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A REVIEW OF REGULATORY TAKINGS AFTER *LUCAS*

JAMES W. SANDERSON AND ANN MESMER*

I. INTRODUCTION

The Supreme Court's recent opinion on regulatory takings, *Lucas v. South Carolina Coastal Comm'n*,[1] is the latest high court guidance addressing the tension between rights of property owners and what some see as broader societal goals of either protecting or providing public access to areas of environmental, and therefore, public value. Many believe that the *Lucas* decision reflects the broader goals of the Reagan-Bush era.[2] It shifts the analytical focus in environmental takings jurisprudence to a more owner-oriented analysis, in line with the general perception that the high court is weighted with "pro-property" justices.[3]

With the election of President Clinton, one question is whether efforts to advance the Clinton/Gore environmental agenda will receive a hostile welcome among the judiciary.[4] A related question is whether property owners will be compensated for losses suffered in the name of "public interest." This article reviews developments in federal takings jurisprudence. It first briefly reviews the historical development of regulatory takings jurisprudence and current practice, then discusses in detail the Court's more recent *Lucas* analysis and issues that remain unresolved.

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1. 112 S. Ct. 2886 (1992).

2. Several initial commentaries cast *Lucas* as a win for private property owners. *See, e.g.*, Paul M. Barrett, *Supreme Court Supports Rights of Landowners*, WALL ST. J., June 30, 1992, at A3; *Commentary: No More 'Takings,' Please*, ROCKY MOUNTAIN NEWS, July 2, 1992, at 70; Elliott, *Property Rights Ruling Recasts Land-Use Law*, THE DENVER POST, July 18, 1992.

3. Five of nine justices are Reagan-Bush appointees: O'Connor, Souter, Scalia, Kennedy, and Thomas. Justice Rehnquist was appointed Chief Justice during this period. Justices White (who announced his retirement from the bench as this Article went to press), Blackmun and Stevens round out the lot. Over 70% of the current active circuit court judges have been appointed since 1980, when the Republicans took office. An even higher percentage of the active district court judges, over 75%, have taken the bench during this time. WEST'S POCKET DIARY, FEDERAL JUDGES EDITION, *1993* at 5-24, 97-111 (1992).

4. The Clinton/Gore plan adopts five major goals: (1) reduce pollution and solid waste; (2) preserve America's natural beauty and key resources; (3) use market forces to encourage environmental protection; (4) exert American leadership for a healthier world; and (5) improve energy efficiency. Contained within these general goals are specific goals, such as reform and proper enforcement of the EPA Superfund, support legislation allowing ordinary citizens to sue federal agencies, make the "no net loss" wetlands pledge a reality, and "crack down" on environmental crime. Clinton/Gore '92 Committee. Clinton/Gore on Protecting Our Environment (1992).

II. REGULATORY TAKINGS

A. *Brief Discussion of the Evolution of Regulatory Takings*

The Fifth Amendment to the U.S. Constitution provides that private property shall not be taken for public use without just compensation.[5] It is settled law that the Fifth Amendment also protects the property of states and local units of government under this principle.[6] "Regulatory takings" under the Fifth Amendment evolved from traditional condemnation law, under which the government directly appropriates private property for such public uses as parks, streets and walkways.[7] The concept of physical appropriation now extends beyond actual entry onto and possession of property to include acts that invade less directly one's private use and enjoyment of property.[8] As the concept of compensable physical invasion grew to include invasions other than actual entry onto property, the notion that regulations could indirectly preclude one's use and enjoyment of property took root.[9] Thus, regulatory takings result from regulation that interferes with a property owner's economic interests to such a degree that, even without physical entry, the property is essentially "appropriated" for governmental use and the owner deserves compensation.[10]

5. U.S. CONST. amend. V. The amendment was intended not to preclude taking of private property for public purposes, but to secure compensation in such event. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 315 (1987).

6. *See, e.g.*, United States v. Carmack, 329 U.S. 230, 242 (1946) ("[W]hen the Federal Government . . . takes for a federal public use the independently held and controlled property of a state or of a local subdivision, the Federal Government recognizes its obligation to pay just compensation for it. . ."); California v. United States, 395 F.2d 261, 263-64 (9th Cir. 1968) ("[T]he Fifth Amendment protects the property of the State from appropriation by the United States without 'just compensation.' This is true even when the property has been dedicated by the State to public use.").

7. *See, e.g.*, Berman v. Parker, 348 U.S. 26 (1954) (condemnation of land for redevelopment pursuant to District of Columbia Redevelopment Act).

8. *See, e.g.*, United States v. Causby, 328 U.S. 256 (1946) (government planes flying low over a chicken farm constituted a compensable physical invasion that prevented the owner from operating a successful chicken farming business); Baker v. Burbank-Glendale-Pasadena Airport Auth., 705 P.2d 866 (Cal. 1985), *cert. denied*, 475 U.S. 1017 (1986) (homeowners allowed to sue municipality for taking resulting from noise and vibrations caused by aircraft).

9. *See, e.g.*, Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922) (statute forbidding mining of subsurface coal constituted taking of coal); Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) (interest in environmental data recognized as a trade secret under state law and thus was a property interest for takings purposes). *But see* Calvert Invest. Inc. v. Louisville Metro. Sewer Dist., 847 F.2d 304 (6th Cir. 1988) (no property interest in expectation to continue delivering sewage treatment services); United States v. Charles George Trucking Co., 682 F. Supp. 1260 (D. Mass. 1988) (entry onto property for CERCLA clean-up purposes is not a taking); Cecos Int'l Inc. v. Jorling, 706 F. Supp. 1006 (N.D. N.Y. 1989), *aff'd*, 895 F.2d 66 (2d Cir. 1990) (company's expectation that permit procedures will not change is not a protected property interest for takings purposes); Environmental Waste Control, Inc. v. Agency for Toxic Substances and Disease Registry, 763 F. Supp. 1576 (N.D. Ga. 1991) (damage to business reputation from preliminary assessment under CERCLA not a protected property interest); Lachney v. United States, 2 Cl. Ct. 244 (1983), *aff'd*, 765 F.2d 158 (Fed. Cir. 1985) (two year delay in granting permit pursuant to Clean Water Act § 404 did not constitute a taking).

10. The analysis to determine whether compensation is deserving, however, is different for each type of taking. Physical appropriations have, at least since Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), required no consideration of

B. *Court Proceedings in a Takings Case*

Controversies involving potential takings are unique in that property owners' various remedies are not necessarily pursued in one case. For example, permit denial or a zoning action may be challenged under applicable substantive criteria (i.e., statutory or regulatory law) before an administrative law judge. This is distinguished from rights the property owner may have under the Fifth Amendment. When confronted with a permit denial, an owner who believes that his property has been "taken" can pursue his substantive case before an administrative law judge and can also pursue compensation for a taking in claims court.[11]

An owner can pursue equitable relief in claims court, but courts favor using claims court for money damages only.[12] This rule relates directly to the maxim that the necessity of compensation does not result from unlawful government actions, but instead from lawful exercises of regulatory powers that do not include compensation for losses.[13]

Takings claims for monetary relief proceed under the Tucker Act in claims court.[14] The general policy has been stated by the United States Supreme Court in the case of *United States v. Riverside Bayview Homes, Inc.*:[15]

> We have held that, in general, "[e]quitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to a taking. *Ruckelshaus v. Monsanto Company*, 467 U.S. 986, 1016 (1984) [citation omitted].

The United States Claims Court has jurisdiction "to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."[16] However,

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whether the government legitimately has regulated. Compensation is instead deserving upon a determination that a physical appropriation has occurred. Regulatory takings determinations take account not only of whether legitimate governmental action might preclude recovery, but also of the remaining value of property after governmental action. These are essentially *ad hoc*, factual inquiries, and do not always result in a compensable taking. Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124, (1978).

11. With limited exceptions, the federal district courts have concurrent jurisdiction for claims against the United States not exceeding $10,000. 28 U.S.C. § 1346(a)(2) (1988).

12. The claims court may grant declaratory judgements and grant equitable relief (including injunctions) within its jurisdiction. 28 U.S.C. § 1491(a)(2) and (3) (1982). However, the Supreme Court indicated in Preseault v. ICC, 494 U.S. 1 (1990), that Takings Clause cases should be pursued in claims court as suits for compensation.

13. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 492 at n.22 (1987) (illegal actions or public nuisances are not compensable).

14. 28 U.S.C. § 1491(a)(1)(1988); Preseault v. ICC, 494 U.S. 1 (1990) (takings challenge to conversion of public lands easement from railroad to public trail without permission was premature when not brought in claims court first).

15. 474 U.S. 121, 127-28 (1985) (facial challenge to permit requirements of § 404 of the Clean Water Act as regulatory taking premature.).

16. 28 U.S.C. § 1491 (a) (1) (1988).

> [T]he United States Claims Court shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.[17]

The statute of limitations for actions over which the claims court has jurisdiction is six years.[18] With limited exceptions, the federal district courts have concurrent jurisdiction for claims against the United States not exceeding $10,000.[19] Claims court judges can sit anywhere within the United States to take evidence and enter judgment.[20] Parties can appeal claims court decisions to the Federal Circuit Court of Appeals, which has exclusive jurisdiction to hear claims court cases.[21]

III. THE LAW OF REGULATORY TAKINGS PRIOR TO AND AFTER *LUCAS*

The Supreme Court issued its decision in *Lucas* in late June, 1992. The decision, one of two takings cases decided by the Court,[22] marked a turning point in takings analysis.

A. *Prior to* Lucas—*Balancing of Governmental Interests against Owner's Interests*

The test for determining whether government action amounts to a regulatory taking has appeared in two related forms since 1980. Each test basically requires balancing legitimate governmental interests against a property owner's right to compensation for the resulting reduction in the property's value.[23]

The *Agins* two-part test was announced in 1980.[24] Under the *Agins* test, one can recover compensation pursuant to the Fifth Amendment where: (1) government action fails to substantially advance a legitimate governmental interest; or (2) government action effectively deprives the

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17. *Id.* § 1500.

18. *Id.* § 2501. *See also* DiPerri v. Federal Aviation Admin., 17 ERC 1792 (D. Mass. 1981) (action for uncompensated taking for noise associated with Logan Airport accrued at least 15 years earlier and was barred by six-year statute of limitations).

19. 28 U.S.C. § 1346(a)(2). *See also* United States v. Mt. Vernon Memorial Estates, Inc., 17 ERC 2212 (N.D. Ill. 1981) (district court did not have jurisdiction to hear eight million dollar counterclaim by landowners for taking resulting from denial of permit to construct sanitary landfill).

20. 28 U.S.C. § 2505 (1988).

21. *Id.* § 1295(a)(3).

22. The other case that the court decided was Yee v. City of Escondido, 112 S. Ct. 1522 (1992), concerning whether a rent control ordinance amounted to a taking.

23. *See* Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 60 (1964); Richard A. Epstein, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985). For a recent review of takings analysis as it relates to selected environmental matters prior to *Lucas*, see James S. Burling, *Property Rights, Endangered Species, Wetlands, and other Critters — Is it Against Nature to Pay for a Taking?* 27 LAND & WATER L. REV. 309 (1992).

24. Agins v. Tiburon, 447 U.S. 255 (1980).

owner's property of all economic value.[25] In *Agins*, plaintiff developers sought compensation for a taking of a five-acre tract because the City of Tiburon restricted development of that tract to five or fewer single-family homes.[26] Plaintiffs had planned to build multi-family dwellings on the property.[27] The Supreme Court ruled that the restriction did not amount to a taking.[28] The Court's discussion focussed on the City's legitimate exercise of a governmental interest and less on determining the tract's residual value.[29] In fact, the Court went so far as to speculate that the owner might actually benefit from leaving the tract undeveloped, and that such a benefit could offset any losses.[30]

The Court also used the *Agins* test to decide *Nollan v. California Coastal Comm'n.*[31] In *Nollan*, a state agency conditioned a private property owner's building permit on securing a right-of-way across the owner's land.[32] The easement supposedly improved public access to the beach.[33] The *Nollan* Court refined the "legitimate state interests" test, requiring a substantial "nexus" between the exercise of governmental authority and the purpose to be achieved.[34] The Supreme Court saw through the defendant's veiled purpose of preserving public access to a beach by requiring plaintiff to grant a right-of-way across its property when constructing their home. The Court stated that beach access might be a laudable purpose, but a single property owner cannot be required to relinquish a major property interest (i.e., the right to exclude others) to promote that purpose without being compensated for a taking.[35] The Court ruled that a taking had occurred because the law did not effectively advance a legitimate state interest.[36]

In other cases, however, the Court has employed a three-prong test that balances various factors related to the *Agins* test.[37] Three factors that have particular significance in this regard are: (1) the character of government action; (2) the economic impact of government action; and

25. *Agins*, 447 U.S. at 260. *See also* United States v. Riverside-Bayview Homes, Inc., 474 U.S. 121 (1985) (although test not applied, Court reiterates applicability of *Agins* test).
26. *Agins*, 447 U.S. at 257.
27. *Id.* at 258.
28. *Id.* at 263.
29. *Id.* at 260-61.
30. *Id.* at 262.
31. Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).
32. *Id.* at 827.
33. *Id.* at 828.
34. *Id.* at 837.
35. *Id.* at 841. The Supreme Court has not elaborated an exact standard for determining what constitutes a "legitimate state interest." Federal courts have seldom found that a taking occurs solely because a legitimate governmental interest is not substantially advanced, but rather have found it necessary in every case to include at least a nominal discussion of economically viable use of the property at issue. *See, e.g.*, Avoyelles Sportsman's League v. Alexander, 511 F. Supp. 278 (W.D. La. 1981), *aff'd in part rev'd in part*, 715 F.2d 897 (5th Cir. 1983) (state has legitimate interest in regulating wetlands under § 404 of Clean Water Act).
36. *Nollan*, 483 U.S. at 841.
37. This test existed prior to *Agins*. The two tests relate in that *Agins* essentially restates the three-prong test as a general, two-part balancing test. Until *Lucas*, the tests have survived as independent analyses.

(3) the extent to which government action interferes with distinct, investment-backed expectations.[38] Although the *Agins* test has survived, recent courts have used this three-prong test to analyze takings issues.[39] The Court seemingly employs the three-prong test to focus more directly on matters from an owner's perspective. Accordingly, a taking occurs if the injury to the property is sufficiently severe, even though the government might have a legitimate interest in regulating.

For example, in *Florida Rock Industries, Inc. v. United States*,[40] the Federal Circuit noted that the "holding or plain implication of *Riverside Bayview Homes, Inc.*[41] . . . is that a regulation can be a taking if its effect on a landowner's ability to put his property to productive use is sufficiently severe."[42] In *Florida Rock*, the plaintiff was a limestone miner who was denied a Section 404 permit under the Clean Water Act to mine ninety-eight acres of a 1,560 acre tract.[43] In its analysis, the court recognized that Clean Water Act regulations substantially advance the public welfare.[44] However, the court downplayed the environmental degradation or "pollution" that the regulations prevented. In balancing public against private interests, the court in *Florida Rock* concluded that this was a situation where a private interest deserved compensation for

38. Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211, 224-25 (1986) (citing *Penn Central*, 438 U.S. at 124).

39. *See, e.g.*, Duquesne Light Co. v. Barasch, 488 U.S. 299 (1989) (statute precluding recovery of costs spent on defunct nuclear power plant did not interfere with utility's overall investment-backed interests); Keystone Bituminous Coal Ass'n v. DiBenedictis, 480 U.S. 470 (1987) (no taking of subsurface coal where state has legitimate purpose for regulating and coal's value not diminished). Other cases not discussed here also use the three-prong test, including: Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) (chemical company on notice of conditions in which EPA can release information relating to registration of chemicals under FIFRA and had no reasonable investment-backed expectation that information would be protected); Price v. City of Junction, 711 F.2d 582 (6th Cir. 1983) (ordinance allowing city to order removal of junked vehicles from property does not deny landowner of economically viable uses of land); Atlas Corp v. United States, 895 F.2d 745 (Fed. Cir.), *cert. denied*, 498 U.S. 811 (1990) (UMCTRA regulations requiring company to stabilize mill uranium tailings piles did not interfere with investment-backed interests); Skaw v. United States, 740 F.2d 932 (Fed. Cir. 1984) (governmental designation of river area for protection under National Wild and Scenic Rivers Act may have deprived land owners of economically viable use of mining claim); Ciampitti v. United States, 22 Cl. Ct. 310 (1991) (denial of permit to fill New Jersey wetlands did not deprive owners of all economically viable use of property, owners had unreasonable expectation that property could be developed profitably; mixture of *Agins* and three-part test); Dufau v. United States, 22 Cl. Ct. 156 (1990) (mixture of *Agins* and three-part test; sixteen-month delay in issuing permit did not constitute a temporary taking because it did not deprive owners of enough economically viable use of property); Jentgen v. United States, 657 F.2d 1210 (Ct. Cl. 1981), *cert. denied*, 455 U.S. 1017 (denial of permits to construct near navigable waters of the United States did not render property valueless); Deltona Corp v. United States, 657 F.2d 1184 (Ct. Cl. 1981), *cert. denied*, 455 U.S. 1017 (1982) (denial of § 404 of Clean Water Act permit did not render property valueless); Claridge v. New Hampshire Wetlands Bd., 485 A.2d 287 (N.H. 1984) (owners could not reasonably expect to develop property containing wetlands and thus no taking occurred).

40. 791 F.2d 893 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987).

41. 474 U.S. 121 (1985). The *Riverside* case criticized the lower court's narrow construction of § 404 regulations of the Clean Water Act to avoid compensation. *Id.* at 127.

42. *Florida Rock*, 791 F.2d at 900.

43. *Id.* at 895-96.

44. *Id.* at 898.

loss incurred, aside from the threat that regulation prevented.[45]

B. Lucas *Clarifies the Test for Determining Whether Government Action Amounts to a Regulatory Taking*

The Court's decision in *Lucas* comes full circle in a sense. It integrates the current emphasis on economic impacts highlighted by the three-prong test into the *Agins* test, to provide clarity for future takings cases. In *Lucas*, plaintiff Lucas sued because legislation amending the South Carolina Coastal Zone Management Act of 1972,[46] passed subsequent to his acquisition of beachfront property, prevented him from developing two lots situated along the South Carolina coast.[47] The case made its way through the South Carolina courts until the state supreme court ruled that the legislation prevented harmful and noxious public nuisances and therefore fell within the traditional "nuisance" exception to a taking.[48]

Although the facts of the case center around the nuisance exception, the Supreme Court takes the opportunity to clarify the takings test. The Court first re-enunciates the *Agins* two-part standard as its test, this time placing emphasis on the second prong, denial of all economically beneficial use.[49] The Court reasons that the "deprivation of all economically viable use" test gives merit to the common law "equities" approach which holds that it is fair to compensate someone who has lost all property value, regardless of whether the government action is justified.[50] To bolster this equitable emphasis, the Court justifies its rule by using an historical perspective.[51] Having taken an historical perspective, the Court delivers an implicit message: because traditional condemnation law centered around an owner's loss of property, the law of regulatory takings analysis should square with its historical origins.[52] The Court thus abandons any sort of balancing test and establishes the important initial consideration for future courts—reduction in property value. Whether a regulation advances legitimate governmental interests is secondary to this analysis.[53]

45. *Id.* at 905-06. *See also* Loveladies Harbor, Inc. v. United States, 21 Cl. Ct. 153 (1990) (property owner compensated for denial of § 404 permit under the Clean Water Act).

46. S.C. Code Ann. § 48 (Law Co-Op. 1976 & Supp. 1992).

47. *Lucas*, 112 S. Ct. at 2889-90. *Lucas* is related directly to two other consolidated cases decided pursuant to the same statute in South Carolina. Both cases were not takings where beachfront houses once existed, were destroyed by weather, and could not be rebuilt because of statutory prohibitions. *See* Esposito v. South Carolina Coastal Council, 939 F.2d 165 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 3027 (1992).

48. *Lucas*, 112 S. Ct. 2886.

49. *Id.* at 2893-95.

50. *Id.* at 2894.

51. *Id.*

52. *Id.* at 2893.

53. *Id.* The Court's clarification, however, is not entirely pro-property. The Court emphasized that it will not compensate for less than "total" reductions in value. *Id.* at 2895.

C. Lucas *did not Decide all Questions Related to Residual Value after Government Action, but does Offer New Guidance*

The trial court in *Lucas* determined that the South Carolina statute had reduced Mr. Lucas' property value to nothing.[54] Therefore, the Court does not address directly the considerations involved in establishing a total deprivation of property value. Some of these considerations are: (1) What percentage of the property's value must be lost to amount to a "total deprivation?" (2) What types of remaining uses for the property are considered in determining its residual value? (3) How does the Court consider smaller parcels that are part of larger parcels? Although these questions are not addressed directly, the Court drops some rather strong hints for future cases.

1. What Percentage of the Property's Value must be Lost to Amount to a "Total Deprivation?"

No question now exists that an owner whose property contains no residual value should be compensated.[55] Can this be expressed in percentages? In short, probably. The Court speaks to this issue in footnote eight of its majority opinion, responding to Justice Stevens' dissent.[56] In his dissent, Justice Stevens argues that the majority's opinion is unfair in that someone who loses ninety-five percent of his property's value will not be compensated, while someone who loses just five percent more, or one hundred percent of his property, will be compensated.[57] But the majority refuses to apply percentages to the loss in value,[58] instead referring to other inquiries such as "the economic impact of the regulation on the claimant and . . . the extent to which the regulation has interfered with distinct investment-backed expectations."[59] In this way, the Court shows its preference for a non-numerical analysis that could result in a taking regardless of the percentage of property deprived of value.

2. What Types of Remaining Uses for the Property are Considered in Determining its Residual Value?

Most property can be used for some purpose, even though it might not be developed. For example, a piece of beachfront property might provide both a scenic spot for tourists and wildlife habitat. These types of uses, however, provide little or no income to the developer, whose plans generally include maximizing income by providing exclusive use

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54. *Id.* at 2896.
55. *Id.*
56. *Id.* at 2895.
57. *Id.*
58. This approach has been taken by the lower courts. *See, e.g.*, Dirt, Inc. v. Mobile County Comm'n, 739 F.2d 1562 (11th Cir. 1984) (92% reduction in land value resulting from denial of landfill permit for company operating 14 years not enough to constitute a taking).
59. *Lucas*, 112 S. Ct at 2895 (citing *Penn Central*, 438 U.S. at 124). Note that these inquiries are part of the three-prong test, further indication that the Court is trying to integrate the two tests.

to the owner. Should this make a difference in takings cases?[60] The Court's discussion of whether significant residual value remains in non-income producing property again appears in footnote eight.[61] The majority acknowledges to Justice Stevens that it might consider other types of deprivations as takings, such as interests in excluding strangers from one's land. The majority, however, dodges Justice Stevens' real criticism, that "developmental" uses should not be the only uses the court should consider when determining whether property has any remaining value. If no developmental uses remain, the property still might have enough value remaining to avoid a taking.[62]

The majority indicates that deprivation of all developmental uses seems to be enough for the Court to require compensation.[63] The Court repeatedly equates deprivation of all property uses with "productivity" in its traditional sense, and refers indirectly to several environmental uses as "unproductive" and "idle" uses of property.[64] Two references to the Court's discussion of the takings test illustrate the point:

> On the other side of the balance, affirmatively supporting a compensation requirement, is the fact that regulations that leave the owner of land without economically beneficial or productive options for its use—*typically, as here, by requiring land to be left substantially in its natural state*—carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm. [emphasis added].
>
> We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* [emphasis in original] economically beneficial uses in the name of the common good, *that is, to leave his property economically idle,* he has suffered a taking.[65] [emphasis added].

In addition, the Court compares regulatory takings to statutes that impose servitudes on private scenic lands. Such statutes "suggest the practical equivalence in this setting of negative regulation and appropriation."[66] The Court's negative reference to wildlife refuges, scenic easements and other protective easements for historic architectural, archeological, or cultural purposes implies that such laws might amount to compensable takings in the future.[67]

60. This controversy has been brewing in the lower courts. In *Florida Rock*, for example, the trial court refused to consider the value of the property to the government as a measure of residual value in a property, and instead referred to the lack of business interest in the property to prove that the property had no residual value after government action. Florida Rock Indus., Inc. v. United States, 21 Cl. Ct. 161, 171-74 (1990).

61. *Lucas*, 112 S. Ct. at 2895.

62. *Id.*

63. *Id.* at 2899.

64. *Id.* at 2894-95.

65. *Id.*

66. *Id.* at 2895.

67. *Id.*

3. How does the Court Consider "Partial" Takings, *i.e.*, Smaller Parcels that are Part of Larger Parcels?

Although the *Lucas* case clearly decides that deprivation of all economically beneficial use is reason in itself to compensate an owner for a taking, the case does not address the issue of partial takings, which is fundamental to determining economic deprivation.[68] "Partial takings" result when a court considers denial of a permit for development of only a portion of an owner's larger holdings.[69]

For example, assume that Development, Inc. owns a 100 acre parcel. Owners like Development, Inc. commonly buy large parcels and develop only a section at a time. In this case, Development, Inc. decides to develop twenty of the 100 acres. The government, however, determines that it will deny necessary approval to develop the twenty acres because all of the subparcel contains wetlands.[70] Thus, the twenty acre portion of Development, Inc.'s 100 acre parcel is rendered idle and Development, Inc.'s investment is for naught.

Will the Court require the government to compensate Development, Inc. for the lost investment in that twenty acres, or will the Court look at the entire holdings of Development, Inc. adjacent to and surrounding the twenty acres, and determine that no compensation is necessary, because only twenty percent of the entire parcel is reduced in value? The question arises because the Court has used both approaches in nearly identical cases.[71] Indeed, the Court openly acknowledges that the issue exists and must be resolved in a future case.[72]

A close reading of *Lucas* indicates that partial takings similar to the above scenario will likely be compensated. Indeed, compensating partial takings follows logically from the Court's justification that regulatory takings resemble physical invasions, or appropriations.[73] Physical inva-

68. As the Court stated in footnote seven, the new rule emphasizing total deprivations of property value has more rhetorical than real force until the issue of whether to compensate partial takings is settled. *Id.* at 2894. *See generally* Frank I. Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1190-93 (1967).

69. *Lucas*, 112 S. Ct. 2886. The Court passed on an opportunity after *Lucas* to decide the partial takings issue (also referred to as the "parcel as a whole" question) when it refused to review *Tull v. Virginia*, 113 S. Ct. 191 (1992). *See also Wetlands: High Court Foregoes Opportunity to Define 'Parcel as a Whole' for Compensable Takings*, 23 Env't Rep. Current Dev. 1551 (1992).

70. Several cases have addressed takings as a result of denial of a § 404 permit. *See generally* Florida Rock Indus., Inc. v. United States, 21 Cl. Ct. 161, 164 (1990); Loveladies Harbor, Inc. v. United States, 21 Cl. Ct. 153, 154 (1990); Ciampitti v. United States, 18 Cl. Ct. 548, 550 (1989).

71. *Compare* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414 (1922) (law restricting subsurface extraction of coal held to effect a taking) *with* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497-502 (1987) (nearly identical law held not to effect a taking). 112 S. Ct. at 2894 n.7.

72. Perhaps as a way to forecast how the Court will resolve the tension between the two holdings, the Court refers to "the State's law of property — *i.e.*, whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claim alleges an diminution in (or elimination of) value." *Lucas*, 112 S. Ct. at 2894 n.7.

73. *Id.* at 2894.

sions are compensated even though a potentially small part of one's property might be taken.[74] Thus, partial takings should be compensated no matter how small.

The view that partial takings should be compensated finds much support in the Court's discussion. The Court repeatedly compares regulatory deprivations to physical appropriations that are compensated regardless of the government's interest in regulating.[75] For example, eminent domain statutes creating scenic easements are similar to regulatory takings.[76] Such statutes often impinge on only a portion of an owner's property.

More generally, the Court warns against government's ability to press private property into some form of public purpose under the guise of mitigating serious harm.[77] The Court views restrictive regulations almost as a legislative evil, stating that the economically beneficial use test should not succumb to "our usual assumption that the legislature is simply 'adjusting the benefits and burdens of economic life.' "[78] In addition, although total deprivations of beneficial use will be relatively rare,[79] the Court spends much more discussion justifying that total deprivations are compensable when they happen.

In other comments, the Court emphasizes repeatedly that good reasons exist for its frequently expressed belief that owners who sacrifice all economically beneficial uses in the name of the common good must be compensated.[80] Finally, probably the most revealing hint is the Court's criticism of its holding in *Penn Central* in footnote seven.[81] In *Penn Central*, the Court refused to compensate a property owner for a regulatory taking, because regulation deprived him of only a portion of his property. The Court reveals in *Lucas* that the *Penn Central* holding is now "extreme and unsupportable."[82]

D. Lucas *Limits the Scope of the Nuisance Exception Depending on State Law*

A long line of cases establish that "harmful or noxious uses" of property can be proscribed without compensation.[83] This exception is

74. *Id.* at 2893. The most recent case on point is Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (plaintiff suffered a taking through physical invasion of only 1 1/2 cubic feet of a building for cable TV lines).

75. *Lucas*, 112 S. Ct. at 2894-95.

76. *Id.* at 2895.

77. *Id.*

78. *Id.* at 2894.

79. *Id.* at 2894.

80. *Id.* at 2895.

81. "For an extreme —and, we think, unsupportable—view of the relevant calculus, see *Penn Central Transportation Co v. New York City*, 366 N.E.2d 1271, 1276-77 (1977), *aff'd*, 438 U.S. 104 (1978), where the state court examined the diminution in a particular parcel's value produced by a municipal ordinance in light of the total value of the taking claimant's other holdings in the vicinity. Unsurprisingly, this uncertainty regarding the composition of the denominator in our 'deprivation' fraction has produced inconsistent pronouncements by the Court." *Lucas*, 112 S. Ct. at 2894 n.7.

82. *Id.*

83. *Id.* at 2897. Several cases were cited in *Lucas* for this proposition. Mugler v. Kansas, 123 U.S. 623 (1887) (law prohibiting manufacture of alcoholic beverages); Hadachek

commonly called the "nuisance" exception to a taking, although the *Lucas* Court is careful to characterize the exception as potentially broader, falling within the state's general police powers.[84] The nuisance exception is not subject to takings analysis. Instead, the exception falls outside the parameters of consideration indicating whether a taking has occurred.

The *Lucas* Court rejects the nuisance exception to the extent that the "legitimate state interest" test restates the same concern. To the extent that a statute contains no direct, specific and clearly stated link to the common law of nuisance in that state, it is not a nuisance exception to a taking.[85] In such case, laws should be analyzed as part of a takings analysis, and should be considered under the "legitimate state interests" test. This change is bound to diminish the number of cases that are subject to the nuisance exception and therefore will increase the chances that exercise of regulatory powers amounts to a taking.[86]

In response to *Lucas*, legislatures would be well-advised to re-examine state land use restrictions, and amend laws to either strengthen their connection with common law nuisance principles or otherwise amend laws to avoid unconstitutional takings if connections with common law do not exist. Mere recitations of general purposes won't protect state governments.[87]

E. Lucas *does not Address the Practical Issue of Quantifying Damages*

The Court in *Lucas* did not address how to value the property that Mr. Lucas lost. Instead, the Court remanded the case to the South Carolina court for further proceedings.[88] To date, the lower courts have used several methods to value land. One might extrapolate those approaches to apply to other property such as water. Practically speaking, determining the amount of reduction in value is difficult and can easily dissolve into a "battle of the experts."

1. Options for Valuing Land

A review of three recent claims court cases in which damages were awarded for reduction of property value upon denial of a Section 404

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v. Sebastian, 239 U.S. 394 (1915) (law barring operation of brick mill in residential area); Miller v. Schoene, 276 U.S. 272 (1928) (order to destroy diseased cedar trees to prevent infection of nearby orchards); Goldblatt v. Hempstead, 369 U.S. 590 (1962) (law effectively preventing continued operation of quarry in residential area).

84. *Lucas*, at 2897.

85. *Id.* at 2900-01. The *Lucas* Court states that all legislation must identify common law principles and show their relationship to the current restriction, i.e., the Court will not "fill in the blanks" for state legislatures.

86. There exists little means of predicting the number of cases that will now result in compensation to owners because of this shift. No doubt the initial barrier of the nuisance exception will be easier to overcome for a time. In cases where a taking has clearly occurred but for this exception, chances are greater that owners will now be compensated.

87. Ironically, even though the Court criticizes the "artfulness" of legislative drafting, it has seemingly established a future of artful drafting in state legislatures.

88. *Lucas*, 112 S. Ct. at 2902.

permit under the Clean Water Act illustrates the difficulty of valuing property. Simply put, the court must determine the value of the property prior to government action and subtract any remaining value after government action from that amount. Applying this simple concept, however, leads to various results. In both *Florida Rock* and *Loveladies Harbor*,[89] the fair market value of the property at the time of the taking (also the fair market value of the property prior to government action) was the value of damages. For example, in *Florida Rock*, the property was valued at $10,500 per acre prior to government action and ninety-eight acres were lost ($1,029,000 was awarded in damages). Although both courts preferred to use a "comparable sales" figure in calculating the fair market value of property prior to government action, they disagreed on how to calculate that figure. "Comparable sales" are used often in real estate valuations. One looks for sales of comparable property under comparable conditions to determine market value. In *Florida Rock*, the trial court ultimately rejected a comparable sales analysis as not comparable enough, and used a different calculation that was based on acquisition cost, adjusted for the "changing value of money and reality." In *Loveladies Harbor*, the court employed another variation on "comparable sales," projecting the value of the property after development, and then subtracting development costs from the final total. Finally, *Formanek*[90] uses the *Loveladies Harbor* approach, but adjusts the dollar values to reflect present values.

2. Options for Valuing Water

Comparable sales analysis is quite useful if one can find comparable situations to use as a baseline in calculating value. Difficulty arises with this approach, however, when property is more unique such as water rights[91] and mineral rights.[92] If at least three means of calculating comparable sales of land exist, imagine the difficulty in determining values of these more obscure types of property.

If one applies the above approaches to valuing water several possible valuations can result. Using a water reservoir project as an example, one might arrive at a "comparable" sales figure by determining the value of water sold in another similar project. One might also reasonably determine the cost of the project after development and adjust that

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89. In Loveladies Harbor, Inc. v. United States, 21 Cl. Ct. 153 (1990), plaintiff was denied a § 404 permit under the Clean Water Act to develop 11.5 acres of 51 acres remaining from a 250 acre tract in New Jersey.

90. Formanek v. United States, 26 Cl. Ct. 332 (1992).

91. For a more in-depth discussion of regulatory takings as they apply to water rights, see David C. Hallford, *Environmental Regulations as Water Rights Takings*, NAT. RES. & ENVT. 13-15, 54-56 (Summer 1991).

92. *See* Whitney Benefits, Inc. v. United States, 926 F.2d 1169 (Fed. Cir.), *cert. denied*, 112 S. Ct. 406 (1991) for a recent discussion differentiating between land and mineral rights. Other recent mineral rights cases which constitute takings include: NRG Co. v. United States, 24 Cl. Ct. 51 (1991) (cancellation of mineral prospecting permits on Indian lands constituted taking); United Nuclear Corp. v. United States, 912 F.2d 1432 (Fed. Cir. 1990) (expectation of mining lease approval is a reasonable, investment-backed expectation).

cost to today's dollars. The difficulty comes when determining the value of water after government action. Water rights can be "changed" through court proceedings and used for other purposes, but such a change almost always diminishes the amount of the water right.[93] In addition, one cannot realistically determine the results of a change case without actually going through the process. A change case could result in a total loss of rights, or might diminish the right only marginally.[94] Predicting a result is impossible.

III. CONCLUSION

During the Reagan-Bush era, the claims court was revived and subsequent claims court decisions of Reagan-Bush appointees have awarded high dollar amounts in damages for regulatory takings.[95] In addition, the Supreme Court, now weighted heavily with Republican appointees, has established the claims court as the sole venue for takings claims seeking compensation. Now that *Lucas* has been decided, the claims court has a mandate to continue issuing decisions that take less account of legitimate state interests in regulating and more account of a loss in an owner's property value resulting from that regulation. Any far-reaching environmental regulations enacted under President Clinton could reach into the federal government's pocket as well. In the final analysis, following *Lucas*, more owners will be compensated for regulatory takings.

93. *See* Hallford, *supra* note 92.

94. In *Whitney Benefits*, 926 F.2d at 1175-76, the court determined that the existence of a statutory provision, 30 U.S.C. § 1260(b)(5), that enabled the federal government to exchange coal that could not be developed for coal that could be developed, did not preclude the court from finding that SMCRA provisions precluding surface mining of alluvial valley floors constituted a taking.

95. Damages amounting to over a million dollars in each case were awarded in *Florida Rock* and *Loveladies Harbor*. *See supra* text accompanying notes 89-90.