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COUNTING VOTES AND DISCOUNTING HOLDINGS IN THE SUPREME COURT'S TAKINGS CASES

RICHARD J. LAZARUS*

The regulatory takings issue is notoriously muddled.¹ Dramatically opposing views regarding the proper relationship between private property and government regulation consistently have polarized scholarly debate.² The Supreme Court today seems no less splintered on the issue's proper resolution than it was when it first embarked down the regulatory takings path with Justice Holmes's opinion for the Court in *Pennsylvania Coal Co. v. Mahon*,³ from which Justice Brandeis sharply dissented. The Court's regulatory takings decisions are among its most conten-

* Professor of Law, Georgetown University School of Law. This Essay is based on a presentation given April 11, 1996, at a Symposium on Defining Takings: Private Property and the Future of Government Regulation sponsored by the William & Mary School of Law's Institute of Bill of Rights Law. I would like to thank Professor Lynda L. Butler for inviting me to participate in the Symposium and Georgetown University law students Andrea Blander and Andrew Schaefer for their research assistance in preparing this Essay. Finally, I served as counsel for governmental entities in many of the Supreme Court regulatory takings cases discussed in this Essay. This Essay expresses my views alone and not necessarily those of my clients in any of those cases.

1. See Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984).

2. Compare, e.g., RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985) (arguing that the Eminent Domain Clause and parallel clauses in the Constitution render many reforms of the 20th century, such as zoning, constitutionally suspect), with Thomas C. Grey, *The Malthusian Constitution*, 41 U. MIAMI L. REV. 21 (1986) (criticizing Epstein's constitutionally based argument in *Takings: Private Property and the Power of Eminent Domain* for rolling back the welfare state through traditional property rights); Mark Kelman, *Taking Takings Seriously: An Essay for Centrists*, 74 CAL. L. REV. 1829, 1830 (1986) (book review) (asserting that critical insights best expose Epstein's *Takings* "pretenses to analytical power"); and Joseph L. Sax, *Takings*, 53 U. CHI. L. REV. 279, 292 (1986) (book review) (stating that the legal and economic world are too complex for Epstein's "simple formal rules").

3. 260 U.S. 393 (1922).

tious. Many are decided by closely divided votes.⁴ Individual Justices seem to waver with regularity on the issues, prompting majorities in one case to become dissents in another, and vice versa, thereby further deepening the precedential confusion.⁵

This Essay focuses on a dimension of the regulatory takings issue that has received relatively little attention in what is otherwise a vast amount of literature on the topic: Why the Court is so persistently splintered and its precedent so seemingly schizophrenic. Most academic discussion has focused on the sheer difficulty of reconciling the public's firmly held conception of sacrosanct private property rights with the public's increasing demand for restrictions on the exercise of those same rights when they affect others adversely.⁶ This Essay's thesis is that reasons for this phenomenon exist beyond those that have dominated the ongoing academic discourse. These additional reasons are best revealed by piercing the popular fiction that the Court is a monolithic institution. The Court's decisions should instead be read keeping in mind the fact that the Court is simply nine individual Justices who speak through the voice of shifting coalitions of at least five Justices.

4. See discussion *infra* Part I and note 9.

5. See discussion *infra* Part II.A.

6. See, e.g., JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM* (1990); Eric T. Freyfogle, *The Owning and Taking of Sensitive Lands*, 43 *UCLA L. REV.* 77, 78 (1995); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 *HARV. L. REV.* 1165, 1224-45 (1967); Rose, *supra* note 1, at 594-97; Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 *YALE L.J.* 149 (1971); see also Jed Rubenfeld, *Usings*, 102 *YALE L.J.* 1077, 1096 (1993) (criticizing legal scholarship that focuses on "the irreconcilable conceptual demands made on the idea of private property within our legal system" as "taking takings thinking too seriously"); Carol M. Rose, *Property As the Keystone Right*, 71 *NOTRE DAME L. REV.* 329 (1996). Professor Rose has stated:

The rhetoric of property often seems to resound with the notes of heroic autonomy But such heroic rhetoric rests on the quite mistaken notion that this most intensely social of institutions hinges on individualism alone, whereas in fact it thoroughly mixes independence and cooperation. Indeed, taken to an extreme, the in-your-face rhetoric of property rights can undermine actual institutions of property, suggesting that anything goes, and that the property owner need not care in the least for his fellows.

Id. at 365.

Such a piercing of the Court's judicial veil offers three lessons about regulatory takings. First, it suggests the propriety of discounting the import of the Court's precedent in individual cases and the futility of reconciling what may be, at bottom, irreconcilable rulings. Advocates and legal academics who ignore this lesson routinely conflate the significance of the Court's precedent in takings cases.

Second, by identifying the underlying reasons for the Court's splintering and shifting majorities, students of the regulatory takings issue, as well as members of the regulatory and regulated communities, can appreciate better the full dimensions of the issue. By examining the votes of individual Justices in each of the cases, the questions asked at oral argument, and the arguments made in the briefs, one discovers the full panoply of factors that have influenced the Justices in takings cases. These factors extend beyond the traditional debate between prepolitical and civic conceptions of property. By tugging in an oppositional fashion at the Justices, these factors implicate a host of crosscutting issues that make maintaining the development of a stable majority on regulatory takings issues especially difficult.

Finally, a more focused examination of the individual Justices suggests the kinds of arguments that a new majority coalition of Justices now on the Court might find acceptable. Justice Kennedy will be the decisive vote in the establishment of this new majority, and pragmatism will need to replace adherence to purist principles in any advocacy designed to promote an analytical framework capable of being embraced by a new majority led by Justice Kennedy.

This Essay consists of three parts, followed by a brief conclusion. The three parts roughly mirror the three lessons to be learned in undertaking a closer examination of the reasons why the Court's regulatory takings precedent exhibits such conflict and doctrinal instability. First, the Essay describes the general benefit gained from thinking of the Court as nine distinct Justices in analyzing the Court's precedent, with illustrations from the Court's takings precedent. Next, in an effort to identify the wide-ranging factors that actually are at work in establishing a majority on the Court in particular cases, the Essay explores a variety of source materials, ranging from opinions of individual Jus-

tices to oral argument transcripts to the briefs of the advocates themselves. Finally, the Essay makes a preliminary attempt to identify an analytical framework for the regulatory takings issue that, although lacking purity of principle and perhaps bordering on the nihilistic, may provide instead the level of pragmatism necessary to strike an acceptable balance between opposing views.

I. LESSON NUMBER ONE: THE SIGNIFICANCE OF THE
CONSTITUTION'S "RULE OF FIVE" FOR UNDERSTANDING AND
RELYING UPON THE COURT'S REGULATORY TAKINGS PRECEDENT

Supreme Court lore reports that Justice Brennan would ask his new law clerks to identify the single most important rule of constitutional law. Following a heated debate, with each law clerk undoubtedly seeking to impress the Justice with his or her profound understanding of federal constitutional law, Justice Brennan reportedly would announce them all wrong. The most important rule, he would declare, is the "rule of five"—i.e., the Court decides cases by a majority vote of at least five Justices.⁷ Justice Brennan reportedly practiced what he preached. Upon his resignation from the Court, many testified to his special ability to forge surprising majority coalitions in controversial cases.⁸

The regulatory takings cases illustrate well the importance of the "rule of five." Many of the decisions have only five Justices joining the majority opinion, and there has been no consistent majority.⁹ The difference between the majority and dissent has been stark, just as it first was in *Pennsylvania Coal Co. v. Mahon*.¹⁰ The reasoning of the majority in one case becomes

7. Mark V. Tushnet, *Themes in Warren Court Biographies*, 70 N.Y.U. L. REV. 748, 763 (1995).

8. See Thurgood Marshall, *A Tribute to Justice William J. Brennan, Jr.*, 104 HARV. L. REV. 1, 5 (1990); Abner J. Mikva, *A Tribute to Justice William J. Brennan, Jr.*, 104 HARV. L. REV. 9, 10 (1990); Richard A. Posner, *A Tribute to Justice William J. Brennan, Jr.*, 104 HARV. L. REV. 13, 14 (1990); Nina Totenberg, *A Tribute to Justice William J. Brennan, Jr.*, 104 HARV. L. REV. 33, 37-38 (1990).

9. See *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987); *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981).

10. 260 U.S. 393 (1922).

that of the dissent in the next (and vice versa)—sometimes with very little time separating the Court's changing decisions.

Consider, for example, the Court's famed 1986 Term takings trilogy, wherein the Court decided in rapid succession three significant regulatory takings cases: *Keystone Bituminous Coal Ass'n v. DeBenedictis*,¹¹ decided in March, and *First English Evangelical Lutheran Church v. County of Los Angeles*¹² and *Nollan v. California Coastal Commission*,¹³ both decided in June. *Keystone Bituminous* and *Nollan* are rooted in wholly incompatible notions of the relationship between private property and police power regulation.¹⁴ Although to a lesser extent, it is similarly difficult to square the jurisprudential underpinnings of *First English* with the Court's ruling in *Keystone Bituminous*.¹⁵

If one views the Court as a monolith, it is very difficult to discern the theory that unifies these three rulings. The Court certainly makes little, if any, effort to do so. If one instead views the Court as reflecting coalitions of individual Justices, the picture becomes more clear. Justice White was the only Justice in the majority in all three cases, but he wrote none of the opinions for the Court;¹⁶ nor did he write any separate concurring opinions. It is therefore more important to ask what made a difference for Justice White in these cases than to undertake a fictional inquiry into the Court's unifying theory in support of these three rulings.

Examining the votes of individual Justices also suggests the real possibility that one of the most discussed of regulatory takings cases in recent years, *Lucas v. South Carolina Coastal*

11. 480 U.S. 470 (1987).

12. 482 U.S. 304 (1987).

13. 483 U.S. 825 (1987).

14. Compare *Keystone Bituminous*, 480 U.S. at 486-88 (maintaining that the state can exercise its police power broadly "to accomplish a number of widely varying interests"), with *Nollan*, 483 U.S. at 836-37 (holding that land-use regulation must "further the end advanced as the justification for the prohibition").

15. See *First English*, 482 U.S. at 314-22 (holding that even temporary takings must be compensated).

16. Justice White authored majority opinions for the Court in two cases raising regulatory takings claims, *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986), and *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). He also dissented in another, *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 353 (1986).

Council,¹⁷ no longer represents viable precedent, at least in the United States Supreme Court. As in many of the regulatory takings cases, only five Justices joined the Court's majority in *Lucas*.¹⁸ Justice White was, again, the decisive vote. What very few have remarked upon, however, is that Justice White announced his resignation from the Court less than a year after *Lucas* was decided.¹⁹

Hence, the slim *Lucas* majority vanished almost upon its arrival. There are no longer five Justices on the Court who clearly support Justice Scalia's rationale. Yet, commentator after commentator insists on treating *Lucas* as weighty precedent, without remarking on its current vulnerability.²⁰ *Lucas* is, of course, entitled to dispositive weight in the lower courts. Those courts are supposed to adhere to Supreme Court precedent until it is modified formally,²¹ no matter how clear it may be that shifts in the Court's composition will prompt its undoing as soon as the Court again addresses the issue. The Supreme Court is not similarly circumscribed.²² In the Supreme Court, one should

17. 505 U.S. 1003 (1992).

18. The majority in *Lucas* consisted of Chief Justice Rehnquist and Justices White, O'Connor, Scalia, and Thomas. *See id.*

19. *Lucas* was decided on June 29, 1992, *see id.*, and Justice White announced his resignation on March 19, 1993. *See* Linda Greenhouse, *White Announces He'll Step Down from High Court*, N.Y. TIMES, Mar. 20, 1993, at A1.

20. A number of law review symposia followed on the heels of *Lucas*, none of which considered the significance of the subsequent shift in the Court's composition. *See, e.g.*, James E. Brookshire, "Taking" the Time To Look Backward, 42 CATH. U. L. REV. 901 (1993); Dennis J. Coyle, *Takings Jurisprudence and the Political Cultures of American Politics*, 42 CATH. U. L. REV. 817 (1993); John A. Humbach, "Taking" the Imperial Judiciary Seriously: Segmenting Property Interests and Judicial Revision of Legislative Judgments, 42 CATH. U. L. REV. 771 (1993); Glynn S. Lunney, Jr., *Compensation for Takings: How Much Is Just?*, 42 CATH. U. L. REV. 721 (1993); Katherine A. Bayne, Note, *Lucas v. South Carolina Coastal Council: Drawing a Line in the Sand*, 42 CATH. U. L. REV. 1063 (1993).

21. *See, e.g.*, *Hutto v. Davis*, 454 U.S. 370, 375 (1982) ("[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts . . ."). There are, of course, a few lower court judges who appear to exercise a free hand with the Supreme Court's precedent. *See* Francis Wilkinson, *Judge Hand's Holy War*, AM. LAW., May 1987, at 111.

22. *See, e.g.*, *Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992) ("[T]he rule of *stare decisis* is not an 'inexorable command' Rather, when this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations"); *see also* Linda Greenhouse, *High Court*

expect *Lucas* to receive a very narrow reading.

Indeed, the litigation before the Court in *Lucas* reflected a similar development. The Court's decision in *Keystone Bituminous* provided those defending the South Carolina Coastal Council with seemingly powerful precedent in support of the challenged South Carolina coastal development law.²³ The holding in *Keystone Bituminous* seemed unequivocal; the Court largely limited *Pennsylvania Coal* to its facts, concluding that a taking had not occurred and that the state can properly exercise its police power "to abate activity akin to a public nuisance."²⁴ All of the litigants before the Court in *Lucas*, however, were well aware that despite its recent vintage, *Keystone Bituminous* was shaky, and therefore risky, precedent upon which to rely. At the time that *Lucas* was decided, the Court consisted of three Justices (Stevens, White, and Blackmun) from the *Keystone Bituminous* majority and three (Rehnquist, Scalia, and O'Connor) from the dissent. At least two (Thomas and Kennedy) of the three new Justices seemed inclined to follow the *Keystone Bituminous* dissenters.²⁵ For this reason, it was risky for government lawyers in *Lucas* to rely heavily on *Keystone* if they hoped to obtain Justice O'Connor's vote. Although they needed the vote of Justice White, who was in the *Keystone* majority, government lawyers could not afford to alienate Justice O'Connor. Such alienation might have resulted, however, if their advocacy left an impression that accepting their argument required Justice O'Connor to embrace the Court's ruling in *Keystone*, from which she recently had dissented. Accordingly, neither the brief filed

Asked To Reverse Ruling in a Religion Case, N.Y. TIMES, Oct. 31, 1996, at A1.

23. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987).

24. *Id.* at 488.

25. Justice Thomas's speeches and writings prior to joining the Court suggested his strong support for an aggressive reading of the Fifth Amendment Just Compensation Clause, notwithstanding his efforts during the confirmation process to distance himself from that view. See *Nomination of Judge Clarence Thomas To Be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 102d Cong. 110-27 (1991). Just a few months before *Lucas* was before the Court, Justice Kennedy gave a speech at a law school in which he stressed the centrality of private property rights under the Federal Constitution. See Robert A. Chaim, *Justice Kennedy Inaugurates the Archie Hefner Memorial Lecture Series*, MCGEORGE MAG., 1991, at 10-11; *infra* text accompanying note 39.

by the South Carolina Coastal Council nor the brief filed by the United States as amicus curiae, made *Keystone* a centerpiece of its argument.²⁶

The same strategic considerations should now be present for any party making a regulatory takings claim before the current Supreme Court. The more the party links the merits of its claim to the Court's decision in *Lucas*—which is what most advocates would naturally do—the more that party would risk *losing* its case before the Court. The “rule of five” is unforgiving; you need five votes. There are, at most, only four votes on the current Court (Chief Justice Rehnquist and Justices O'Connor, Scalia, and Thomas) to support the reasoning of the majority in *Lucas*.

Further, no reason exists to suppose that either of the two Justices who have joined the Court since *Lucas* was decided (Justices Ginsburg and Breyer) is likely to vote with the four Justices left from the *Lucas* majority. Quite the opposite conclusion is instead likely to be true.

In *Dolan v. City of Tigard*,²⁷ a case that Justice Kennedy (who provided the fifth vote) thought was easier than *Lucas* for the plaintiff property owner,²⁸ Justice Ginsburg refused to join the four Justices left from the *Lucas* majority. She instead joined the dissenting opinion filed by the same Justices who dissented similarly in *Lucas*.²⁹

26. See Brief for Respondent, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (No. 91-453); Brief for the United States As Amicus Curiae in Support of Reversal, *Lucas* (No. 91-453).

27. 512 U.S. 374 (1994).

28. Although Justice Kennedy joined the majority opinion in *Dolan*, he declined to do so in *Lucas*, expressly stating that he “share[d] the reservations” of his dissenting colleagues, Justices Blackmun, Stevens, and Souter, “about a finding that a beachfront lot loses all its value because of a development restriction.” *Lucas*, 505 U.S. at 1034 (Kennedy, J., concurring in the judgment).

29. See *Dolan*, 512 U.S. at 396 (Stevens, J., with whom Blackmun & Ginsburg, JJ., join, dissenting). During the Senate hearings on her nomination to the Court, then-Judge Ginsburg was deliberately vague about her views on the regulatory takings issue, though her characterization of *Lucas* perhaps presaged her dissent in *Dolan*. Responding to a question from Senator Pressler, she stated:

There must be dozens or scores of cases in which litigants are seeking clarification of the line between regulation and taking. I can't offer now anything more than to say I appreciate that the issue is very much alive, and that the most recent decision, the *Lucas* decision is hardly the be-all-and-end-all.

Although Justice Breyer has not yet participated in a regulatory takings case, his testimony on the takings issue during his confirmation hearings provides little comfort to future plaintiffs bringing regulatory takings claims. Justice Breyer essentially turned *Pennsylvania Coal* on its head. He asserted that the Takings Clause should not “go[] too far” so as to present obstacles to reasonable government regulation of private property.³⁰ Like the dissenters in *Dolan*,³¹ Justice Breyer equated aggressive readings of the Takings Clause with the *Lochner* era, contending that each suffers from a common flaw: seeking to read into the Constitution a specific economic theory.³² Justice Breyer maintained that the Constitution cannot and does not contain such a theory. Rather, economic theories are a “function of the circumstances of the moment. And if the world changes so that it becomes crucially important to all of us that we protect the environment, that we protect health, that we protect safety, the Constitution is not a bar to that”³³

To be sure, the Court does not abandon precedent routinely whenever there is a shift in the composition of the Court. There is properly much force in the notion of *stare decisis*, albeit less in judicial interpretation of the Constitution than in construction of statutory provisions. Much of the Court’s precedent remains good law, despite the fact that it is likely that today’s Court would approach the same issues very differently were the individual Justices to address the issues in the first instance.

The Court’s regulatory takings precedent, however, exhibits no such judicial hesitancy to strike out anew. The Court instead routinely has ignored recent rulings. The Court also has read its own decisions very narrowly. That is the likely fate of *Lucas* should the current Court revisit the issue. Although Justice

Nomination of Ruth Bader Ginsburg To Be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary, 103d Cong. 238 (1993) (statement of Judge Ruth Bader Ginsburg).

30. See S. EXEC. REP. NO. 103-31, at 22 (1994).

31. See, e.g., *Dolan*, 512 U.S. at 406-07 (Stevens, J., with whom Blackmun & Ginsburg, JJ., join, dissenting) (“The so-called ‘regulatory takings’ doctrine . . . has an obvious kinship with the line of substantive due process cases that *Lochner* exemplified.”).

32. See S. EXEC. REP. NO. 103-31, at 23.

33. *Id.*

Kennedy concurred in the judgment of *Lucas*,³⁴ which vacated the lower court's ruling and remanded the case for further proceedings, there was a tremendous gulf between his rationale for doing so and that of Justice Scalia's majority, which Justice Kennedy pointedly declined to join.

Justice Kennedy rejected in its entirety the majority's foundational claim—that background principles of the common law, such as nuisance law as applied by judges, provide an exclusive touchstone for excusing a police power measure that severely restricts the use of privately owned land.³⁵ Kennedy insisted that such common law doctrine should not be “the sole source of state authority to impose severe restrictions.”³⁶ He affirmatively asserted that on especially fragile ecosystems a state must be able to restrict development and use more severely “than the common law of nuisance might otherwise permit,” without triggering the Fifth Amendment's just compensation guarantee.³⁷

There is no reason to suppose that Justice Kennedy's refusal to join the *Lucas* majority was undertaken lightly. Justice Kennedy is not a Justice who routinely writes separate concurring opinions that concur only in the judgment. He does so occasionally, generally joining his conservative colleagues' opinions, as he has done in other regulatory takings cases.³⁸

Justice Kennedy also has declared publicly his strong inclinations in favor of an aggressive reading of the Fifth Amendment's Just Compensation Clause for the protection of private property rights. In a speech delivered not long before *Lucas* came before the Court, he recognized the clash between the Lockean, prepolitical, natural rights conception of private property and the Hobbesian view that property rights emanate exclusively

34. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1032 (1992) (Kennedy, J., concurring in the judgment).

35. *See id.* at 1035 (Kennedy, J., concurring in the judgement) (“The common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent society.”).

36. *Id.*

37. *Id.*

38. *See, e.g., Dolan v. City of Tigard*, 512 U.S. 374, 377 (1994) (Rehnquist, C.J., writing for the majority, joined by O'Connor, Scalia, Kennedy, & Thomas, JJ.); *cf. Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1032 (1992) (Kennedy, J., concurring in the judgment).

from the State.³⁹ Justice Kennedy commented specifically on the Court's reluctance since *Lochner* to take an active role in defending property rights and speculated that it was time for the Court to return to that role to ensure that the right to private property does not become a "second-class right": "[P]roperty provides the structural vehicle through which we can protect ourselves against a blueprint for the future being imposed by government . . . ever hungry for self-aggrandizement."⁴⁰

Consequently, Justice Kennedy's decision not to join the *Lucas* majority, but rather to write separately, is especially significant. The Justices do not pay equal attention to all issues. As would be expected, the Justices take greater care and spend more time on the issues that matter most to each of them. The takings issue clearly is such an issue for Justice Kennedy. He is developing a vision of how to resolve the tensions that exist between private property rights and the police power of the state. Although Justice Kennedy naturally is sympathetic to private property rights, he does not believe that Justice Scalia has struck the right chord in his majority opinion for the Court in *Lucas*. Otherwise, as Justice Kennedy has done in other cases, he would have *both* joined the majority opinion *and* supplemented his views with a concurring opinion, rather than merely concurring in the judgment.⁴¹

If one were to argue a regulatory takings case before the Supreme Court today, it would be sensible to pay at least as much heed to Justice Kennedy's concurring rationale as to the rationale found in the *Lucas* majority opinion. It is more likely that the view expounded by Justice Kennedy, not by the *Lucas* majority, speaks for the Court today on regulatory takings issues.

39. See Chaim, *supra* note 25, at 10-11.

40. *Id.*

41. See, e.g., *United States v. Lopez*, 115 S. Ct. 1624, 1625 (1995) (Rehnquist, C.J., writing for the majority joined by O'Connor, Scalia, Kennedy & Thomas, JJ.); *id.* at 1634 (Kennedy, J., concurring).

II. LESSON NUMBER TWO: THE SIGNIFICANCE OF THE VOTES OF INDIVIDUAL JUSTICES IN REVEALING THE CROSSCUTTING ISSUES BEHIND THE MAJORITIES AND DISSENTS IN THE COURT'S DECISIONS

Commentators often criticize Justices for voting in seemingly anomalous or inconsistent ways.⁴² Anomaly and inconsistency are condemned as such.⁴³ In other disciplines, however, anomaly presents a positive opportunity. In science, for example, the discovery of an anomaly—an observation that does not square with established theory—can be a moment of celebration and not despair. Anomaly presents a possible window for fuller understanding of a phenomenon being studied.⁴⁴ Physicists developed the theory of relativity and quantum mechanics because of the increasing failure of Newtonian classic mechanics to explain experimental observations such as the photoelectric effect.⁴⁵ In evolutionary biology, some believe that the genetic anomaly can provide the impetus for species adaptation and advance.⁴⁶

Anomaly can be similarly useful in identifying the motivations behind the Justices' voting in unexpected ways. Rather than calling for conclusory criticism, the unexpected vote can be seen

42. See, e.g., Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 756-57 (1990); Betsy Levin, *Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School*, 95 YALE L.J. 1647, 1658-60 (1986); *The Supreme Court, 1992 Term—Leading Cases*, 107 HARV. L. REV. 144, 270 (1993); *The Supreme Court, 1988 Term—Leading Cases*, 103 HARV. L. REV. 137, 326 (1989).

43. But see Christopher J. Peters, *Foolish Consistency: On Equality, Integrity, and Justice*, 105 YALE L.J. 2031, 2113 (1996) (“[O]ur courts finally must rid themselves of the habit of thinking that adjudicative consistency holds some inherent value tugging them away from what is just.”).

44.

Discovery commences with the awareness of anomaly, i.e., with the recognition that nature has somehow violated the paradigm-induced expectations that govern normal science. It then continues with a more or less extended exploration of the area of anomaly. And it closes only when the paradigm theory has been adjusted so that the anomalous has become the expected.

THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 52-53 (2d ed. 1970).

45. See RICHARD FEYNMAN, *THE CHARACTER OF PHYSICAL LAW* 162-63 (1965); see also *id.* at 158 (“In other words we are trying to prove ourselves wrong as quickly as possible, because only in that way can we find progress.”).

46. See STEPHEN JAY GOULD, *THE PANDA'S THUMB* 186-93 (1980).

as a window revealing the factors likely to prompt an individual Justice to vote one way rather than another in a regulatory takings case. It is instructive to determine what competing consideration sufficed to warrant abandoning apparently consistent decision making.⁴⁷ To that end, this portion of the Essay identifies voting patterns of several Justices. Each Justice is discussed separately. Of special emphasis in this Essay are any votes that might seem counterintuitive or otherwise surprising. Their surprising nature makes them potentially the most revealing. In particular, they may suggest that those crosscutting issues underlying the regulatory takings debate play a far larger role in influencing the Court's rulings than has been expressly acknowledged by the opinions themselves.

A. *The Unexpected in Justice Voting*

Justice White is the easy case for highlighting vote shifting in the Court's regulatory takings cases.⁴⁸ He is, however, hardly alone. With the exception of Justice Scalia, there is a surprising amount of movement in how individual Justices vote in regulatory takings cases on the Court. Surveyed below are the voting patterns of Justice Brennan and several of the current Justices, other than Justice Kennedy, who have played significant roles in the Court's takings jurisprudence during the past two decades.

1. *Chief Justice Rehnquist*

Many would assume that Chief Justice Rehnquist has adhered to a fairly steady line of decision in takings cases. Not so. Although one can fairly characterize the Chief Justice as generally sympathetic to the claims of private property owners, his writings and votes are not without qualification and some judicial backtracking.

For instance, in *Kaiser Aetna v. United States*,⁴⁹ then-Justice Rehnquist wrote the opinion for the Court in which he declared

47. Cf. John E. Coons, *Consistency*, 75 CAL. L. REV. 59, 112-13 (1987) ("[I]nconsistency's most compelling claim for recognition may lie in its potential service to truth.").

48. See *supra* note 16 and accompanying text.

49. 444 U.S. 164 (1979).

the "fundamental" nature of the property owner's "right to exclude."⁵⁰ The Court ruled in *Kaiser Aetna* that the federal government's insistence on public access to a navigable private marina constituted a taking of property requiring compensation.⁵¹ Just a few months later, however, then-Justice Rehnquist authored a unanimous opinion for the Court in *PruneYard Shopping Center v. Robins*.⁵² In that case, the Court ruled that the "right to exclude" was not fundamental to a shopping center owner who had failed to demonstrate that his ability to exclude certain leafleteers was "essential to the use or economic value of [his] property"⁵³

Similarly, contrasts exist between the opinion that the Chief Justice wrote for the Court in *Dolan v. City of Tigard*⁵⁴ and Justice Scalia's opinion for the Court in *Nollan v. California Coastal Commission*.⁵⁵ The tone of *Dolan* is decidedly different from the one that Justice Scalia set for the Court in *Nollan*. The *Dolan* opinion is discernibly more tempered, more deferential, and ultimately more respectful of the workings of, and necessity for, state and local land-use regulation.⁵⁶ In this respect, the *Dolan* opinion may share some common roots with *PruneYard*, which rests similarly on notions of federalism and the primacy of state law for the definition of private property rights.⁵⁷

PruneYard is not the only case in which the Chief Justice sided with the government in a takings case. He joined Justice Brennan's opinion for the Court in *Andrus v. Allard*,⁵⁸ which

50. *Id.* at 179-80.

51. *See id.* at 180.

52. 447 U.S. 74 (1980).

53. *Id.* at 84.

54. 512 U.S. 374 (1994).

55. 483 U.S. 825 (1987).

56. *See, e.g., Dolan*, 512 U.S. at 387 ("No . . . gimmicks are associated with the permit conditions imposed by the city in this case."); *id.* at 396 ("Cities have long engaged in the commendable task of land use planning, made necessary by increasing urbanization particularly in metropolitan areas such as Portland. The city's goals . . . are laudable, but there are outer limits on how this may be done.").

57. *PruneYard*, 447 U.S. at 84-85 (referring to the "residual authority [of a State] that enables it to define 'property' in the first instance" and "the State's asserted interest in promoting more expansive rights of free speech and petition than conferred by the Federal Constitution").

58. 444 U.S. 51 (1979).

used very strong proregulation rhetoric in rejecting a takings challenge to the Eagle Protection Act⁵⁹ and the Migratory Bird Treaty Act,⁶⁰ both of which restricted the sale of eagle feathers.⁶¹ Rehnquist also joined Justice Blackmun's majority opinion for the Court in *Ruckelshaus v. Monsanto Co.*,⁶² which rejected most, but not all, of a takings claim brought against the Environmental Protection Agency (EPA) based on trade secret disclosure requirements under the Federal Insecticide, Fungicide, and Rodenticide Act.⁶³

This past Term, in *Bennis v. Michigan*,⁶⁴ the Chief Justice, writing for a slim five-Justice majority, dismissively rejected a plaintiff's claim that a state criminal forfeiture law amounted to an unconstitutional taking of private property.⁶⁵ In *Bennis*, the plaintiff herself had committed no crime, yet she lost her title to an automobile that she and her husband owned jointly when he had used the automobile in the crime of soliciting a prostitute.⁶⁶ Employing somewhat elliptical reasoning, the Chief Justice's opinion for the Court tersely stated that "[t]he government may not be required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain."⁶⁷

Finally, Chief Justice Rehnquist's view of the role of nuisance law in takings analysis has shifted significantly over the years. In *Keystone Bituminous Coal Ass'n v. DeBenedictis*,⁶⁸ Rehnquist wrote in his dissent that "our cases have never applied the nuisance exception to allow complete extinction of the value of a parcel of property."⁶⁹ That claim is inconsistent with his earlier dissenting statement in *Penn Central Transportation Co. v. New*

59. 16 U.S.C. § 668(a) (1994).

60. *Id.* § 703.

61. *See Allard*, 444 U.S. at 67-68.

62. 467 U.S. 986 (1984).

63. 7 U.S.C. §§ 136-136y (1994); *see Ruckelshaus*, 467 U.S. at 1013-14.

64. 116 S. Ct. 994 (1996).

65. *See id.* at 1001.

66. *See id.* at 996.

67. *Id.* at 1001.

68. 480 U.S. 470 (1987).

69. *Id.* at 513.

*York City*⁷⁰ that the Court's precedent established "two exceptions [to the Takings Clause] where the destruction of property does *not* constitute a taking,"⁷¹ one of which was when the "forbidden use is dangerous to the safety, health, or welfare of others."⁷² Significantly, Chief Justice Rehnquist did not equate the nuisance exception to common law precedent but seemed to allow for more broadly based exercises of the police power restricting such dangerous uses of property.⁷³ More recently, however, the Chief Justice joined the majority opinion in *Lucas v. South Carolina Coastal Council*,⁷⁴ which rejected both his *Keystone Bituminous* analysis by embracing a nuisance exception⁷⁵ and his *Penn Central* analysis by seeming to limit the nuisance exception to judicial application of the common law.⁷⁶

2. Justice Brennan

Justice Brennan was generally a reliable vote for the government in regulatory takings cases, just as Chief Justice Rehnquist was generally a reliable vote against the government. As with the Chief Justice, however, factors could arise that would prompt Justice Brennan to change his usual voting pattern. To the great dismay of government regulators and environmentalists, Justice Brennan sided with those favoring a constitutionally required money damage remedy in his dissent in *San Diego Gas & Electric Co. v. City of San Diego*,⁷⁷ a case in which the majority invoked procedural grounds to avoid reaching the ultimate issue.⁷⁸ It was not long before property owners realized the potential for victory that Justice Brennan's realignment promised, in *First English Evangelical Lutheran Church v.*

70. 438 U.S. 104 (1978).

71. *Id.* at 144.

72. *Id.* at 145.

73. *See id.* ("The nuisance exception to the taking guarantee is not coterminous with the police power itself").

74. 505 U.S. 1003 (1992).

75. *See id.* at 1027-32.

76. *See id.* at 1029.

77. 450 U.S. 621, 653 (1981) (Brennan, J., with whom Stewart, Marshall, & Powell, JJ., join, dissenting).

78. *See id.* at 631-33.

*County of Los Angeles.*⁷⁹

To be sure, one can posit a distinction between the Fifth Amendment remedy issue and the threshold issue of whether a regulation effects a taking in the first instance. Justice Stevens, however, has the better argument in contending that the two issues cannot be divided so neatly.⁸⁰ Justice Brennan's view that there must be a remedy for temporary takings reflects an intolerance toward government interference with property rights that is at odds with the legal theory underlying the opinions that he joined and authored rejecting takings claims on the merits.⁸¹ The temporal restrictions that Justice Brennan agreed mandate just compensation do not differ fundamentally from the spatial restrictions that he concluded do not mandate compensation.⁸² In a less charitable moment in his dissent in *Nollan v. California Coastal Commission*,⁸³ Justice Stevens chastised Justice Brennan for failing to perceive the inconsistency and, in Justice Stevens's view, unfairly subjecting land-use regulation to unrealistic constitutional standards.⁸⁴

79. 482 U.S. 304 (1987) (holding that the government must compensate property owners for a temporary taking).

80. *See id.* at 328-35 (Stevens, J., dissenting).

81. *See id.* at 330-31 (Stevens, J., dissenting) (discussing *Keystone Bituminous and Penn Central*).

82. *See id.* at 330 (Stevens, J., dissenting) ("Regulations are three dimensional; They have depth, width, and length. . . . It is obvious that no one of these elements can be analyzed alone to evaluate the impact of a regulation, and hence to determine whether a taking has occurred.")

83. 483 U.S. 825, 866 (1987).

84.

I write today to identify the severe tension between [the decision in *First English*] and the view expressed by JUSTICE BRENNAN's dissent in this case that the public interest is served by encouraging state agencies to exercise considerable flexibility in responding to private desires for development in a way that threatens the preservation of public resources. I like the hat that JUSTICE BRENNAN has donned today better than the one he wore in *San Diego*, and I am persuaded that he has the better of the legal arguments here. Even if his position prevailed in this case, however, it would be of little solace to land-use planners who would still be left guessing about how the Court will react to the next case, and the one after that. As this case demonstrates, the rule of liability created by the Court in *First English* is a shortsighted one. Like JUSTICE BRENNAN, I hope that a "broader vision ultimately prevails."

Id. at 867 (Stevens, J., with whom Blackmun, J., joins, dissenting) (citations omitted).

3. Justice Stevens

Justice Brennan did not respond to Justice Stevens's criticism of him in *Nollan*. Had Justice Brennan chosen to respond in kind, he certainly could have reminded Justice Stevens that his own record did not reflect a wholly steady view in takings cases. Justice Stevens has authored more opinions than most Justices have in favor of government regulators in takings cases, writing the majority opinion in *Keystone Bituminous*, concurring in the judgment in *Williamson County Regional Planning Commission v. Hamilton Bank*,⁸⁵ and dissenting in *First English*, *Nollan*, *Lucas*, and *Dolan*. Many forget, however, that Justice Stevens joined then-Justice Rehnquist's dissent in *Penn Central*, having declined to join Justice Brennan's majority opinion for the Court. Justice Stevens likewise joined the majority ruling in *Loretto v. Teleprompter Manhattan CATV Corp.*⁸⁶ that a taking had occurred,⁸⁷ again declining to join Justice Brennan in dissent.⁸⁸ In *Loretto*, Justice Stevens embraced a per se approach to the takings issue that presaged a mode of analysis that he subsequently criticized as unduly rigid when the Court extended its application in *Lucas*.⁸⁹

4. Justice O'Connor

Justice O'Connor's views exhibit more consistency than many of the other members of the Court. She has tended to be among the most aggressive in her defense of private property rights. She joined the dissenters in *Keystone Bituminous*, and the majority in *Nollan*, *Lucas*, and *Dolan*. Unlike her voting tendencies in other areas of constitutional law,⁹⁰ she declined to join Jus-

85. 473 U.S. 172, 202 (1985).

86. 458 U.S. 419, 420 (1982).

87. *See id.* at 441-42.

88. *See id.* at 442.

89. *Compare id.* at 434-35 ("[W]hen the 'character of the governmental action,' . . . is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public health benefit or has only minimal economic impact on the owner."), with *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1071 (1992) (Stevens, J., dissenting) ("[F]airness and justice' are often disserved by categorical rules.").

90. *See, e.g., Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995); *Planned*

tice Kennedy's effort in *Lucas* to set forth a more moderate constitutional vision of the Fifth Amendment. Perhaps even more revealing, Justice O'Connor has in recent years twice taken the unusual step of formally dissenting from denials of certiorari in regulatory takings cases in which aggrieved landowners sought the Court's review.⁹¹ Justices generally do not formally record their dissents from denial of certiorari. Doing so, therefore, underscores the depth and intensity of the Justice's views.

If there are any surprises in Justice O'Connor's voting pattern, they are likely to be found in her position on the remedy issue. On this issue, her votes to some extent are the mirror image of Justice Brennan's. In *MacDonald, Sommer & Frates v. County of Yolo*,⁹² Justice O'Connor joined Justice Stevens's majority, which declined to reach the remedy issue.⁹³ Then, in *First English*, Justice O'Connor joined parts of Justice Stevens's dissent, which expressed both concern about respecting state courts⁹⁴ and skepticism about the merits of the threshold takings claim.⁹⁵ In *First English*, the landowner challenged a law that restricted its ability to operate a camp for the disabled in an area that the government deemed unsafe because of the threat of flooding.⁹⁶ Review of the oral argument reveals Justice O'Connor's concern with the dangers of such a use of the property.⁹⁷ That same concern also may have provided the impetus for Justice Scalia's assertion in the majority opinion in *Lucas* that

Parenthood v. Casey, 505 U.S. 833 (1992).

91. See *Parking Ass'n v. City of Atlanta*, 115 S. Ct. 2268 (1995) (Thomas, J., with whom O'Connor, J., joins, dissenting); *Stevens v. City of Cannon Beach*, 510 U.S. 1207 (1994) (Scalia, J., with whom O'Connor, J., joins, dissenting).

92. 477 U.S. 340 (1986).

93. See *id.* at 348-53.

94. See *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 335-39 (1987) (Stevens, J., with whom Blackmun & O'Connor, JJ., join, dissenting as to Parts I and III).

95. See *id.* at 322-28 (Stevens, J., with whom Blackmun & O'Connor, JJ., join, dissenting as to Parts I and III).

96. See *id.* at 307-08.

97. See Official Transcript Proceedings Before the Supreme Court of the United States at 26, *First English* (No. 85-1199) [hereinafter *First English* Oral Argument Transcript] (questions posed by Justice O'Connor) ("[D]o you think that local governments don't have authority to engage in flood control regulation? . . . And does the church plan to rebuild on a flood plain where people have been killed?").

prohibiting development that would flood another's property could destroy all economic value without constituting a taking of property.⁹⁸ Because Justice O'Connor supplied Justice Scalia with the crucial fifth vote in *Lucas*, Justice Scalia may have been responding to Justice Brennan's "rule of five."⁹⁹

5. *Justice Scalia*

No one could contend that Justice Scalia has not adhered to a firm position in the regulatory takings cases. Property owners have no greater ally on the Court. He opposed the property owner's loss in *Keystone Bituminous*¹⁰⁰ and voted with the majority in support of private property rights in *First English*, *Nollan*, *Lucas*, and *Dolan*. Not coincidentally, his majority opinions for the Court in both *Nollan* and *Lucas* included some of the most sweeping and potentially far-reaching rhetoric promoting Fifth Amendment protection of private property rights against governmental encroachment.¹⁰¹

To discover the revealing anomalies in Justice Scalia's votes, one must look beyond the regulatory takings cases. When other members of the Court have wavered somewhat in takings cases in response to competing concerns, Justice Scalia alone has not. By not doing so, however, he necessarily has produced some tension between his takings jurisprudence and his opinions in other areas of constitutional law. Missing from Justice Scalia's analysis in the takings cases is his typical concern that courts not

98. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992).

99. See *supra* note 7 and accompanying text.

100. 480 U.S. 470, 506 (1987) (Rehnquist, C.J., dissenting).

101.

We view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination. As indicated earlier, our cases describe the condition for abridgement of property rights through the police power as a "Substantial advanc[ing]" of a legitimate state interest. We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective.

Nollan v. California Coastal Comm'n, 483 U.S. 825, 841 (1987).

invoke the Constitution to upset laws enacted by the democratically elected legislative branch.¹⁰² Gone is his normal penchant for restricting the meaning of the Constitution to the original intent of the Framers.¹⁰³ Likewise, remarkably absent is any concern with federal courts invoking the federal Constitution to override the judgments of state and local governments—a federalism concern.¹⁰⁴

B. The Crosscutting Issues

There are, of course, many possible explanations for Justices shifting their views in regulatory takings cases. One very likely possibility is that the individual Justices are not nearly as obsessive as academics suppose them to be about the precise meaning of every specific word or phrase in the opinions that they write or join. Commentators, therefore, are mistaken if they believe that they gain tremendous insight into a particular Justice's thinking by performing such word parsing. The opinions are often a joint product, very much the result of collaborative efforts among the Justice, his or her law clerks, and the views of other chambers.¹⁰⁵ When the opinion is one for the Court or for several Justices joining in a separate opinion, accommodation of competing views is necessary.¹⁰⁶

102. See Humbach, *supra* note 20, at 771-72; see also ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 229-30 (1990) (criticizing Richard Epstein's reading of the Fifth Amendment's Just Compensation Clause as permitting judicial usurpation of legislative judgment).

103. See Michael J. Gerhardt, *A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia*, 74 B.U. L. REV. 25, 61-63 (1994); see also BORK, *supra* note 102, at 230 ("My difficulty is not that Epstein's constitution would repeal much of the New Deal and the modern regulatory-welfare state but rather that these conclusions are not plausibly related to the original understanding of the takings clause.")

104. See Frank I. Michelman, *Property, Federalism, and Jurisprudence: A Comment on Lucas and Judicial Conservatism*, 35 WM. & MARY L. REV. 301, 307, 310-28 (1993).

105. See Charles W. Collier, *The Use and Abuse of Humanistic Theory in Law: Reexamining the Assumptions of Interdisciplinary Legal Scholarship*, 41 DUKE L.J. 191, 229-30 (1991) ("Supreme Court opinions are becoming less . . . the product of an individual and powerful mind, less an original text or primary source providing a theoretical model for scholarship, and more the product of 'bureaucratic writing' by law clerks. . . . They are the proverbial 'work of many hands.'")

106. See Kevin M. Stack, Note, *The Practice of Dissent in the Supreme Court*, 105 YALE L.J. 2235, 2239 (1996).

The Justices also react to the facts of the cases before them based on their own life experiences. There may be no conscious or even desired effort to develop a coherent unifying legal position. Consider, for example, Justice Powell's sympathy for the historic preservation regulation challenged in *Penn Central* and his hostility toward restrictions on coal mining challenged in *Keystone Bituminous*.¹⁰⁷ Justice Powell's contrasting votes might reflect nothing more than his appreciation for historic preservation and coal. Each is well established in his home state of Virginia, where one finds both Colonial Williamsburg and a heavy economic dependence on coal mining.¹⁰⁸

The votes of the Justices, however, also suggest the crosscutting issues in regulatory takings cases. No case before the Court exists in a vacuum removed from the Court's other precedent. A Justice's vote in a case before the Court does not turn simply on the particular facts before the Court. Nor does a Justice consider the regulatory takings issue in isolation. A Justice inevitably considers the relationship of the Court's resolution of the issue at hand to other, broader issues that recur frequently in different substantive areas of the Court's varied docket. These so-called "crosscutting" issues provide the common threads between rulings and, ultimately, the fabric of the jurisprudence of a single Justice.

What makes the Court's takings jurisprudence so susceptible to vote shifting is the way that those crosscutting issues tug at individual members in an oppositional fashion in takings cases. "Oppositional" in this context refers to a crosscutting issue's tendency to push a Justice toward voting in a way contrary to what otherwise might be his or her natural inclination on the primary legal issue before the Court.

107. Cf. Official Transcript Proceedings Before the Supreme Court of the United States at 46, *Hodel v. Indiana*, 452 U.S. 314 (1981) (No. 80-231) (statement of Justice Powell) (expressing his concern, Justice Powell stated that because of the geographic characteristics of Virginia, "in many instances the land ha[s] no value whatever under the administration of [a surface mining control law]").

108. Justice Kennedy's surprising vote in *Lucas* may reflect his appreciation, based on years of living in California, of the hidden perils of residential development in potentially unstable ecosystems. See Richard J. Lazarus, *Putting the Correct "Spin" on Lucas*, 45 STAN. L. REV. 1411, 1422-23 (1993).

For example, a Justice like Scalia naturally might be inclined to uphold an executive branch agency's effort to make environmental regulations less demanding and costly to industry, but nonetheless might feel equally compelled to reject the agency's effort based on the plain meaning of the statutory language. His overriding commitment to "plain meaning" construction of statutory language would probably trump any pro-business, antiregulatory inclinations that he might harbor.¹⁰⁹

In regulatory takings cases, there are a substantial number of crosscutting issues that have just such oppositional tendencies. These issues may well explain much of the vote shifting that has occurred. Even more importantly, however, they may suggest the roots of compromise necessary for the establishment of a new majority coalition on the Court on the regulatory takings issue.

1. *Original Intent or Understanding*

The Justices routinely debate the significance and meaning of the Framers' original intent or understanding in deciding issues of constitutional law.¹¹⁰ The basic notion that the Court should

109. In *City of Chicago v. Environmental Defense Fund*, 511 U.S. 328 (1994), Justice Scalia wrote an opinion for the Court that rejected the EPA's interpretation of the Resource Conservation and Recovery Act which would have allowed municipalities to exempt from costly hazardous waste management regulations the ash generated from the combustion of municipal waste to produce energy. *See id.* at 334-35. The majority ruled that the meaning of the statutory language was plain and declined to rely on any contrary legislative history. *See id.* at 337 ("[I]t is the statute, and not the Committee Report, which is the authoritative expression of the law . . ."). Justice Scalia's penchant for plain meaning construction of statutes and his antipathy for legislative history are well established. *See Antonin Scalia, Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517; James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1, 41-42 (1994).

110. *See, e.g., U.S. Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842 (1995) (holding unconstitutional a state constitutional provision limiting the number of federal congressional terms an individual can serve); *United States v. Lopez*, 115 S. Ct. 1624 (1995) (holding that a gun control law exceeded Congress's authority to regulate commerce under the Constitution). The body of legal scholarship on original intent and its applications also continues to grow. *See* RAOUL BERGER, *GOVERNMENT BY JUDICIARY* 363-72 (1977); BORK, *supra* note 102, at 143-259; CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 93-161 (1993); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

tie the meaning of the Constitution more closely to original intent is more favored by members of the Court identified frequently as conservatives than by those members identified as liberals.¹¹¹ As applied to regulatory takings cases, however, the issue of original intent wreaks havoc on what might otherwise be natural coalitions within the Court.¹¹²

The original intent argument generally favors those resisting regulatory takings claims against environmental and land-use regulation. Little historical evidence exists to support the view that the Framers contemplated that the Just Compensation Clause would restrict nonphysically invasive police power restrictions on the use of private property.¹¹³ Consequently, supporters of land-use and environmental regulation quickly find themselves securing the flag of original intent around their cause,¹¹⁴ and conservatives, concerned about unduly prohibitive restrictions on private property, find themselves voicing the expansive constitutional rhetoric that they roundly condemned when previously invoked on behalf of civil rights plaintiffs and criminal defendants.¹¹⁵

111. See *Lopez*, 115 S. Ct. at 1643-46 (Thomas, J., concurring); William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

112. The "liberal" and "conservative" labels are extraordinarily imprecise in describing the Justices and potentially misleading with regard to the regulatory takings issue given the ties of property rights proponents to Lockean liberalism. I nonetheless use these labels in this Essay for lack of an alternative shorthand expression for describing the predilections of the Justices on certain crosscutting issues.

113. See J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 ECOLOGY L.Q. 89, 91-96 (1995); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 785-97 (1995); see also John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1289-93 (1996) ("The reason the Framers did not address land use regulation in the Takings Clause is that they did not regard it as a taking."). But see Douglas W. Kmiec, *The Original Understanding of the Taking Clause Is Neither Weak nor Obtuse*, 88 COLUM. L. REV. 1630, 1635 (1988).

114. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1055-60 (1992) (Blackmun, J., dissenting).

115. See *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994) ("We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of poor relation in these comparable circumstances."); *Lucas*, 505 U.S. at 1028 & n.15 (agreeing that "early constitutional theorists did not believe the Takings Clause em-

2. Federalism

A similar reversal of positions occurs when one relates federalism concerns to the regulatory takings issue. For example, those who support environmental protection laws that promote national environmental protection objectives have not shied away from overriding state and local prerogatives.¹¹⁶ Conservative activists, scholars, and judges, however, have decried the subjugation of state and local governments to national interests.¹¹⁷ Indeed, the very name of the most prominent of conservative legal think tanks—The Federalist Society—expresses that baseline position.¹¹⁸

Each side, however, must display some legal gymnastics in addressing the regulatory takings issue. Conservatives trumpet the need for federal courts to invoke the federal Constitution to override state and local legislative enactments.¹¹⁹ Liberals, however, discover the sanctity of state and local autonomy in finding no merit to takings challenges and in emphasizing that

braced regulations of property at all” and relying on the “historical compact recorded in the Takings Clause that has become part of our constitutional culture”).

116. See Adam Babich, *Our Federalism, Our Hazardous Waste, and Our Good Fortune*, 54 MD. L. REV. 1516, 1534-50 (1995); John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183, 1190-99 (1995); Jim Florio, *Federalism Issues Related to the Probable Emergence of the Toxic Substances Control Act*, 54 MD. L. REV. 1354, 1363-70 (1995); Oliver A. Houck & Michael Rolland, *Federalism in Wetlands Regulation: A Consideration of Delegation of Clean Water Act Section 404 and Related Programs to the States*, 54 MD. L. REV. 1242, 1244-53 (1995); Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1157-65 (1995).

117. See Daniel A. Farber, *The Constitution's Forgotten Cover Letter: An Essay on the New Federalism and the Original Understanding*, 94 MICH. L. REV. 615, 618-26 (1995).

118. See Richard Neely, *The Politics of Patronage: Empowering Joe Lunchbucket*, 4 CORNELL J.L. & PUB. POL'Y 525, 525 (1995) (“The Federalist Society focuses on shifting the level of government decision-making from the federal government to state or local government . . .”).

119.

We realize that even our present holding will undoubtedly lessen to some extent the freedom and flexibility of land-use planners and governing bodies of municipal corporations when enacting land-use regulations. But such consequences necessarily flow from any decision upholding a claim of constitutional right; many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities . . .

First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 321 (1987).

property rights are defined in the first instance by state law.¹²⁰

3. *Judicial Activism*

Related notions of judicial activism play out similarly in the regulatory takings cases. Liberals who tend to be the targets of complaints asserting that they support "government by judiciary"¹²¹ now launch that same claim at conservatives who promote aggressive application of the Just Compensation Clause.¹²² Similarly, conservatives, apparently enjoying a convenient bout of temporary amnesia, enthusiastically turn to the courts to champion their vision of wise social and economic policy.¹²³

4. *Government Distrust*

A fourth crosscutting issue relates to distrust of government and individual autonomy. This is an especially problematic feature of regulatory takings disputes. Liberals and conservatives alike exhibit distrust of government, albeit in different contexts. Regulatory takings claims, however, can bridge that gap capably, allowing both groups to concern themselves with possible

120.

[The doctrine of exhaustion] is supported by our respect for the sovereignty of the several States and by our interest in having federal judges decide federal constitutional issues only on the basis of fully developed records. The States' interest in controlling land-use development and in exploring all the ramifications of a challenge to a zoning restriction should command the same deference from the federal judiciary.

Id. at 338 (Stevens, J., dissenting) (citations omitted); see also *Lucas*, 505 U.S. at 1051 (Blackmun, J., dissenting) ("These cases rest on the principle that the State has full power to prohibit an owner's use of property if it is harmful to the public."); Byrne, *supra* note 113, at 111-15 (describing the damage resulting from judicial intrusion into state property law).

121. See BERGER, *supra* note 110; BORK, *supra* note 102.

122. See *Dolan v. City of Tigard*, 512 U.S. 374, 407 (1994) (Stevens, J., dissenting) (describing both *Lochner* and the "regulatory takings' doctrine" as "having similar ancestry" and as "potentially open-ended sources of judicial power to invalidate state economic regulations that Members of this Court view as unwise or unfair"); *Lucas*, 505 U.S. at 1046 (Blackmun, J., dissenting) ("The Court offers no justification for its sudden hostility toward state legislators, and I doubt that it could."); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 846 (1987) (Brennan, J., dissenting) ("[The Court's] narrow conception of rationality, however, has long since been discredited as a judicial arrogation of legislative authority.").

123. See Byrne, *supra* note 113, at 118-19.

governmental abuses.

Distrust of government provides much of the driving force behind the property rights movement. Justice Holmes long ago spoke of the tendency of government, if left unchecked, to define away property rights.¹²⁴ Richard Epstein has written openly of the need for the courts to invoke the Fifth Amendment to guard against majoritarian efforts to appropriate property owned by others.¹²⁵ Liberals tend to support such redistributive governmental programs, so long as they provide the promise of progressiveness. In certain settings, however, restrictions on property rights more closely approximate interests in individual autonomy and security than they do "mere" economic interests. When individual autonomy is implicated, core liberal concerns with governmental overreaching may surface quickly.

One can speculate also about how these crosscutting issues have, in fact, prompted some of the vote swings discussed previously. Justice White shifted to support the private property plaintiffs in both *Lucas* and *Nollan*, in each case supplying Justice Scalia with the crucial fifth vote. One possible explanation for Justice White's shift is that in each of these cases, unlike those in which he had sided with the government, the plaintiff sought to protect his right to build a home on residential property.¹²⁶ Notions of personal autonomy and security were directly implicated. Concerns about governmental overreaching were, accordingly, more acute than they might have been had mere economic interests been at stake.

At least in *Nollan*, plaintiff's counsel seemed to anticipate this advantage in presenting his argument. At oral argument, he stressed repeatedly the strong connection between the real property rights being protected and noneconomic concerns with individual autonomy and security. Plaintiff's counsel referred repeatedly to the property's use as a "family home" for parents with small children.¹²⁷ He emphasized the personally intrusive na-

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

125. See EPSTEIN, *supra* note 2, at 344-46; Thomas W. Merrill, *Rent Seeking and the Compensation Principle*, 80 NW. U. L. REV. 1561, 1584-85 (1986) (reviewing Epstein's *Takings*, *supra* note 2).

126. See *Lucas*, 505 U.S. at 1008; *Nollan*, 483 U.S. at 827-28.

127. See Official Transcript Proceedings Before the Supreme Court of the United

ture of members of the public walking just a few feet away from a private residence. He described for the Court how plaintiff's small children would be playing in plain view just a few feet from where strangers would lurk if the government's position were upheld.¹²⁸ By the time counsel for the government rose to defend the state law, the Justices' questions reflected the concerns raised regarding individual security and privacy.¹²⁹

Chief Justice Rehnquist's votes likely reflect a similar tug-of-war. His vote and opinion for the Court in favor of the government in *PruneYard* likely reflected the significant federalism concerns found in the case: the right of a state to decide the content of its own constitution and its own state property laws.¹³⁰ His tempered opinion for the Court in *Dolan*—tempered relative to what Justice Scalia likely would have written for the Court—similarly seemed to try to respond to the legitimate needs of state and local planners to engage in urban land-use planning.¹³¹ His recent dismissal of the takings claim in *Bennis* may be explained by his fairly traditional, conservative deference to government in the area of criminal law enforcement.¹³²

The advocacy in these cases reveals concerted efforts by counsel to use these crosscutting issues to create the coalitions necessary to yield a favorable judgment. In seeking to move Justices like Rehnquist to reject the takings claim, counsel for the appel-

States at 3, 20, *Nollan* (No. 86-133).

128. See *id.* at 14 ("[P]eople can walk along just a few feet from the Nollans' house. They can see over the seawall directly into their living room. . . . Now, as any parents of small children, that concerns them."); *id.* at 19 (stating that the Nollans "don't want the people crossing within a few feet of their window, to go out and ask them to cross down by the waterway and stay away from their private residence, for example, if their small children are playing in the backyard"); *id.* at 20 ("As parents of small children, you're talking about the backyard of their home [P]eople could wander back and forth right next to their windows."); *id.* at 28 ("[W]e are dealing with a program that takes a very important concern—this is a private residence, a family with small children—away from this family to serve a program, a statewide program.").

129. See *id.* at 40-41 (questions from the Court) ("[L]et's assume there's a person down the street that I think—I don't trust him. I mean, he just looks shifty eyed. And he takes to walking back and forth seven feet away from my back window, back and forth; back and forth"); *id.* at 42 ("Mr. Nollan thought he bought a privacy buffer.").

130. See *supra* note 57 and accompanying text.

131. See *supra* note 56 and accompanying text.

132. See *supra* note 64-67 and accompanying text.

lees in *PruneYard*, as well as the United States government in its amicus brief, emphasized federalism concerns, including the right of the states to define the scope of state property law and the right to petition the government.¹³³ In *Dolan*, those who supported the government's defense against the takings claim similarly underscored issues of federalism and complained about the tyranny of government by the judiciary.¹³⁴ The government's brief in *Bennis* also was replete with reminders of the forfeiture's close nexus to a criminal prosecution, plainly designed to appeal to conservatives such as the Chief Justice.¹³⁵

133. The appellees' brief focused on federalism from the start:

The Federal System of our government allows and encourages the states to resolve their peculiar problems under state law. This court's prior decisions concerning expressive activity in shopping centers withheld federal protection under the First Amendment, but no decision has undermined the states' power to regulate such property to protect fundamental state rights.

Brief of Appellees at 14, *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) (No. 79-289); see also Brief for the United States As Amicus Curiae at 21, *PruneYard* (No. 79-289) ("State law conferring rights in property and defining the limitations of those rights is, accordingly, ordinarily the source of those rights, rather than a taking of them—especially where, as here, the pertinent state constitutional provision long antedates any claim or investment by the [landowner]."). The Chief Justice's concern with state law as the primary source of property law is further reflected in an exchange with government counsel at oral argument in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), in which he questioned counsel's characterization of the definition of "property" as a question of federal law. See Official Transcript Proceedings Before the Supreme Court of the United States at 10, *Ruckelshaus* (No. 83-196). In *Kaiser Aetna v. United States*, then-Justice Rehnquist's majority opinion similarly stressed that the marina at issue had always been considered private property under applicable Hawaii law. *Kaiser Aetna v. United States*, 444 U.S. 164, 179 (1979).

134. See Brief for Respondent at 30, *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (No. 93-518) ("Petitioner apparently wants the Court to return to those *Lochnerian* days of heightened judicial review of economic regulation, but now under the guise of takings analysis rather than through that already-discredited substantive due process analysis."); Brief of the National Association of Counties, Council of State Governments, National League of Cities, International City/County Management Association, National Institute of Municipal Law Officers, and U.S. Conference of Mayors As Amici Curiae in Support of Respondent at 12, *Dolan* (No. 93-518) (citing *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 402 (1979)) ("Deference to the judgments of local governments in the area of land-use regulation is of particular importance given the sensitive and complex determinations that such regulation demands.").

135. See Brief for the United States as Amicus Curiae Supporting Respondent at 25, *Bennis v. Michigan*, 116 S. Ct. 994 (1996) (No. 94-8729) ("Nothing in *Lucas* or *Dolan*, neither of which involved a forfeiture of property that had been used illegal-

Understanding Justice Brennan's motivation for siding with the landowners seeking a constitutional damage remedy in *First English* and *San Diego Gas* requires little speculation.¹³⁶ His responsiveness to a crosscutting issue was fairly explicit.¹³⁷ Justice Brennan has long been concerned about government violations of individual constitutional rights and has supported constitutional damage remedies to deter and compensate those violations.¹³⁸ It is not surprising therefore that he would not abandon his general support for constitutional damage remedies in determining the appropriate remedy for one specific kind of constitutional violation, namely regulatory takings. Here again, the briefs in the case reveal a concerted effort by advocates to attract traditional liberal support for constitutional damage remedies.¹³⁹ The briefs included one written by Pacific Legal Foundation lawyers on behalf of the San Diego Urban League, arguing that curbing governmental overreaching in land-use regulation that adversely affected racial minorities required a civil rights remedy.¹⁴⁰

ly, casts doubt on th[e] principle" that "if the . . . government's actions comport, procedurally and substantively, with the terms of a lawfully enacted forfeiture statute, it may seize private property without compensating the owner." (citations omitted); *id.* ("Petitioner did not allege or prove that she took all reasonable steps to prevent illegal use of the car.").

136. See *supra* notes 77-79 and accompanying text.

137. See *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 661 n.26 (1981) (Brennan, J., dissenting) ("[I]f a policeman must know the Constitution, then why not a planner?").

138. Justice Brennan has authored many landmark decisions protecting individual rights by allowing for constitutional damage remedies. See, e.g., *Carlson v. Green*, 446 U.S. 14 (1980) (supporting constitutional damages remedy); *Owen v. City of Independence*, 445 U.S. 622 (1980) (supporting constitutional damages remedy); *Davis v. Passman*, 442 U.S. 228 (1979) (supporting constitutional damages remedy); *Monell v. Department of Soc. Servs.*, 436 U.S. 658 (1978) (supporting constitutional damages remedy); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (supporting constitutional damages remedy); see also *DeShaney v. Winnebago County Dep't. of Soc. Servs.*, 489 U.S. 189, 203 (1989) (Brennan, J., dissenting) (supporting constitutional damages remedy).

139. See, e.g., Brief of Appellant at 37, *San Diego Gas* (No. 79-678) (citing *Owen*, 445 U.S. at 650-51) ("[T]his Court . . . specifically and emphatically held that damage compensation is available and is to be awarded when constitutional rights are violated by cities, regardless of the good faith of the action taken.").

140. The Urban League contended that:

Just as this Court has forbidden exclusion clearly based on race or national

Fewer judicial tea leaves evidence why Justice Stevens dissented with then-Justice Rehnquist and Chief Justice Burger in *Penn Central*, rather than joining Justice Brennan's majority opinion.¹⁴¹ Justice Stevens does not appear later to have second-guessed that vote, as he has since invoked that dissenting opinion in other cases.¹⁴² A likely distinction is that *Penn Central* is the only takings case that involved a regulation targeting particular properties and landowners rather than applying to all properties equally. The general applicability of the regulation was a factor that Justice Stevens subsequently emphasized in *Lucas* while defending South Carolina's law.¹⁴³ Counsel for Penn Central identified that particular characteristic as "the vice of this landmark law."¹⁴⁴

Finally, Justice O'Connor's votes for the majority in *First English* (in part) and *Yolo County*¹⁴⁵ likely reflect her lingering concerns about the federalism implications of regulatory takings claims.¹⁴⁶ Ironically, both she and Justice Brennan perceived the same distinction between the merits of a takings claim (i.e., whether a taking has occurred) and the remedy issue and, in addressing the latter, both willingly allowed other crosscutting concerns to shift their votes.¹⁴⁷ In *First English*, however, each

origin, so should this Court disallow and deter exclusion which is solely motivated by a municipal desire to further purely parochial aims to the detriment of the economically disadvantaged. A wide range of remedies is necessary to ensure municipal responsibility as well as accountability.

Brief of Amicus Curiae San Diego Urban League, Inc., in Support of Appellant at 19-20, *San Diego Gas* (No. 79-678); *id.* at 23-28 (relying extensively on needs of minorities and on Justice Brennan's opinion for the Court in *Owen*, 445 U.S. at 622).

141. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 138 (1978).

142. See *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 491 n.20 (1987).

143. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1071-74 (1992) (Stevens, J., dissenting).

144. Official Transcript Proceedings Before the Supreme Court of the United States at 28, *Penn Central* (No. 77-444) [hereinafter *Penn Central* Oral Argument Transcript] (statement of Mr. Gribbon); see *Penn Central*, 438 U.S. at 131 (noting Penn Central's concession that no taking occurs if a development restriction is the result of a generally applicable law rather than an individual landmark designation).

145. *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986).

146. See *supra* notes 93-97 and accompanying text.

147. In joining the majority opinion in *Yolo County*, Justices O'Connor and Brennan agreed that compensation cannot be deemed "just" until "a court knows what use, if any, may be made of the affected property." *Yolo County*, 477 U.S. at 350.

managed to offset the other as they moved in opposite directions. Justice O'Connor's dissent seems motivated by her belief that the ordinance challenged in that case prevented a dangerous use of a floodplain: the operation of a camp for disabled children.¹⁴⁸

Both the briefs that were filed in *First English* and the oral arguments that were made before the Court demonstrate the advocates' understanding that the most effective way to obtain a Justice's vote is to use one of the crosscutting issues as leverage to support his or her view of the merits of the regulatory takings claim. Those supporting a damages remedy, then, stressed to Justice O'Connor the abusive and unfair tactics employed by land-use regulators.¹⁴⁹ In contrast, those resisting a damages remedy sought to persuade conservative Justices like Justice O'Connor by repeatedly emphasizing the intrusiveness of damages remedies on state and local governments and the propriety of judicial deference to legislative judgments.¹⁵⁰

Accordingly, the Court's regulatory takings precedent is not simply the product of a debate on the meaning of private property and its relationship to the police power. The votes of individual Justices are often as much the result of their views on other crosscutting jurisprudential concerns implicated by the regulato-

148. See *supra* notes 96-98 and accompanying text.

149. See *First English* Oral Argument Transcript, *supra* note 97, at 58 (statement of Michael Berger, Counsel for First English) ("[Governmental delays and lengthy litigation in regulatory takings cases] is the kind of horror story, Justice O'Connor, that goes on in California, and it goes on all the time."). The property owner's efforts seem to have had an impact on Justice O'Connor, which, despite her dissent in *First English*, may explain her aggressive stance in favor of property owners in subsequent regulatory takings cases. See *id.* at 55 (statement of Justice O'Connor) ("[T]here are some horror stories out there of local governments intentionally running these things through the mill indefinitely . . . with full recognition that if they lose on one they can make a minor modification of the requirement and go again and effectively deprive people forever of any use."); *supra* note 91 and accompanying text.

150. Environmental organizations resisting the damages remedy sought to invoke the federalism and judicial activism concerns of conservative Justices. See, e.g., Brief of the National Trust for Historic Preservation, National Association of Counties, National Association of County Planning Directors, National Wildlife Federation, Preservation Action, and National Parks and Conservation Association, As Amici Curiae in Support of Appellees at 13, *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981) (No. 79-678) ("Implying a [d]amage [r]emedy [w]ould [i]nterfere with the [r]elationship [b]etween [f]ederal and [s]tate [a]uthorities and [b]etween the [c]ourts and the [l]egislative [b]ranch").

ry takings debate. They may have inclinations regarding private property and its relative importance, but for most Justices, those inclinations are not the driving force behind their answers to the legal questions presented. Each Justice looks beyond that narrow debate and seeks to develop a position that responds to his or her view on issues such as original intent, federalism, judicial activism, the need for judicially manageable standards, and other similar concerns, in the ultimate effort to define their own jurisprudential identity. For that reason, scholars and practitioners seeking to proffer a workable test for regulatory takings analysis are mistaken if they focus on the property rights issue in isolation. In order to establish a stable majority view on the Court, one must make a careful accounting of a variety of cross-cutting issues that underlie the shifting coalitions behind the Court's discordant rulings to date. The question of how some Justices on the current Court might seek to accomplish that task and what such a test might look like is the subject of this Essay's final lesson.

III. LESSON NUMBER THREE: THE SIGNS OF A JUSTICE KENNEDY-LED MAJORITY ON THE COURT FOR A NEW REGULATORY TAKINGS TEST

Piercing the Supreme Court's veil promotes understanding of the Court's regulatory takings precedent, including both the current vulnerability of rulings like *Lucas* and the identity of those factors that have produced the thin and shifting majorities supporting the Court's decisions. Such piercing also provides guidance regarding what a new majority led by Justice Kennedy might decide in future regulatory takings cases. The seemingly aberrant votes of individual Justices suggest where common ground is likely to be found between otherwise opposing views. These votes are not necessarily the product of illogic or inconsistency; they instead may reflect potential accommodation and the seeds of future compromise between what long have remained opposing, irreconcilable views.

Notwithstanding the inevitably speculative nature of the exercise, predicting where that compromise might be struck is possi-

ble. This is *not* to suggest what the Court should do.¹⁵¹ This prediction, instead, involves the far more problematic undertaking of gauging where the Court's regulatory takings analysis is likely to go should Justice Kennedy attempt to forge a new majority on the issue. Make no mistake about it—this is an exercise in unabashed speculation.

Drawing on the analysis presented in the prior two sections of this Essay, the general ingredients of a new, centrist majority led by Justice Kennedy would seem to be (1) Justice Kennedy's concurring opinion in *Lucas*,¹⁵² (2) Justice O'Connor's concern with state and local autonomy and the need to restrict activities dangerous to human life and health,¹⁵³ (3) Justice Stevens's concern with singling out property owners for disproportionate burdens and perhaps with historic preservation laws generally,¹⁵⁴ (4) Justice Stevens's further concern with permanent physical occupation of private property,¹⁵⁵ (5) former-Justice Brennan's concern (likely shared by the more liberal members of the current Court) with government abuse of police power authority at the expense of individual autonomy and security,¹⁵⁶ (6) former-Justice White's related concern with the sanctity of the home,¹⁵⁷ (7) Justice Souter's concern with the limits of takings analysis and the propriety of the judicial role in overseeing state and local land-use planning,¹⁵⁸ and (8) Justice Breyer's views on the impropriety of presuming constitutional codification of a particular economic theory and the necessity of allowing for police power restrictions protective of human health and

151. For criticism of the "fundamental rights" framework emerging in the Court's regulatory takings cases, see Rubenfeld, *supra* note 6, at 1097-11.

152. 505 U.S. 1003, 1032 (1992) (Kennedy, J., concurring in the judgment).

153. *See supra* notes 94-97 and accompanying text.

154. *See supra* notes 142-44 and accompanying text.

155. *See supra* notes 86-89 and accompanying text.

156. *See supra* notes 81, 138 and accompanying text.

157. *See supra* note 126 and accompanying text.

158. *See Dolan v. City of Tigard*, 512 U.S. 374, 411-14 (1994) (Souter, J., dissenting) (arguing that the Court is improperly addressing issues not raised by the facts before the Court); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1076-78 (1992) (statement of Souter, J.) (voting to dismiss the writ of certiorari); *cf. United States v. Lopez*, 115 S. Ct. 1624, 1651-52 (1995) (Souter, J., dissenting) (arguing for deference to the legislature).

safety.¹⁵⁹

Because Justice Kennedy is the most likely instigator of a new majority, his concurring opinion in *Lucas* provides the logical starting point for developing a new framework. That opinion certainly presents the possibility of a middle-ground position. In his *Lucas* opinion, Justice Kennedy challenged both sides of the regulatory takings debate and took a few tentative steps toward bridging their differences.

First, Justice Kennedy challenged the two mainstay positions of the *Lucas* majority. He contended that total economic deprivation was not enough to justify a per se approach.¹⁶⁰ He further argued that, in any event, the common law of nuisance and other background principles of the common law do not provide the exclusive justification for denying just compensation for such a complete deprivation of property rights.¹⁶¹

Justice Kennedy offered in place of the *Lucas* majority's analytic framework one requiring an independent assessment of the loss of value in light of the landowner's reasonable expectations.¹⁶² This inquiry would include consideration of the property owner's actual intent as well as his capacity to undertake the use, the prevention of which now forms the basis of his takings claim.¹⁶³ Justice Kennedy also argued that mere background principles of the common law were insufficient to define a property owner's reasonable expectations. He argued instead that such interests could find a basis in "objective rules and customs that can be understood as reasonable by all parties in-

159. See *supra* notes 30-33 and accompanying text.

160. See *Lucas*, 505 U.S. at 1034 (Kennedy, J., concurring in the judgment) ("Where a taking is alleged from regulations which deprive the property of all value, the test must be whether the deprivation is contrary to reasonable, investment-backed expectations.").

161. See *id.* at 1035 (Kennedy, J., concurring in the judgment) (citing *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 593 (1962)) ("In my view, reasonable expectations must be understood in light of the whole of our legal tradition. The common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent society.").

162. See *id.* at 1034 (Kennedy, J., concurring in the judgment).

163. See *id.* at 1033 (Kennedy, J., concurring in the judgment) ("Among the matters to be considered on remand must be whether petitioner had the intent and capacity to develop the property and failed to do so in the interim period because the State prevented him.").

volved.¹⁶⁴

According to Justice Kennedy, these objective rules and customs extend to the government's "enacting new regulatory initiatives in response to changing conditions . . ." ¹⁶⁵ In justifying restrictions beyond the common law, he offered as an example the government's need to restrict private uses on a "fragile land system" like coastal property, even if such restrictions might result in the complete destruction of economic value.¹⁶⁶ Such restrictions, in Justice Kennedy's view, would not interfere with the reasonable expectations of an owner of ecologically fragile property.

Justice Kennedy's concurrence in *Lucas* also challenged those who favor governmental regulation. He suggested that not all governmental ends would be sufficiently weighty to warrant denying compensation. He identified promotion of tourism as a governmental goal that would not justify the absence of compensation.¹⁶⁷ Additionally, Justice Kennedy introduced a new dimension to takings analysis by asserting that the regulatory means as well as the ends must be reasonable in order to pass Fifth Amendment Takings Clause muster.¹⁶⁸

A possible analytical framework that emerges from Justice Kennedy's views is not unlike that which the Court utilizes in other areas of constitutional law. Takings scrutiny would essentially have two different levels, in much the same way that the Court applies different levels of scrutiny to decide equal protection,¹⁶⁹ First Amendment,¹⁷⁰ and dormant Commerce Clause challenges.¹⁷¹

164. *Id.* at 1035 (Kennedy, J., concurring in the judgment).

165. *Id.* (Kennedy, J., concurring in the judgment).

166. *Id.* (Kennedy, J., concurring in the judgment).

167. *See id.* (Kennedy, J., concurring in the judgment).

168. *See id.* (Kennedy, J., concurring in the judgment).

169. *See* *Bush v. Vera*, 116 S. Ct. 1941 (1996) (applying strict scrutiny review to a state's redistricting plan); *Shaw v. Hunt*, 116 S. Ct. 1894 (1996) (applying strict scrutiny review to a state's redistricting plan); *Romer v. Evans*, 116 S. Ct. 1620 (1996) (applying rational basis review to Colorado's "Amendment 2").

170. *See* *McIntyre v. Ohio Elections Comm'n*, 115 S. Ct. 1511, 1519 (1995) (applying strict scrutiny to political speech); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 n.13 (1993) (applying intermediate scrutiny to commercial speech); *Larsen v. Valente*, 456 U.S. 228, 246 (1982) (applying strict scrutiny to cases involving religious freedom).

171. *See* *Oregon Waste Sys., Inc. v. Department of Env'tl. Quality*, 511 U.S. 93, 98-

There would, in the first instance, be an inquiry into the alleged deprivation in order to gauge its relative severity based on its character and degree. This first-level inquiry would determine whether the takings issue at hand implicated a "core" or "fundamental" concern of the Just Compensation Clause. Whether the landowner's deprivation warranted just compensation would turn on that inquiry in combination with an inquiry into the substantiality of the government's justification for the challenged restriction, based similarly on the character of the justification and the degree to which the restriction is reasonably necessary to serve that justification. The injection of the "necessary" qualifier reflects Justice Kennedy's stated concern with the reasonableness of the "means" as well as the "ends" of the challenged restriction.

Core concerns would trigger, in effect, heightened takings scrutiny. Just compensation would not be required *per se*, but the government would have to survive heightened scrutiny to avoid the compensation requirement. The test would make differences in kind dispositive and would turn on differences in degree only when they reached the level of gross disproportionality. The inquiries would remain fairly binary: akin to heightened takings scrutiny for some kinds of interferences and diminished scrutiny for lesser interests. The courts have utilized such approaches more or less successfully in a host of other constitutional contexts, albeit with a tendency to create compromising categories of mid-level scrutiny.¹⁷² Such blunt-edged approaches cause difficulties at the borders¹⁷³ but are worthwhile so long as the categories provide for easy disposition of the vast majority of cases.

The challenge, of course, would be to identify the categories:

99 (1994) (explaining which level of scrutiny to apply in negative Commerce Clause cases); *Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992) (finding protectionist state statutes *per se* invalid under the Commerce Clause).

172. *See, e.g., Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371, 2375-76 (1995) (describing "intermediate" level scrutiny for restrictions on commercial speech); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 135 (1994) (describing "heightened equal protection scrutiny" review of gender-based classifications).

173. *See, e.g., Discovery Network*, 507 U.S. at 419 ("This very case illustrates the difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category.").

(1) the kinds of interferences with private property that would warrant the greatest degree of protection and (2) the kinds of governmental interests, if any, capable of justifying the most intrusive restrictions without compensation. At one end of the spectrum would be total destruction of economic value, which generally would warrant heightened judicial scrutiny. Defining the center of the spectrum is more difficult, however, and Justice Kennedy's *Lucas* concurrence suggests where to draw some of the finer distinctions. Any economic deprivation under a takings claim must be based on actual rather than theoretical contemplated use, and the actual use must be clearly lawful at the time that the property owner's expectations came into fruition.¹⁷⁴ Otherwise, the expectations are not sufficiently reasonable to warrant heightened constitutional protection. In addition, owners of fragile land systems would generally be on notice that the government might need to enact substantial restrictions on the use of the property to guard against the possible adverse consequences of developing such land.¹⁷⁵

Justice Kennedy's concurrence also suggests that promotion of tourism, business, and other economic redistributive goals would not be legislative ends capable of satisfying heightened takings scrutiny. Hence, just compensation would be required in instances of total destruction of economic value.¹⁷⁶ Although such concerns are entirely legitimate and important bases for police power restrictions on the use of land, the Court's new majority likely would conclude that it is proper to assign them less weight in the takings equation than they would a police power measure intended to prevent serious public health and safety risks. In the former circumstances, the police power measure is exclusively distributional in character. Depriving one property owner of all economic value for the benefit of another competing economic value normally would require just compensation.¹⁷⁷

174. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1033 (1992) (Kennedy, J., concurring in the judgment).

175. See *id.* at 1035 (Kennedy, J., concurring in the judgment).

176. See *id.* (Kennedy, J., concurring in the judgment).

177. Somewhat analogous concerns have been expressed in the Court's dormant Commerce Clause cases. See *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 956 (1982) (recognizing the difference between economic protectionism and health

On the other hand, as Justice Kennedy maintained in *Lucas*, government regulations aimed at stabilizing especially fragile land systems could satisfy the heightened takings review.¹⁷⁸ The reasons for the governmental restriction may have distributional or aesthetic dimensions, but they are not exclusively so. The basic maintenance of those land systems typically can serve even weightier and more substantial ends because of the degree and kind of harms that result from their disruption.¹⁷⁹

The prior votes and opinions of other likely members of a Justice Kennedy majority further fill out this new takings framework.¹⁸⁰ Permanent physical invasions or occupations would plainly trigger heightened takings scrutiny.¹⁸¹ So too would interferences with property rights that implicate core private property concerns with personal autonomy and security.¹⁸² One example would be governmental prohibition of a landowner's construction of a single-family home for her personal use. Another might be governmental engagement in continuous, proximate overflight of private residential property.¹⁸³ Governmental prohibitions on traditional rights and uses of property, such as basic subsistence activity or the right to devise, also would likely merit heightened takings scrutiny.¹⁸⁴

Restrictions on the use of property in order to promote historic preservation would satisfy normal takings review but would be less likely to survive heightened takings scrutiny as applied by a Justice Kennedy-led majority.¹⁸⁵ Restrictions that would pass

and safety regulations).

178. See *Lucas*, 505 U.S. at 1035 (Kennedy, J., concurring in the judgment).

179. See *id.* (Kennedy, J., concurring in the judgment).

180. See Laura S. Underkuffler-Freund, *Takings and the Nature of Property*, 9 CANADIAN J.L. & JURISPRUDENCE 161, 185 (1996) (describing how under emerging Supreme Court precedent "all property interests are *not* held with the same intensity and are *not* protected equally" and how there is a "hierarchical ordering of stringency of protection").

181. See *Lucas*, 505 U.S. at 1015.

182. See *supra* notes 81, 136 and accompanying text.

183. See *Brown v. United States*, 73 F.3d 1100 (Fed. Cir. 1996).

184. See *Hodel v. Irving*, 481 U.S. 704, 716 (1987).

185. Even the United States as *amicus curiae* in support of the City of New York in *Penn Central* agreed that the historic landmark designation would amount to a taking if the property owner was not provided a "reasonable return." *Penn Central* Oral Argument Transcript, *supra* note 144, at 59. The federal government's argu-

muster under heightened analysis, on the other hand, would include those that safeguard human health and safety,¹⁸⁶ as long as they are reasonably necessary. As proposed by Justice Kennedy in *Lucas*, this inquiry would focus on the reasonableness of the means.¹⁸⁷ A court would consider whether the restrictions were reasonably or narrowly tailored, including the reasonableness of the fit between the government's purposes and the object of the restriction. The government would need to demonstrate a

cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy. [So long as] the owner's use of the property is (or, but for the regulation, would be) the source of the social problem, it cannot be said that he has been singled out unfairly.¹⁸⁸

An inquiry into the reasonableness of the means likely would *not* require a distinct less restrictive alternative analysis, but that issue will probably be a matter of considerable discussion in the fashioning of this new approach. In other areas of constitutional law, the Court has embraced such a heightened inquiry into means without subjecting the restriction to less restrictive alternative scrutiny.¹⁸⁹ To satisfy this standard, a restriction

ment in that case was presented by then-Assistant Attorney General Patricia Wald, now a federal appellate judge.

186. Like Justice O'Connor in *First English*, see *supra* note 97, Justice Kennedy in *Lucas* repeatedly posed questions at oral argument suggesting that there are instances when all economic uses can be taken for urgent safety reasons and not compensated, citing earthquake faults and coastal property as two examples. See Official Transcript Proceedings Before the Supreme Court of the United States at 15-16, *Lucas* (No. 91-453). The identity of Justice Kennedy is not evident on the face of the transcript; his identity is derived from the author's notes taken at the oral argument itself (notes on file with the author).

187. See *supra* note 168 and accompanying text.

188. *Pennell v. City of San Jose*, 485 U.S. 1, 20 (1988) (Scalia, J., concurring in part and dissenting in part). The Court's ruling in *Pennell* is especially significant in discerning possible compromise because Justices Brennan, White, Marshall, Blackmun, and Stevens all joined the Chief Justice's majority opinion. See *id.* at 3. Justices Scalia and O'Connor joined only in part, and Justice Kennedy did not participate in the case. See *id.* at 20.

189. The Court currently uses this approach in the First Amendment area to determine the validity of government regulation of commercial speech. See *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371, 2380 (1995) (quoting *Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989)) ("[T]he 'least restrictive means' test has no role in the

must not be unduly over- or underinclusive. An example of impermissible underinclusiveness could be a restriction that singles out one property owner for severe use restrictions but leaves other, similarly situated properties unrestricted. "A regulation need not be 'absolutely the least severe that will achieve the desired end,' but if there are numerous and obvious less-burdensome alternatives to the restriction . . . that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable."¹⁹⁰ Where the fit is deemed unreasonable, compensation would be required.

In many respects, of course, Justice Scalia already is trying to lead the Court to a takings analysis with his own binary framework. The substance of that analysis, however, would be very different. Under his view, the per se takings categories—physical occupation and total economic deprivation¹⁹¹—undoubtedly would be much larger, and the takings test for those intrusions falling outside the per se categories would be significantly more demanding.

Justice Brennan's "rule of five," however, likely prevented Justice Scalia from going as far as he would have preferred to go in *Lucas*. He was unable to answer the crucial denominator question raised by the *Lucas* framework: "[How to] make clear the 'property interest' against which the loss of value is to be measured."¹⁹² If the economic impact inquiry is based on "parcel as a whole" analysis,¹⁹³ compensation will rarely be justi-

commercial speech context. 'What our decisions require,' instead, 'is a "fit" between the legislature's ends and the means chosen to accomplish those ends,' a fit that is not necessarily perfect, but reasonable"); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 416 (1993) (quoting *Fox*, 492 U.S. at 480) ("It [is] the city's burden to establish a 'reasonable fit' between its legitimate interests in safety and esthetics and its choice of a limited and selective prohibition of newsracks as the means chosen to serve those interests.").

190. *Discovery Network*, 507 U.S. at 417 n.13 (quoting *Fox*, 492 U.S. at 480).

191. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015-16 (1992).

192. *Id.* at 1016 n.7. Justice Scalia, writing for the Court in *Lucas*, explicitly recognized the significance of the denominator issue. See *id.* ("Regrettably, the rhetorical force of our 'deprivation of all economically feasible use' rule is greater than its precision, since the rule does not make clear the 'property interest' against which the loss of value is to be measured.").

193. See *id.* at 1016-17 n.7; *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 496-99 (1987) (applying "parcel as a whole" analysis); *Penn Cent. Transp.*

fied—invariably some part of the property will possess residual economic value. If the inquiry is based on a denominator that considers just the most restricted part of the property, however, compensation will be ordered far more routinely. Justice Scalia no doubt would have liked to address that issue, but, in doing so, he probably would have lost Justice White's vote and perhaps Justice O'Connor's vote as well.

Justice Kennedy, however, appears interested in leading the Court down a quite different path. His willingness to do so in future cases will turn on the strength of his conviction that Justice Scalia's position is ill-advised and not susceptible to mere fine-tuning. Even if willing, Justice Kennedy's ability to create the new majority will also turn on the willingness of some of the more liberal Justices to temper their own views to achieve a more centrist position.

CONCLUSION

Wishful thinking of others notwithstanding, the "takings puzzle" has not been solved.¹⁹⁴ In certain respects, the pieces of that puzzle are in as much disarray as ever. The *Lucas* majority view does not solve the puzzle;¹⁹⁵ that decision is not even likely to be weighty precedent before the current Court.

The most likely solution to the puzzle will not come from Justice Scalia, even though he has written many of the Court's most recent significant regulatory takings opinions. It will more likely come from Justice Kennedy, who has written no opinions for the Court on the issue. The signs of a Justice Kennedy-inspired new majority are already evident. They present themselves both in his surprising concurring opinion in *Lucas* as well as in a careful parsing of those various votes of the other Justices that likewise seemed initially surprising or even anomalous. Together, they

Co. v. New York City, 438 U.S. 104, 130-31 (1978) ("Taking[s]' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. . . . [T]his Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole . . .").

194. *But see* Douglas W. Kmiec, *At Last, the Supreme Court Solves the Takings Puzzle*, 19 HARV. J.L. & PUB. POL'Y 147 (1995).

195. *But see id.* at 148, 151-52.

present the possibility a of new compromise. The willingness and ability of those Justices to forge that compromise remains an open question. So, too, does the impact of Justice Brennan's unrelenting "rule of five" when change in the Court's membership next occurs.¹⁹⁶

196. The two most likely Justices to retire next—Chief Justice Rehnquist and Justice Stevens (with Justice O'Connor as an outside possibility)—would shift the Court's voting in very different directions.