *Loveladies*, on the basis of the factors just outlined.

#### V. THE CONSEQUENCES OF FAILING TO GRASP THE FULL RANGE OF FACTORS AND OTHER CONSIDERATIONS IN REGULATORY TAKING CASES

As suggested in the introductory pages of this Article, the failure to fully understand the number, variety, range, depth, and interconnected character of the factors that form a part of most taking analyses seems greatest among those groups and individuals with extreme views—those who would over-regulate land on one hand, and property rights absolutists on the other. The former, caught up in the worthiness of their cause, are inclined to ignore (or minimize the scope of) the

115. *Id.* at 1177.

116. 22 Cl. Ct. 310 (1991).

117. *Id.* at 321. The court's entire discussion of these issues is insightful. *See id.* at 321-22.

118. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1008 (1992).

119. *See supra* notes 22-26 and accompanying text.

Fifth Amendment's taking clause,<sup>120</sup> the latter would characterize almost any regulation as a regulatory taking requiring the payment of just compensation. Both groups are, of course, wrong, and if their respective pronouncements produced little more than back and forth sniping at one another, the situation would be annoying, but bearable. But that is not all we have to contend with. The fact of the matter is that both groups, to a degree disproportionate to their numbers, and in ways that ignore more accurate and correct taking principles, have been able to influence the larger public debate. On one hand, we are beset with overzealous regulatory proposals,<sup>121</sup> which then must be seriously discussed and hopefully

---

120. An unfortunate example of this was evidenced at a very high level of Maine's regulatory and legal establishment shortly after the *Lucas* decision was handed down. The Natural Resources Policy Division of the State Planning Office pulled together a publication, *In the Wake of Lucas: A Compilation of Articles and Analysis Concerning the Case and the Takings Issue*. The compilation included a memorandum from the Department of Attorney General directed to all Environmental and Natural Resources Agencies. Jeff Pidot, Deputy Attorney General, State of Maine, *Lucas v. South Carolina Coastal Council, Memorandum to Environmental and Natural Resources Agencies*, July 31, 1992, reprinted in *IN THE WAKE OF LUCAS: A COMPILATION OF ARTICLES AND ANALYSIS CONCERNING THE CASE AND THE TAKINGS ISSUE* at 38 (Natural Resources Policy Division, State Planning Office, Aug. 1992). It was prepared by a Deputy Attorney General, and obviously received wide distribution by its inclusion in the above-noted publication. See *id.* At one point the author of the Memorandum says:

It is perhaps more important to recognize what the *Lucas* Court did *not* do. It did not waiver from the core rule that a regulatory taking ordinarily requires a deprivation of all economically valuable uses of land. On at least this one principle, all the justices appear to be satisfied.

*Id.* at 41. That's simply incorrect; all the justices did not agree that in order to find a regulatory taking the landowner must be deprived of all economic value. Justice Scalia makes that point quite clear. See *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1016 n.7, 1019 n.8. The Attorney General's memorandum concludes: "Accordingly, it would be incorrect to read *Lucas* as suggesting that the scope of statutory authority, vested in state agencies to regulate the uses of land, has been seriously undermined." *Id.* In the broadest sense the statement is probably true, but its tone and the tone of the whole memo is unmistakable—*Lucas* and other recent United States Supreme Court cases are no big deal: it's business as usual in Maine. But *Lucas* and the line of cases of which it is a part cannot be, and should not have been, dismissed so cavalierly. This memo, from this source, sent the wrong signals with respect to the law of taking to regulators, planners, and land use lawyers throughout Maine, and we are all paying the price—emboldened regulatory proposals that have spawned property rights legislation year after year.

121. Beyond the Maine examples already cited, *supra* note 16, the *Portland Press Herald* reported a proposal tendered to the Town of Scarborough's Open Space Committee to preserve open space by imposing a \$200,000 per lot impact fee. See David Connerty- Martin, *Scarborough Struggles to Save Space*, PORTLAND PRESS HERALD, Dec. 6, 1999, at 1B. Another example (actually in place) is laid out in the Maine Land Use Regulatory Commission's (LURC) zoning and development controls for unorganized areas. Three categories of lakes (and surrounding land areas) are subject to stringent control. Management class six consists of remote ponds; these waterbodies are mostly small, are presently undeveloped and difficult to access, and possess a cold-water fishery—all development except timber harvesting is barred within one-half mile of the shoreline of such lakes (there are 176 such waterbodies in Maine). Management class one lakes are larger; they are also undeveloped and difficult to access (but have no unique cold-water fishery)—all development except timber harvesting is barred within one-quarter mile of the shoreline of such lakes (there are 29 such waterbodies in Maine). Management class two lakes are larger still; they are accessible and there is some existing development; from a fishery and aesthetic viewpoint these lakes, if not unique, are nonetheless very attractive—development is limited to timber harvesting and one unit per mile of shoreline (there are 36 such waterbodies in Maine). In the aggregate, 241 waterbodies encompassing approximately 16% of the surface

modified to fit within the parameters of taking law. These proposals have in turn provoked overly simplistic legislative efforts to define a taking;<sup>122</sup> these legislative proposals have also engendered serious debate—debate which at least for now has led to the defeat (in Maine and at the national level) of these too narrow and unwise efforts to define a taking.<sup>123</sup> But engineering the defeat of unwise taking legislation is a lose-lose undertaking. It is costly in time and money. It may not indefinitely succeed. It deflects public officials from the more pressing business of enforcing and fine-tuning a wide array of reasonable and necessary regulations. It suggests to a broader public that property rights absolutists may have a point—

---

waters under LURC jurisdiction (and the respective surrounding land areas) are presently subject to these varying degrees of regulatory stringency. Is it any wonder that the private property owners of these lands are concerned? See COMPREHENSIVE LAND USE PLAN, Appendix C (Dep't of Conservation, Maine Land Use Regulation Comm'n, 1997). Finally in the Natural Resources Council (NRC) of Maine's publication, *Sprawlstoppers*, the NRC urges Maine towns to delineate growth and non-growth areas; the latter would encompass a major portion of the buildable land in most suburban and rural towns. See SPRAWLSTOPPERS: STRATEGIES TO HELP PREVENT DEVELOPMENT SPRAWL IN MAINE COMMUNITIES (Natural Resources Council of Maine). In the latter areas, the NRC ideally would "prohibit subdivisions," *id.* at 13; prohibit so-called "non-essential commercial development," *id.*; establish a low allowable density of development, e.g., "one unit per ten acres," *id.* at 14; require that the majority of land be dedicated to open space, e.g., "75% of developable land," *id.*; impose large road frontage requirements on many existing roads, e.g., greater than 1000 feet, *see id.* at 17; limit the number of building permits issued annually in non-growth areas to a low percentage (10% is recommended) of the total number of building permits issued townwide—thus, if as many as 100 permits were issued annually, only 10 would be available for any and all development in what might well be the largest physical land area (portion) of the town, *see id.* at 13; and finally, where subdividing in rural areas is allowed, NRC would "limit the number of lots which can be sold in any rural subdivision within a year, e.g., two," *id.* at 16. None of these proposed regulatory limitations is tied to any inherent limitations on the land (soils, steep slope, water table, flood plain or storm surge areas, etc.); they are not tied to (or required to be justified by) infrastructure limitations; they are intended to exclude all, or almost all, development in delineated non-growth areas of most Maine towns—we're talking literally about millions of acres of land. If these proposals were adopted, many would argue that they are a facial taking; they would almost certainly seem vulnerable (individually and collectively) to "as applied" taking challenges. Moreover, proposals of the type outlined here and in note 16, *supra*, (even if offered only for discussion purposes) are like a red flag to a bull—property rights advocates are both threatened and angry; their response—they would shore up the institution of property by legislation that would define such proposals (if adopted) as a taking. See generally, Orlando E. Delogu, *The Misuse of Land Use Control Powers Must End: Suggestions for Legislative and Judicial Responses*, 32 ME. L. REV. 29 (1980).

122. See *supra* notes 17, 19. The usual method seeks to define a taking utilizing a one-dimensional, diminution in value, approach. The legislative definitions differ only in the degree of diminution that would define a taking; most federal proposals are in the 20-25% range, though at least one focusing on wetlands and endangered species habitat would allow up to a 50% diminution in value before compensation payments to the landowner (for a taking) would be required. See Underkuffler-Freund, *supra* note 2, at 162 n.10. Maine's L.D. 1217 in the 117th Legislature (not adopted) defined a taking as a 50% reduction from preregulation fair market value. See An Act to Protect Constitutional Property Rights and to Provide Just Compensation, L.D. 1217 (117th Legis. 1995). At least one legislative proposal, L.D. 2121 in the 119th Legislature, would require compensation for any diminution in value growing out of state or local government regulation. See An Act Regarding Regulations and Compensation to Property Owners, L.D. 2121 (119th Legis. 1999).

123. See *supra* note 19; see also Glenn P. Sugameli, "Takings" Bills Threaten People, Property, Zoning, and the Environment, 31 URB. LAW. 177 (1999).

that there may be a problem—that a better piece of taking legislation could perhaps be drafted and should perhaps be adopted.

But a better piece of taking legislation is not out there somewhere waiting to be discovered. There are too many variables, too many unique pieces of land, and unique development circumstances. That is why a case by case approach (not legislation) is needed to determine whether in a particular setting a taking has occurred.<sup>124</sup> The suggestion that well over 100 years of taking case law (literally thousands of cases) that have sought to balance the array of complex factors that go into a taking analysis can be reduced to a one-size-fits-all legislative definition of a taking is a myth; if it were possible, we would have done it long ago. But it is a beguiling myth, a myth that accords with our “rule of law” sensibilities. And sadly, it is a myth that regulatory zealots keep alive by continuing to proffer regulatory proposals that shock many, particularly rural landowners—proposals that under the classic *Pennsylvania Coal*<sup>125</sup> formulation go “too far.”<sup>126</sup>

Where it will all end is difficult to predict, but it seems useful to lay out two scenarios: one is more hopeful in the meshing of property rights and police power within a constitutional and democratic system, the other is more dire in its consequences. The more hopeful scenario is premised first on a broader knowledge and acceptance of taking law as it really is, circa 2000, by all units of government in Maine (and in other states). Whether we like the law of taking as it has evolved is irrelevant. The last twenty-five years of United States Supreme Court case law is there, and it is not going away. We must accept what is widely recognized—that

---

124. The assumption here is that taking disputes may find resolution by gaining (more or less readily) access to our court system; in fact, in many jurisdictions this access is a time consuming and an extraordinarily difficult process. Those who would overregulate when operating in a legislative forum have found considerable success in turning back (or at least delaying) taking challenges in judicial forums by interposing a wide array of what are often referred to as prudential doctrines—standing, abstention, finality, exhaustion, ripeness, mootness, the argued availability of state remedies when in federal court, etc. Courts, aware of separation of powers principles and dictum that would reach constitutional questions later rather than sooner, are often reluctant to examine legislative or quasi-legislative regulatory judgments at all, and certainly not prematurely. Taking challenges then, are not seen (by governmental defendants or by courts) as an opportunity for speedy resolution of the merits of the case, but instead are turned into a war of attrition, in a setting where the regulators have a lot of staying power. Though these issues are largely beyond the scope of this Article, one observation is pertinent. To the extent that these litigation tactics succeed, the eventual passage of taking legislation is made even more likely; by arguably over-regulating on one hand, and all but foreclosing judicial resolution of taking challenges on the other, we not only give credibility to property rights advocates, but we seemingly make property rights legislation necessary. See, e.g., John J. Delaney & Duane J. Desiderio, *Who Will Clean Up the “Ripeness Mess”? A Call for Reform So Takings Plaintiffs Can Enter the Federal Courthouse*, 31 URB. LAW. 195 (1999). This latter article contains, in appendix, the full testimony of Professor Daniel Mandelker to a subcommittee of the House Judiciary Committee on H.R. 1534, a 1997 bill before the United States Congress designed to remove ripeness (and other) barriers to plaintiffs who would raise taking issues in federal courts. See *id.* at 254-56. It is interesting and persuasive reading, and one must believe that if this legislation fails today, it will not fail indefinitely. See also Kathryn E. Kovacs, *Accepting the Relegation of Taking Claims to the State Courts: The Federal Courts’ Misguided Attempts to Avoid Preclusion under Williamson County*, 26 ECOLOGY L.Q. 1 (1999).

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

126. See *supra* notes 7, 8 and accompanying text.

courts in recent years (at every level) have been a little more protective of property rights than they might have heretofore been. At the same time, they have sustained without reservation a wide range of essential and necessary police power controls.<sup>127</sup> Neither of these trends is likely to change. Once this is accepted, a softer, more precise, more sophisticated set of police power controls (controls well within the parameters of current taking law) can begin to be designed. Such controls need not be, nor should they be, blunt instruments or heavy-handed. They should be more scalpel-like in character. They should be tied to real data (soils, slope, population levels, traffic volumes, infrastructure capacity) and/or measurable health and safety risks (storm surge, flood recurrence, waste load characteristics). Such controls should aim at allowing the fullest range of uses, the highest level of economic return, consistent with protecting public interests, not the barest minimum that may, or may not be, constitutionally sustainable.<sup>128</sup> A system of controls along these lines, controls that fully respect taking principles, will not ward off the rantings of the most extreme property rights advocates, but such controls will be respected by, and hold the support of, the broader public; such controls will diminish the likelihood that taking litigations will be successful and will make the passage of taking legislation both less necessary and less likely.<sup>129</sup>

---

127. This affirmation goes back to the paradigm case, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), wherein the Court noted that: "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law . . . some values [property rights] are enjoyed under an implied limitation and must yield to the police power." *Id.* at 413. Nothing in the recent line of United States Supreme Court cases compromises these views—indeed they are repeatedly reaffirmed. *See supra* note 4.

128. *See National Land and Inv. Co. v. Kohn*, 215 A.2d 597 (Pa. 1965). In balancing property rights and police power controls, the court noted: "[W]e must also appreciate the fact that zoning involves governmental restrictions upon a landowner's constitutionally guaranteed right to use his property, unfettered, except in very specific instances by government restrictions." *Id.* at 607. The point being made is that property rights (not police power controls) are constitutionally protected—controls may well be necessary but they must be justified by some aspect of public health, safety, or general welfare and should be no more burdensome than necessary. The question should not be how far can we push a regulatory control, but rather, what is the degree of control needed to achieve the public interest at risk—regulations should not go beyond this point.

129. A collateral point beyond the scope of the taking issues examined in this Article should be noted. The more hopeful scenario outlined may be made even more hopeful (that is, underlying public interests may be more fully served) by utilizing a wide range of proactive government spending and decision-making powers in a manner that complements the softer, more precise use of regulation that has been suggested. For example, channeling growth to more desired locations—minimizing sprawl, may be achieved not simply by regulation limiting development in areas where we prefer it not to be, but by locating such facilities as schools, highway interchanges and other road improvements, water and sewer lines, etc., in areas where we want that development to occur. We could reinforce our build/anti-sprawl strategy by channeling housing subsidies to build areas; by repairing and/or improving all existing infrastructure-type facilities in build areas (sewers, sidewalks, street lighting, parks, etc.); by reducing lot sizes, utilizing density bonuses, creating incentives for clustering, planned unit developments, and multi-family housing in build areas. Unlike stringent regulatory controls (designed to minimize development in one part of town), these policy and spending choices by government do not raise taking questions—they do not tell anyone what they can or cannot do with their property—they simply make development more attractive in one area of town as opposed to another area. If pursued fully, such measures reduce the need for stringent regulatory controls—public interest goals are achieved by inducing appropriate behavior, not by prohibiting (in ways that may raise taking problems) less desired behavior.

The more dire scenario is easy to lay out. If proponents of regulatory control, no matter how well-intentioned, continue to press the regulatory envelope, and continue to ignore Fifth Amendment limitations and taking principles as they have unfolded over the last twenty-five years, the absolutists (sooner or later) will win. Courts will more readily respond to taking claims; the passage of taking legislation becomes not just a possibility, but a likelihood; and the support of the broader public, a support essential for any regulatory program to succeed, will be lost. And once the pendulum has swung, it will not be just extreme regulatory proposals and programs that will be at risk. Many necessary and essential zoning, land use, and environmental controls that are commonplace today will be watered down or eliminated to ward off taking challenges and/or to keep diminutions in value occasioned by such controls within whatever new parameter (50%, 30%, 20% reduction in property value) defines a taking. It will be a field day for the less responsible developer/property owner, and it may well be some time before a more balanced view of public interest reasserts itself. We should not, we need not run these risks.

## VI. CONCLUSION

Debate as to the meaning of the Taking Clause goes back a long time. In regulatory taking settings, determining when there has been a taking has been made more difficult by efforts to simplify and explain taking principles by reducing the question to be decided (does this regulation, in this setting, go "too far?") to a two or three factor test intended to produce an easy answer. But courts have not always agreed on which two or three factors are most significant, and different word formulations (suggesting slightly different meanings) of even those factors generally accepted as significant can readily be found. That is the problem—inherently complex constitutional principles do not lend themselves to over-simplification. We should stop looking for quick, shorthand, one, two, or three factor tests to determine whether in a particular setting there has been a taking—it is fruitless and even counter-productive.

The fact is, as this Article has shown, there are eight, nine, or ten factors, perhaps more (depending on how one chooses to add them up) that may need to be put into the balancing calculus to determine whether a particular set of circumstances gives rise to a taking. And though all of these factors will not be important in each taking case, it is almost impossible to predict at the outset which factors will loom large in a particular setting; thus, it is important that they all be understood and kept at the ready. Proponents of a more coherent approach to, and a more coherent body of, taking case law should not shrink from these truths. In fact, it is only when these underlying realities are recognized that we can see that past taking cases are not in the total disarray that critics claim<sup>130</sup> and reasonable prediction as to the outcome of future taking cases is possible.<sup>131</sup> Past cases may

---

130. See *supra* note 13.

131. See Peterson, *Part II, supra* note 13. This, the second of Professor Peterson's excellent articles analyzing the taking clause, suggests this very predictability. See *id.* at 58-59. After proceeding exhaustively through a myriad of cases to find a unifying set of principles that would explain taking cases, she concluded that:

[T]here is a pattern to the Court's takings decisions. That pattern is not attributable to the announced doctrine, [the definitional label the case may bear] but rather to the



not square up with this two-factor, or that three-factor formula, but the outcome may well have been a reasonable one, and one that could readily be reconciled with the larger multi-factor analytic framework laid out here. And if reasonableness and the balancing of public and private interests remain the touchstone of future taking cases, this larger analytic framework will allow a high degree of predictability as to outcome in such cases.

Those with an agenda can act as if taking law is largely unpredictable, and/or incapable of precise definition or delineation—but that is not true. Taking law may not lend itself to off-hand, facile, or tautological definition. But once one understands the full range of factors and other considerations at work in a taking analysis, and as important, once one has all of the facts (or as many as possible) with respect to a particular regulation in a particular setting, a reasonably accurate determination can be made as to whether there is a taking in that setting. The definition of a taking, then, is like Justice Stewart's definition of pornography—difficult to formulate in so many words, but as he said, "I know it when I see it."<sup>132</sup> So too with a taking—give me the regulation, give me the facts, give me a setting, a timeframe, and a context—I'll know it [a taking] when I see it. And so too will the courts and the larger public.

Finally, learning to live within the parameters of today's more precisely defined law of taking is not something we need fear. The sky will not fall. The historic balances between public interests and private property rights have not become dangerously unbalanced as a result of recent case law, and no such unbalancing is likely in the immediate future. On the contrary, understanding the law of taking, and then proceeding along the more hopeful lines suggested here is the only course that in the long-run allows public interests to really be protected; at the same time it is a course that provides constitutional legitimacy to government and constitutional protection to the governed.

---

fact that the Justices evidently are deciding these cases according to their sense of when it is fair [reasonable] for the government to take something of economic value from a private party without paying for it. By following their moral intuitions, [that is, by fairly and reasonably balancing competing public and private interests] they have produced results that can be explained in a coherent [and, one might add, a predictable] manner.

*Id.* at 161-62.

132. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). This analogy was made more than a decade ago. See Siemon, *supra* note 102 at 363.