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John A. Humbach

Elisabeth Haub School of Law at Pace University

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“TAKING” THE IMPERIAL JUDICIARY SERIOUSLY: SEGMENTING PROPERTY INTERESTS AND JUDICIAL REVISION OF LEGISLATIVE JUDGMENTS

*John A. Humbach**

I. INTRODUCTION

On the day the Supreme Court decided *Lucas v. South Carolina Coastal Council*,¹ Justice Antonin Scalia, who wrote the *Lucas* majority opinion, declared with plain chagrin: “The Imperial Judiciary lives.”² He criticized his “unelected, life-tenured” colleagues in the strongest terms for allowing the Court to succumb to the “more natural direction” of its temptation—the direction of “systematically eliminating checks upon its own power.”³ He cited the fears of Lincoln that “if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, . . . the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.”⁴

Lucas was brought by a land owner who lost the whole value of his ocean front property as a result of a government regulation on beach development.⁵ For months, people concerned about property rights, the environment and “takings” had speculated on how the Supreme Court would deal with *Lucas*’s extreme facts. Then, on the very last day of the Court’s term, came Justice Scalia’s tough words on judicial overstepping and his opinion in *Lucas*. From Scalia’s remarks it might have seemed that the time was nigh

* James D. Hopkins Professor of Law, Pace University School of Law, White Plains, New York.

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

2. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2882 (1992) (Scalia, J., dissenting).

3. *Id.* at 2874.

4. *Id.* at 2883 (quoting Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), reprinted in INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES, S. Doc. No. 101-10, 101st Cong., 2d Sess. 139 (1989)) (alterations in original).

5. Actually, it may be “highly questionable” whether the regulation in question actually deprived Mr. Lucas of *all* of the land’s value. *Lucas*, 112 S. Ct. at 2995 (statement of Souter, J.). This was, however, the South Carolina lower court’s finding. *Id.* at 2890. The Supreme Court accordingly decided *Lucas* under this factual assumption. *Id.* at 2896 n.9.

for a resounding re-endorsement of the traditional authority of legislatures to set public policy on problematic uses of land. It might have seemed that the Supreme Court would at last rein in certain lower courts and their recent forays into Takings Clause activism, putting an end to judicial preemption of laws duly made under our nation's democratically-driven processes.

Alas, however, Justice Scalia's remarks were not in *Lucas*, but in another case. What the Supreme Court did in *Lucas* itself was to reassign flat-out a portion of this nation's ultimate environmental and land use authority from the legislatures, which traditionally had it,⁶ to the courts. It did so by holding that the Takings Clause⁷ of the United States Constitution forbids state legislatures to remedy defects in the common law of nuisance if the objectionable land uses happen to be the only marketable uses of the regulated land.⁸ As a result, the common law of nuisance has become a criterion of "taking" when disaffected owners challenge land use legislation.

For hundreds of years, state legislatures and their parliamentary predecessors exercised the power to declare new kinds of public nuisance and add to the list of socially intolerable uses of land as new needs became evident.⁹ By establishing common-law nuisance as a criterion of takings, the Supreme Court has directed courts to reevaluate such legislative determinations in light of the judiciary's own set of rules concerning land use rights and

6. See *infra* note 9 and text accompanying notes 38-41.

7. U.S. CONST. amend V. The Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation." *Id.*

8. In the Court's words, a regulation that takes "all economically productive or beneficial uses of land," *Lucas*, 112 S. Ct. at 2901, "cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Id.* at 2900. When regulations do more than merely "duplicate the result that could have been achieved in the courts" under common law, compensation must be paid. *Id.*

Although the *Lucas* Court specified background principles of property as well as nuisance, it focused in its subsequent discussion solely on the common law of nuisance. *Id.* at 2901-02. The distinctive background principles of property to which the Court referred remain unclear. This Article likewise focuses on nuisance.

9. *Hadacheck v. Sebastian*, 239 U.S. 394, 411 (1915); *Reinman v. Little Rock*, 237 U.S. 171 (1915). See generally J.R. Spencer, *Public Nuisance—A Critical Examination*, 48 CAMBRIDGE L.J. 55 (1989) (discussing development of the public nuisance doctrine). The courts have had that power too, of course, but courts are supposed to act case by case and follow precedent—a generally restraining force when it comes to legal reform. See, e.g., *Gorieb v. Fox*, 274 U.S. 603, 608 (1927) (quoted *infra* text accompanying note 52); *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870, 871 (N.Y. 1970) ("[T]he judicial establishment is neither equipped . . . nor prepared" to lay down effective pollution policy "as a by-product of private litigation."). Therefore, as new needs become apparent, it has been "the great office of statutes . . . to remedy defects in the common law . . . adapt[ing] it to the changes of time and circumstances." *Munn v. Illinois*, 94 U.S. 113, 134 (1876). For a more detailed discussion see John A. Humbach, *Evolving Thresholds of Nuisance and the Takings Clause*, 18 COLUM. J. ENVTL. L. 1, 17-22 (1993); see also Joseph L. Sax, *The Constitutional Dimensions of Property: A Debate*, 26 LOY. L.A. L. REV. 23, 27-29 (1992).

wrongs. In doing so, it has elevated the common law of nuisance—and the judges who define it—to a new ascendancy over legislatures' traditional land use authority, at least for the “relatively rare situations”¹⁰ of “total regulatory takings”¹¹ to which *Lucas* applies.

There is indication that the Supreme Court may be inclined to expand the range of cases in which its new nuisance criterion will apply.¹² Prior to *Lucas*, some lower federal courts had already begun to do their own judicial reevaluations of legislatively determined land use policy.¹³ When these courts found that their own perceptions of harm or balance differed from those of the legislature, they declared the legislature's land use restrictions to constitute takings that required the government to pay compensation. The regulatory impacts in these cases did not necessarily rise to the level of the total taking involved in *Lucas*. The question is whether the Supreme Court will follow the lead of these courts and expand the range of takings cases in which courts reconsider the same balance of factors, interests and policy concerns that were before the legislature.

No one seems to disagree that some uses of private land are simply too intolerable for the law to allow, and that society at large does not have a duty to pay people to refrain from such intolerable uses.¹⁴ The really diffi-

10. *Lucas*, 112 S. Ct. at 2894. The Court said that the cases of total takings to which *Lucas* applied were “relatively rare situations” or “extraordinary circumstance[s].” *Id.* *But cf.* discussion *infra* text accompanying notes 142-43 (discussing the potential expansion of *Lucas*'s nuisance criterion).

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

12. The most likely way that this would occur is through truncation or elimination of the Court's longstanding no-segmentation rule, which requires that takings analysis be applied to the parcel as a whole. *See infra* text accompanying notes 137-220 (discussing the no-segmentation rule and its application in the Claims Court). *But cf.* *Concrete Pipe & Prod., Inc. v. Construction Laborers Pension Trust*, 113 S. Ct. 2264 (1993) (reaffirming the no-segmentation principle).

13. The cases discussed at length in this Article are *Whitney Benefits, Inc. v. United States*, 18 Cl. Ct. 394 (1989), *corrected*, 20 Cl. Ct. 324 (1990), *aff'd*, 926 F.2d 1169 (Fed. Cir.), *cert. denied*, 112 S. Ct. 406 (1991), *Loveladies Harbor, Inc. v. United States*, 15 Cl. Ct. 381 (1988), and *Florida Rock Industries v. United States*, 8 Cl. Ct. 160 (1985), *aff'd in part, and vacated in part*, 791 F.2d 893 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987). *See* discussion *infra* text accompanying notes 68-122 and 170-97.

14. For example, writing for the majority in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987), Justice Stevens wrote: “[S]ince no individual has a right to use his property so as to create a nuisance or otherwise harm others, the State has not ‘taken’ anything when it asserts its power to enjoin the nuisance-like activity.” *Id.* at 491 n.20. Dissenting in the same case, Chief Justice Rehnquist wrote that the state has “unquestioned authority to prevent a property owner from using his property to injure others without having to compensate the value of the forbidden use.” *Id.* at 511 (Rehnquist, C.J., dissenting) (citation omitted).

Professor Epstein, an ardent critic of government impingements on private land use decisions, concedes that some uncompensated restrictions are appropriate. “The issue of compensation cannot arise until the question of justification has been disposed of.” RICHARD A.

cult and debatable questions relate to *which* particular land uses are properly categorized as too intolerable to allow. Just because these questions are difficult and debatable does not, however, mean that courts, rather than legislatures, are better suited to have the final say.¹⁵ Yet, whenever courts presume to apply criteria such as “nuisance” or even broader “balancing” criteria in deciding cases of regulatory taking, they are implicitly transferring the ultimate authority to decide land use policy from the legislature to themselves.

This Article examines the diversion of the Takings Clause from its historic limited role to that of a charter for courts to second-guess legislative determinations of land-use rights and wrongs. As we shall see, prior to *Lucas* the Supreme Court and others following its lead have generally not regarded the Takings Clause as a warrant for reaching *de novo* determinations on land use problems and then substituting such judicial determinations, if different, for those of the legislature.¹⁶ Some notable exceptions in the Claims Court and Federal Circuit will then be considered along with the ostensible Supreme Court authority, a sentence in *Agins v. City of Tiburon*.¹⁷ The future importance of such activist review will be considered in light of the main barrier still standing against it, the no-segmentation rule, which requires that the impact of land use regulations be viewed in relation to the owner’s property “as a whole.”¹⁸ Finally, against this background the Article will address the question of the courts’ proper role in supervising legislative judgments in the land use field.¹⁹

EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 199 (1985). In the amicus brief he prepared in support of the owner in *Lucas*, Professor Epstein declined to support an unconditional compensation requirement even for cases of total takings, pointing out that “no balanced theory of takings could be that protective of private property against the legitimate claims of the state.” Brief of the Institute for Justice as Amicus Curiae in Support of Petitioner at 23, *Lucas* (No. 91-453), reprinted in 25 LOY. L.A. L. REV. 1233, 1249 (1992). For further explanation see Richard A. Epstein, *Ruminations on Lucas v. South Carolina Coastal Council: An Introduction to Amicus Curiae Brief*, 25 LOY. L.A. L. REV. 1225, 1226 (1992).

15. Genuine conservative thinkers such as Robert Bork agree that substituting a court’s “sense of legislative prudence” for that of the elected legislature is not a proper remedy for “failures of the legislative process, which certainly occur.” ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 229 (1990). See generally *id.* at 223-40 (critiquing the views of Richard Epstein and Bernard Siegan, among others, and challenging the notion that the Takings Clause is a mandate for courts to overturn legislative policy judgments they do not like).

16. See *infra* text accompanying notes 38-61.

17. 447 U.S. 255, 260-61 (1980); see *infra* text accompanying and following notes 68-136.

18. See *infra* text accompanying notes 137-220.

19. See *infra* part IX.

II. THE PROPERTY RIGHTS DEBATE AND "TAKINGS"

For some years now, a debate over the property rights issue has been growing.²⁰ At the heart of this debate is a difference of views about the relative importance of private land-use autonomy, the right of owners to use their land as they please *versus* the right of communities or the federal government to protect the landbase on which all must depend for national well-being and survival.²¹ Implicit in the support for the expanding body of environmental and land-use regulations is the view that such regulations provide a necessary, albeit imperfect protection for natural, community and other shared resources that are vulnerable to poorly planned development or shortsighted utilization and destruction.²² On the other side of the debate, there are views that range from the position that current government regula-

20. For a good synopsis of the debate and its philosophical underpinnings, see Gregory S. Alexander, *Takings and the Post-Modern Dialectic of Property*, 9 CONST. COMMENTARY 259 (1992). My own depiction of the property rights debate may be found in John A. Humbach, *What is Behind the "Property Rights" Debate?*, 10 PACE ENVTL. L. REV. 21 (1992).

See also Gregory S. Alexander, *Takings, Narratives and Power*, 88 COLUM. L. REV. 1752 (1988), explaining this debate as a reflection of different political visions about "who holds power and how those who hold power use it." *Id.* at 1753. Professor Alexander describes a struggle for power parity or superiority in land use decisions between private landowners and government regulators who are allegedly acting in the public interest. This Article is about the struggle for power parity or superiority in law-making decisions between elected legislatures and judges who might have voted to elect somebody else as legislators. The two stories intersect when groups with conflicting desires, such as development-oriented landowners and environmentalists, acquire allies on the substantive issues in different branches of government.

21. In fact, for many decades laws have substantially restricted the autonomy of the great majority of land owners, the urban and suburban owners. The practical effect of the zoning laws applicable to most urban and suburban parcels is to restrict the uses of those parcels to the *existing uses* for which the parcels were already adapted at the time the owner bought them. Only rural owners in areas not covered by zoning have been largely free to alter the uses and character of their lands. A primary focus of the property rights debate is whether rural land owners should be asked to play by the same rules that urban and suburban landowners have played by for decades.

For a discussion of the need for and constitutionality of "existing-use zoning" for privately-owned rural open spaces, see John A. Humbach, *Law and a New Land Ethic*, 74 MINN L. REV. 339 (1989). *But cf.* James B. Wadley & Pamela Falk, *Lucas and Environmental Land Use Controls In Rural Areas: Whose Land is it Anyway?* 19 WM. MITCHELL L. REV. 331 (1993) (drawing heavily on the alleged psychological needs of rural landowners for land-use autonomy).

22. See *supra* note 20; see also, e.g., Michael C. Blumm, *The Fallacies of Free Market Environmentalism*, 15 HARV. J.L. & PUB. POL'Y 371 (1992) (critiquing the view that serious environmental damage can be best avoided by relying on private market incentives alone); Lynda L. Butler, *Private Land Use, Changing Public Values and Notions of Relativity*, 1992 B.Y.U. L. REV. 629 (1992) (stating that the need for reallocating land use rights to account for third party interests has been ignored by the traditional private property system of absolute, exploitative use); Lynton K. Caldwell, *Rights of Ownership or Rights of Use?—The Need for a New Conceptual Basis for Land Use Policy*, 15 WM. & MARY L. REV. 759 (1974) (proposing a radically revised system of land use rights imposing limitations well beyond the traditional restrictions of nuisance law).

tions are excessive to the conviction that trying to enhance social welfare by land use regulation is just plain wrong.²³

In the debate over the growing body of government environmental and land-use regulation, defenders of private property rights often invoke the Takings Clause of the Fifth Amendment.²⁴ The Clause is invoked to argue that regulatory impingement on private land use and on land value is not merely a bad idea, but that it is an unconstitutional one.²⁵

The Takings Clause protects property. It declares that the government shall not take private property for public use without just compensation.²⁶ Because the Takings Clause protects property, it seems a plausible assumption that the Clause may have at least some bearing on the legality of government regulations on land use, especially regulations that severely impact on private economic interests. However, interpreting the Takings Clause to limit regulation appears ahistorical, contrary to both the intentions of the Framers and to the understanding of most 19th century judges.²⁷ Historically, "taking" meant physical taking.²⁸ It does not even appear that philo-

23. See *supra* note 20; see also, e.g., TERRY L. ANDERSON & DONALD R. LEAL, *FREE MARKET ENVIRONMENTALISM* 9-23 (1991) (discussing the difficulty of assigning objective value to all aspects of land use rights); BERNARD H. SIEGAN, *LAND USE WITHOUT ZONING* 221-27 (1972) (stating that zoning laws should not be constitutionally protected because they do not fit within basic property concepts); Bernard H. Siegan, *The Anomaly of Regulation Under the Taking Clause*, in *PLANNING WITHOUT PRICES* 33-47 (Bernard H. Siegan ed., 1977) (advocating interpreting the Takings Clause to invalidate zoning); Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681 (1973) (examining cost-internalizing systems as alternatives to zoning); Richard A. Epstein, *Property as a Fundamental Civil Right*, 29 CAL. W.L. REV. 187, 200-07 (1992) (discussing the legislative and administrative processes that generate inefficient regulations).

24. See *supra* note 7.

25. See, e.g., William A. Fischel, *Introduction: Utilitarian Balancing and Formalism in Takings*, 88 COLUM. L. REV. 1581, 1583 (1988) ("The takings clause seems to be the ideal remedy for these regulatory excesses.").

26. See *supra* note 7.

27. "[E]arly constitutional theorists did not believe the Takings Clause embraced regulations of property at all . . ." *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2900 n.15 (1992); see also Scott M. Reznick, Comment, *Land Use Regulation and the Concept of Takings in Early Nineteenth Century America*, 40 U. CHI. L. REV. 854, 861 (1973) (reviewing cases in which compensation was not required where there was not a physical invasion); William M. Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 711 (1985) (reviewing evidence that James Madison and his contemporaries intended the Takings Clause to apply only to direct physical takings by the federal government).

28. As late as 1897, the Supreme Court still held the view, based on an "immense weight of authority," that there had to be a "physical invasion of the real estate" in order for a compensable taking to occur. *Gibson v. United States*, 166 U.S. 269, 275-76 (1897) (quoting *Transportation Co. v. Chicago*, 99 U.S. 635 (1879) (holding that non-physical interferences "are universally held not to be a taking" under the Takings Clause)).

sophical forerunners of the clause's ideology, such as John Locke,²⁹ would have asserted a regulation-limiting role for the clause. "For it would be a direct contradiction," Locke wrote, "for any one to enter into society with others for securing and regulating of property, and yet to suppose his land . . . should be exempt from the jurisdiction of that government to which he himself, and the property of the land, is a subject."³⁰

Nevertheless, since the early 1920s, the Supreme Court's conception of "takings" has included not only physical invasions by government, directly or indirectly, but also so-called "regulatory takings"³¹—takings that can result when regulations go "too far" and impinge on private freedom.³² Physi-

29. For whom the "great and chief end" of government was "the preservation of . . . property." 2 JOHN LOCKE, TWO TREATISES OF GOVERNMENT, § 124, at 350-51 (Peter Laslett ed., 1988) (1690).

30. 2 *id.* § 120 at 349. "By the same Act therefore, whereby any one unites his Person, which was before free, to any Commonwealth; by the same he unites his possessions, which were before free, to it also; and they become, both of them, person and Possession, subject to the Government and Dominion of that Commonwealth, as long as it hath a being." 2 *id.*

31. The seminal case on regulatory takings was *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). It held that a prohibition on mining certain coal went "too far" and amounted to a taking, even though the technical ownership and possession of the coal was not disturbed. *Id.* at 415-16.

Even though *Pennsylvania Coal* is widely regarded as a property-protection case *par excellence*, it was actually a case of owner versus owner, and one of the property owners lost. The Court went far to protect the rights of coal companies, creating a whole new constitutional doctrine in the process, but it showed scant concern for preventing destruction of the property of ordinary homeowners: "This is the case of a single private house. No doubt there is a public interest even in this, . . . [but not] a public interest sufficient to warrant so extensive a destruction of the [coal company's] constitutionally protected rights." *Id.* at 413-14. What *Pennsylvania Coal* actually did was to find that the property rights of owners of large amounts of property outweighed the property rights of mere homeowners. The widespread enthusiasm for a case such as *Pennsylvania Coal* among the self-styled defenders of "property rights" may tell much about their underlying agendas.

32. Technically, land use restrictions do not normally take property "rights" in the strict Hohfeldian sense, see Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 28-58 (1913), but rather they take or limit the owner's "freedom" to use the land in particular ways. Taking or restricting freedoms is, of course, the very essence of legislation regulating conduct; taking freedoms is, in other words, an unavoidable concomitant of creating legal "rights." Consider, for example, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257, 261 (1964), which upheld the creation of a civil right to non-discriminatory service at places of public accommodation by cutting back on private owners' freedom to exclude, "a fundamental element of the property right." *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979). A larger example is the creation of the basic property right to exclude (via the tort and crime of trespass), by legally curtailing the natural freedom of human beings to walk the earth.

Taking away legal "rights," once the government has created them, is a much rarer effect of legislation than is taking away freedoms. Moreover, in cases where "rights" in the strict Hohfeldian sense have been taken "for public use," the Supreme Court has invariably required that just compensation be paid. See John A. Humbach, *A Unifying Theory For the Just Compensation Cases: Takings, Regulation and Public Use*, 34 RUTGERS L. REV. 243, 251-61 (1982)

cal takings differ from regulatory takings, and have received different treatment by the courts in significant respects. For example, when analyzing physical takings, the Supreme Court employs a bright line test under which permanent physical invasions of private property are compensable takings per se.³³ By contrast, the tests for regulatory takings are hazy.³⁴

One reason that the tests for regulatory takings are less precise is, of course, that “[g]overnment hardly could go on if to some extent values incident to property could not be diminished without” compensation.³⁵ Unlike an uncompensated physical taking, uncompensated regulations are not inherently wrong, even when the application of the regulations affects private land values and uses.³⁶

(including a full discussion of the distinction between rights and freedoms, and what this can tell us about the interests that the Takings Clause really protects).

33. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Despite the Supreme Court’s categorical language, miscellaneous exceptions still surround the per se rule for permanent physical invasions. There are, for example, the difficult to reconcile situations in which the government effects permanent physical expropriations of private property for the benefit of other private individuals rather than for “public use.” See John A. Humbach, *Constitutional Limits on the Power to Take Private Property: Public Purpose and Public Use*, 66 OR. L. REV. 547 (1987). A recent dramatic example is the change in community property laws that eliminates the husband’s rights of disposition as “head and master,” which occasioned an expropriation by the Supreme Court itself in *Kirchberg v. Feenstra*, 450 U.S. 455, 456 (1981) (holding that the “head and master” provision violated the Fourteenth Amendment).

The constitutionality of statutory forfeitures of lands and chattels, irrespective of the owner’s guilt, provides another apparent exception to the per se rule for physical invasions. See Humbach, *supra* note 9, at 2 n.11. The theory of statutory forfeiture is that “lawmakers, in the exercise of the police power, [are] free to determine that certain uses of property [are] undesirable” and then to adopt confiscation as a “‘secondary defense against [the] forbidden use.’” *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 686 (1974) (quoting *Van Oster v. Kansas*, 272 U.S. 465, 467 (1926)).

34. [O]ur decision in *Mahon* offered little insight into when, and under what circumstances, a given regulation would be seen as going “too far” for purposes of the Fifth Amendment. In 70-odd years of succeeding “regulatory takings” jurisprudence, we have generally eschewed any “set formula” for determining how far is too far, preferring to “engag[e] in . . . essentially ad hoc, factual inquiries.”

Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2893 (1992) (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (alteration in original)).

Compared with cases of physical occupation, the Claims Court has written:

When an alleged taking is due to a statutory or regulatory restriction, . . . the issue is more complex and, as is true in many areas of the law, is not resolved by a bright line test. Rather, in determining if a restriction actually results in a taking, the court must consider the facts and circumstances of each particular case and make an ad hoc determination

Whitney Benefits, Inc. v. United States, 18 Cl. Ct. 394, 399 (1989), *corrected*, 20 Cl. Ct. 324 (1990), *aff’d*, 926 F.2d 1169 (Fed. Cir.), *cert. denied*, 112 S. Ct. 406 (1991).

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

36. Even in *Lucas*—perhaps the high point to date of the modern Supreme Court’s solicitude for private owners’ rights—the Court made clear that “government may . . . affect prop-

The focus of attention in regulatory takings cases is whether the legislature had the power to apply regulatory measures to property as opposed to achieving its objective by condemnation of the property with compensation. Judges who make the decisions about such legislative powers must inevitably do so against the background of their own views concerning the protection and exploitation of the nation's land and natural resources. These views may not agree with those of the legislative majority. Accordingly, there is the constant risk that regulatory takings cases can glide imperceptibly into decisions reallocating ultimate public policy choices from the legislature to the courts.

III. SCOPE OF REGULATORY TAKINGS REVIEW: THE TRADITION

Protecting the rights of private owners is one of the important goals of our society, but it is not the only goal. Almost all private land uses are likely to have some negative spill-over effects on other owners or other important societal goals.³⁷ For these reasons, many diverse factors, interests and policy concerns enter into a consideration of which land uses should, despite their externalities, be allowed and which uses are, on balance, too intolerable for the law to allow.

One of the foundational principles of our nation's Constitution is that, primarily, it is for the legislatures to make the laws that decide among competing factors, interests and policy concerns, and courts are to follow the legislatures' lead in their determinations of right and wrong.³⁸ "Power to

erty values by regulation without incurring an obligation to compensate—a reality we nowadays acknowledge explicitly." *Lucas*, 112 S. Ct. at 2897.

37. "Practically all human activities unless carried on in a wilderness interfere to some extent with others or involve some risk of interference" RESTATEMENT (SECOND) OF TORTS § 822 cmt. g. (1977); see also Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971) (discussing the takings implications of governmental actions dealing with such spill-over effects).

38. This Article does not attempt a structured defense of the position that legislatures rather than courts should have the final say in public land use policy. Rather, the Article accepts the Supreme Court's holdings that elected legislatures are the nation's primary lawmaking bodies. The Article further assumes that judges should not yield to activist temptations to override legislative land use policies whose substantive merits they disagree with. For an argument that the traditional constitutional allocation of lawmaking power is a good one, drawing on political process theory and the work of John Hart Ely, see Douglas T. Kendall, Note, *The Limits to Growth and the Limits to the Takings Clause*, 11 VA. ENVTL. L.J. 547, 557-62 (1992).

There is, of course, a well-recognized exception to legislative supremacy in the special case of fundamental rights. "In a long series of cases [the Supreme] Court has held that where fundamental personal liberties are involved, they may not be abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose." *Griswold v. Connecticut*, 381 U.S. 479, 497 (1965) (Goldberg, J., concurring).

determine such questions, so as to bind all, must exist somewhere; Under our system that power is lodged with the legislative branch of the government.”³⁹ And “in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests.”⁴⁰

The unsuitability of subjecting legislative decisions “to *ex post facto* judicial assessment of ‘the public interest’ ” is particularly great in the economic sphere where “[t]he fact is that virtually all economic regulation benefits some segments of the society and harms others” and “determination of ‘the public interest’ . . . entails not merely economic and mathematical analysis but value judgment.”⁴¹ Nonetheless, when a legislative decision does not seem right, it is only human nature to think that the legislative process perhaps did not get all the factors quite right, that it did not give due weight to all important considerations, and that a different balance, a finer balance, might be conducive to a more amenable result.

Until its holding in *Lucas*, the Supreme Court had consistently eschewed any such judicial re-balancing of legislative determinations in the land use field. The Court’s opinion in *Village of Euclid v. Amber Realty Co.*,⁴² the seminal case that upheld zoning, set the tone. In *Euclid*, the Supreme Court related at some length the many considerations that the legislature might have had in mind in adopting the zoning regulations at issue. The Court noted the presence of factors such as promoting the health and security of

However, an owner’s right to use property as he or she pleases is not recognized as a fundamental right, nor could it be because, among other things: (1) If a right is “fundamental,” then presumably everybody should have it in more or less equal quantities (*e.g.*, recognized fundamental rights such as speech, religion, and voting), but rights to use the material world are not equally distributed nor, probably, should they be, and (2) a right to use one’s land as one pleases would often interfere with another’s right to use his or her land. *See, e.g.*, *Miller v. Schoene*, 276 U.S. 272 (1928) (upholding a requirement that certain cedar trees be destroyed in order to prevent the spread of arboreal disease to nearby apple trees). It is hard to imagine how such unequal and constantly colliding rights, in continual need of adjustment and amendment relative to each other, could be considered fundamental.

But compare Epstein, *supra* note 23, at 187, in which Professor Epstein argues that property rights are fundamental because of their utility (which no one can deny—but then, most rights have utility) and because of their “universality.” *Id.* at 188-94. Epstein does not, however, include rules guaranteeing free *use* of property among the universal property rules he regards as essential to property and, quite the opposite, he concedes that “ownership of property does not confer the untrammelled right to do with it what one pleases.” *Id.* at 202. In the end, Professor Epstein does not conclude that there is a “fundamental” right to use property as one pleases.

39. *Mugler v. Kansas*, 123 U.S. 623, 660-61 (1887).

40. *Lawton v. Steele*, 152 U.S. 133, 136 (1894).

41. *City of Columbia v. Omni Outdoor Advertising, Inc.*, 111 S. Ct. 1344, 1352 (1991) (upholding restrictive billboard regulations against antitrust challenge).

42. 272 U.S. 365, 391-95 (1926).

children,⁴³ facilitating fire control,⁴⁴ preventing “disorder,”⁴⁵ reducing residential area traffic and preventing near-nuisances,⁴⁶ as well as the effects of diverting “natural development.”⁴⁷ However, the Court specifically held that “these reasons, thus summarized *do not* demonstrate the wisdom or sound policy” of the use restrictions in question.⁴⁸

Very possibly, the Court was not convinced by the legislative rationales that it “summarized.”⁴⁹ The Court did not, however, need to be convinced. To uphold the zoning ordinance at hand nothing more was necessary than that “the reasons [be] sufficiently cogent to preclude [the Court] from saying, *as it must be said before the ordinance can be declared unconstitutional*, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to” police-power purposes.⁵⁰

In short, the Court’s approach in *Euclid* was to recite the legislative rationales but not to re-evaluate or re-weigh those rationales. It summarized the legislature’s reasons primarily to demonstrate that the legislature *had* reasons in support of its legislative judgment. During the nearly seven decades since *Euclid*, the Court has repeatedly evinced a similarly deferential approach to legislative judgments about which land uses need to be prohibited and which should be allowed.⁵¹ The Court’s opinions often refer to the reasons underlying the legislation at issue, but the Court has not made an in-

43. *Id.* at 391.

44. *Id.*

45. *Id.*

46. *Id.* at 391, 395.

47. *Id.* at 389-90.

48. *Id.* at 395 (emphasis added).

49. *Id.*

50. *Id.* (emphasis added). The other important prong of modern takings analysis, the effect of any of the specific restraints of the regulations on value or marketability, was not disclosed in the pleadings. *Id.* at 397. The Court’s focus and the approach that it demonstrated was therefore limited to the legitimate governmental interest issue. *Id.*

51. *See, e.g.,* *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986) (upholding a ban on use as adult theater against First Amendment free-expression challenge even though utilizing a more rigorous standard than most land use regulations); *Agins v. City of Tiburon*, 447 U.S. 255, 261-62 (1980) (upholding development density restrictions to prevent ill effects of urbanization); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (upholding restrictions on number of unrelated occupants in a house); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) (upholding prohibition on continued mining of gravel pit); *Miller v. Schoene*, 276 U.S. 272 (1928) (upholding prohibition on maintaining ornamental cedar trees); *Gorieb v. Fox*, 274 U.S. 603 (1927) (upholding setback restrictions that prohibit structures on certain reserved open space portions of building lots).

In the period following *Euclid*, the Supreme Court roundly rejected the turn-of-the-century Lochnerian approach, *Lochner v. New York*, 198 U.S. 45 (1905), *overruled by* *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952), of closely reviewing economic legislation generally. *See* *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938) (rational basis test); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *see also* *Day-Brite Lighting*, 342 U.S. at 423 (stating that the Court “do[es] not sit as a super-legislature”).

dependent re-evaluation of the rationales. As the Court has explained: "State Legislatures and city councils, who deal with the situation from a practical standpoint, are *better qualified* than the courts to determine the necessity, character and degree of regulation which these new and perplexing conditions require; and their conclusions should not be disturbed"⁵²

Twelve years prior to *Lucas*, the Supreme Court "crystallized its thinking"⁵³ about regulatory takings in land use cases, establishing what has become the dominant regulatory-takings formulation for such cases—the two-pronged test of regulatory takings from *Agins v. City of Tiburon*.⁵⁴ In its articulation of the two-pronged test, the Court stated: "The application of a general zoning law to particular property effects a taking if the ordinance [(a)] does not substantially advance legitimate state interests, or [(b)] denies an owner economically viable use of his land."⁵⁵ The Court has interpreted the two prongs of this test so that neither prong stands as an invitation or authorization for courts to trench on the legislature's traditional constitutional prerogative to make the ultimate decisions about land use rights and wrongs.⁵⁶

The first prong of the *Agins* test, (those ordinances which "do[] not substantially advance legitimate state interests") is a rule about the subject-matter limits of lawmaking power.⁵⁷ As the Court has made clear, however, "a

52. *Gorieb*, 274 U.S. at 608 (emphasis added) (upholding setback restrictions that prohibit structures on certain reserved open space portions of building lots); see also *supra* text accompanying note 41 (quoting *City of Columbia v. Omni Outdoor Advertising, Inc.*, 111 S. Ct. 1344, 1352 (1991)).

53. *Jentgen v. United States*, 657 F.2d 1210, 1213 (Ct. Cl. 1981) (citing *Agins*, 447 U.S. at 260), *cert. denied*, 455 U.S. 1017 (1982).

54. 447 U.S. 255 (1980).

55. *Id.* at 260 (citations omitted).

56. See *infra* notes 57-60 and accompanying text (applying test so as not to interfere with legislative judgment). An arguable exception is Justice Scalia's comment in footnote 3 of the majority opinion in *Nollan v. California Coastal Commission*, 483 U.S. 825, 834 n.3 (1987), suggesting that the standard of review for takings claims is not the same deferential rational basis test that applies to due process and equal protection claims: "To the contrary, our verbal formulations in the takings field have generally been quite different. We have required that the regulation 'substantially advance' the 'legitimate state interest'" *Id.*; see *supra* note 50 and accompanying text (explaining the rational basis test). However, the Court's holding in *Nollan* was based primarily on its conclusion that the governmental action "utterly fail[ed] to further the end advanced as the justification." *Id.* at 837. Therefore, the remarks in footnote 3 were, at most, dicta.

57. See *Agins*, 447 U.S. at 260-62 (discussing whether zoning action was within city's power). The outer contours of the legislative police power are obviously not suitable for any fixed delineation:

"Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health and property of the citizens, and to the preservation of good order and the public morals."

broad range of governmental purposes and regulations satisfies the[] requirements [of legitimate state interest].”⁵⁸ Furthermore, judicial “inquiry into legislative purpose is not intended as a license to judge the effectiveness of legislation,” the constitutional question being only whether the legislature “‘rationally could have believed that [the enactment] would promote its objective.’”⁵⁹ In short, as this prong of the *Agins* test has been interpreted and applied, it is fully consistent with the Supreme Court’s deferential approach to legislative policy setting. Irrespective of a measure’s “merit” or “wisdom,” or whether the court is convinced that the legislative balance is a good one, land-use regulations adopted by the legislature will pass the first prong if their purpose falls within the “broad range” and they substantially advance their purpose.

It is likewise for the second *Agins* prong—if the ordinance “denies an owner economically viable use.” Irrespective of the merit, wisdom or even legitimacy of legislative purpose, the legislature does not have the power to enact a measure that deprives owners, without compensation, of economically viable use of their land. The second prong defines the legislative power to remedy social ills in terms of current market values of land. A test that hinges the legislature’s constitutional authority on the vagaries of supply and demand may have much to say against it, but it is at least a test of legislative competence that is not based on the merit, wisdom or correct balance, in the Court’s view, of the legislative action in question.⁶⁰

The Supreme Court’s deference in the land use field has not been a complete abdication. On the contrary, recent decisions demonstrate clearly that even with the traditional deference to legislatures’ land-use policies, courts retain ample room to address egregious cases of non-fit between government acts and “legitimate state interests.” In *Nollan v. California Coastal Com-*

Leisy v. Hardin, 135 U.S. 100, 129 (1890) (quoting *Beer Co. v. Massachusetts*, 97 U.S. 25, 32-33 (1878)).

“The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.”

Village of Belle Terre v. Boraas, 416 U.S. 1, 6 (1974) (quoting *Berman v. Parker*, 348 U.S. 26, 32-33 (1954)).

58. *Nollan*, 483 U.S. at 834-35.

59. *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 511 n.3 (1987) (Rehnquist, C.J., dissenting) (quoting *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 242 (1984) (emphasis deleted)).

60. Perhaps the worst thing about making the economically viable use factor into a categorical test of taking, as occurred in *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992), is that doing so practically necessitates having the *Lucas* nuisance criterion as an escape valve for really bad land uses, thus elevating judicial determinations of land-use rights and wrongs over those made by the democratically elected legislature.

mission,⁶¹ for example, the Court struck down a requirement that an owner dedicate an easement as a condition to getting a building permit. It did so on the ground that "this case does not meet even the most untailed standards" of nexus between the government's alleged purpose and the regulatory action taken.⁶² Similarly, in *City of Cleburne v. Cleburne Living Center, Inc.*,⁶³ the Court invalidated a special permit requirement for a group home on the ground that "the record [did] not reveal any rational basis" for the special permit requirement.⁶⁴

Nevertheless, in both *Cleburne* and *Nollan* the Court made it abundantly clear that the finer tuning of the land-use policy balance is a job for the legislature.⁶⁵ Even in *Lucas*, the Court acknowledged "our contemporary understanding of the broad realm within which government may regulate without compensation," so long as the regulation does not effect a "total taking."⁶⁶ *Lucas* was, however, a turning point.

By adopting a common-law nuisance criterion for regulatory legitimacy, the Supreme Court in *Lucas* has made a formal inroad into its longstanding policy of deference to legislatively determined balances in the land-use field. The Court has endorsed the propriety, at least in cases of total takings, of courts revisiting and revising legislative land-use judgments.⁶⁷ The fact that achieving a public objective has extreme economic impacts on particular owners has become a cue for judicial intercession and *prima facie* proof that the legislature's weighing went awry.

61. 483 U.S. 825, 838-39 (1987).

62. *Id.* at 838.

63. 473 U.S. 432 (1985).

64. *Id.* at 448.

65. See *Nollan*, 483 U.S. at 834-35 (observing that "a broad range of governmental purposes and regulations" will satisfy the legitimate state interest requirement); *Cleburne*, 473 U.S. at 440 (observing that "[w]hen social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes." (citations omitted)).

66. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2897, 2901 (1992).

67. Indeed, this is precisely what happened on remand in *Lucas* itself. The South Carolina Supreme Court held the state liable to the owner for a temporary taking, stating: "Coastal Council has not persuaded us that any common law basis exists by which it could restrain Lucas's desired use of his land; nor has our research uncovered any such common law principle." *Lucas v. South Carolina Coastal Council*, 424 S.E.2d 484, 486 (S.C.) (order on remand), *rev'd*, 112 S. Ct. 2886 (1992).

The Supreme Court has, in addition, warned lower courts against being swayed by imaginative thinking, or public policy hints from the legislature, in deciding what is prohibited by the common law of nuisance for purposes of takings adjudication. It stressed that laws falling within *Lucas* nuisance review "may be defended only if an *objectively reasonable application* of relevant precedents would exclude those [statutorily prohibited] beneficial uses in the circumstances in which the land is presently found." *Lucas*, 112 S. Ct. at 2902 n.18.

IV. REWEIGHING LEGISLATIVE JUDGEMENTS IN THE CLAIMS COURT AND FEDERAL CIRCUIT

The two-pronged *Agins* test of regulatory taking sets boundaries on legislative power based on criteria unconcerned with the reviewing court's view of the merit, wisdom or correctness of balance embodied in the particular legislation in question. It is, however, another thing altogether for a court to decide that the legislature lacked power to prohibit particular activities just because, in the court's own view, the activities targeted by the legislature are not, on balance, detrimental enough to ban.

The United States Claims Court's first decision in *Loveladies Harbor, Inc. v. United States*⁶⁸ provides an excellent example of this latter sort of reasoning. The decision is one of several recent holdings in which the Claims Court (now the United States Court of Federal Claims) has placed itself squarely among those courts willing to become actively involved in "ex post facto judicial assessment of 'the public interest'"⁶⁹ by revisiting the legislative balancing process. In two other cases, *Whitney Benefits v. United States*⁷⁰ and *Florida Rock Industries v. United States*,⁷¹ the Claims Court and the United States Court of Appeals for the Federal Circuit, respectively, performed similar re-evaluations of the balance established by Congress in enacting the legislation under review.⁷²

68. 15 Cl. Ct. 381 (1988), *later proceeding*, 21 Cl. Ct. 153 (1990). In another proceeding, *Loveladies Harbor, Inc. v. United States*, 15 Cl. Ct. 375 (1988), the Claims Court discussed a point unrelated to the present discussion.

69. *City of Columbia v. Omni Outdoor Advertising, Inc.*, 111 S. Ct. 1344, 1352 (1991) (discussed *supra* note 41 and accompanying text).

70. 18 Cl. Ct. 394 (1989), *corrected*, 20 Cl. Ct. 324 (1990), *aff'd*, 926 F.2d 1169 (Fed. Cir.), *cert. denied*, 112 S. Ct. 406 (1991).

71. 791 F.2d 893 (Fed. Cir. 1986), *cert. denied* 479 U.S. 1053 (1987). This decision by the United States Court of Appeals for the Federal Circuit modified the Claims Court decision found at 8 Cl. Ct. 160 (1985).

72. Two 1992 Claims Court decisions touched much more briefly on the re-balancing issue, with opposite reactions. In *Formanek v. United States*, 26 Cl. Ct. 332 (1992), a wetlands fill-permit denial case, the court rejected the government's defense of Congress's act stating that "[p]laintiffs' proposed development simply did not present the *extreme threat* to public health, safety and welfare which precluded the payment of compensation in those [earlier] cases," *id.* at 340 (emphasis added), referring to *Miller v. Schoene*, 276 U.S. 272 (1928), and *Allied-General Nuclear Services, Inc. v. United States*, 839 F.2d 1572 (Fed. Cir. 1988) (nuclear hazard). The implication that Congress can regulate without compensation only to prevent "extreme threats" goes well beyond general contemporary understanding. However, in *B & F Trawlers, Inc. v. United States*, 27 Fed. Cl. 299 (1992), the Court of Federal Claims declined the plaintiff's invitation to re-balance considerations of public interest determined by Congress, quoting an earlier Supreme Court case, to the effect that "'debatable questions as to reasonableness are not for the courts but for the legislature.'" *Id.* at 305 (quoting *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 595 (1962) (quoting *Sproles v. Binford*, 286 U.S. 374, 388 (1932))).

Loveladies was a wetlands case, brought after the Army Corps of Engineers denied an owner/developer a permit under the Clean Water Act⁷³ to fill wetlands for development.⁷⁴ The denial reduced the value of 12.5 acres by over 99%.⁷⁵ The Claims Court said it had to do its own evaluation of the balance of relevant interests under the “legitimate governmental interest” prong of the two-prong *Agins*.⁷⁶ The legitimate governmental interest could not be satisfied, the court said, merely by an “inten[tion] to promote a public benefit.”⁷⁷ Rather, “[t]his determination must also involve the court’s weighing of that intended public benefit against the harm inflicted upon the landowner involved.”⁷⁸

The government’s intended public benefit, explained the court, was “the preservation of wetlands as a productive and valuable resource. . . . Weighing against this public interest is the plaintiff’s right to fill and develop their land.”⁷⁹ Presumably, Congress had already balanced both of these obviously relevant interests in enacting the permit requirement in the first place.⁸⁰ The court did not, however, discuss the possibility of such congressional weighing, but instead proceeded to weigh the interests itself.

The court pointed out that the owner’s land had suffered a large reduction in value.⁸¹ By contrast, “the pollution caused by plaintiff” in filling the wetlands “cannot be considered harmful since the possible pollution is of a kind that is merely incidental to any human action undertaken.”⁸² In short, the regulation created a significant private burden and, according to the court’s “*ex post facto* judicial assessment of ‘the public interest,’ ”⁸³ an inconsiderable public gain.

Although, the Claims Court noted, other jurisdictions had found the balance in favor of the governmental interest in preserving wetlands,⁸⁴ “[w]hen the Federal Circuit balanced the governmental interest in preserving wet-

73. 33 U.S.C.A. §§ 1251-1387 (West 1986 & Supp. 1993). Section 404 of the Clean Water Act, 33 U.S.C. § 1344 (West 1982 & Supp. 1987), prohibits discharge of dredged or fill material into the waters of the United States without a permit from the Army Corps of Engineers.

74. *Loveladies Harbor, Inc. v. United States*, 15 Cl. Ct. 381, 383 (1988).

75. *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153, 160 (1990).

76. *Loveladies*, 15 Cl. Ct. at 388.

77. *Id.*

78. *Id.* (citing *Agins v. City of Tiburon*, 447 U.S. 255, 261 (1980)). *Agins* said nothing, however, about weighing benefit “against” harm—a point discussed *infra* text accompanying and following notes 123-36.

79. *Loveladies*, 15 Cl. Ct. at 388.

80. *Welch v. Swasey*, 214 U.S. 91, 108 (1909) (“These are matters which it must be presumed were known by the legislature . . .”).

81. *Id.*

82. *Loveladies*, 15 Cl. Ct. at 389.

83. *City of Columbia v. Omni Outdoor Advertising, Inc.*, 111 S. Ct. 1344, 1352 (1991) (quoted more fully *supra* text accompanying note 41).

84. *Loveladies*, 15 Cl. Ct. at 388, 395.

lands against the loss of value to the landowner's property, the Federal Circuit found that the balance fell in favor of the landowner."⁸⁵ The Claims Court followed, as it must, the holding of the Federal Circuit.⁸⁶

The Federal Circuit case cited by the *Loveladies* court was *Florida Rock Industries v. United States*,⁸⁷ another judicial re-balancing case in which the court decided that the public interest in preserving wetlands was outweighed by the private owner's interest in destroying them. Interestingly, the *Florida Rock* court concluded that the balance favored the landowner by applying the so-called harm/benefit distinction,⁸⁸ a long intriguing quasi-distinction that the Supreme Court later found feckless in *Lucas*.⁸⁹ The problem with the harm/benefit distinction is that "the distinction between 'harm-preventing' and 'benefit-conferring' regulation is often in the eye of the beholder. . . . Whether one or the other of the competing characterizations will come to one's lips in a particular case depends primarily upon one's evaluation of the worth of competing uses of the real estate."⁹⁰

85. *Id.* at 388 (citing *Florida Rock Indus. v. United States*, 791 F.2d 893 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987)).

86. *Id.* at 395; *see also id.* at 399 ("Upon examination of the regulation's public purpose, plaintiffs have shown that their private interest in developing and utilizing their property *outweighs* the public value in preserving these wetlands." (emphasis added)).

The *Loveladies* court stated at one point that it was "reluctant" to rely on the balancing of the private interest against the public interest because there are problems with using the harm/benefit distinction (discussed immediately below), and because such "overall balancing . . . is generally not a useful guideline for making a takings determination." *Id.* at 389 (citation omitted).

The court apparently overcame its reluctance, and followed the Federal Circuit's balancing precedent. *Id.* at 395. Even more to the point, the court wrote in a subsequent opinion: "It is this court's judgment that the drastic economic impact on plaintiffs' property, coupled with the court's earlier determination of a lack of a countervailing substantial legitimate state interest, *forms the basis* for finding that there has been a taking." *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153, 160 (1990) (citation omitted) (emphasis added).

87. 791 F.2d 893 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987).

88. *Id.* at 900-01. The gist of the harm/benefit distinction is that "'the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful From this results the difference between the power of eminent domain and the police power, that the former recognizes a right to compensation, while the latter on principle does not.'" *Just v. Marinette County*, 201 N.W.2d 761, 767 (Wis. 1972) (quoting ERNST FREUND, *THE POLICE POWER* § 511, at 546-47 (1904) (omission by court)).

89. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2897-98 (1992). The Court had previously attempted to bury the distinction. *See Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 133 n.30 (1978) (citing Joseph L. Sax, *Takings and the Police Power*, 74 *YALE L.J.* 36 (1964)).

90. *Lucas*, 112 S. Ct. at 2897-98.

Even though the harm/benefit distinction does not have the rigorous analytical power sometimes attributed to it, the distinction nonetheless has great rhetorical power. The twin concepts of "harm-preventing" and "benefit-conferring" are intelligibly different in everyday speech. As a matter of convention, people normally use expressions such as "avoid harm" and "receive benefit" to refer to very different things. Although the harm/benefit distinction has

The Federal Circuit invoked the harm/benefit distinction in *Florida Rock* in order to deal with a weird analytical problem in the original opinion by the Claims Court below.⁹¹ The analytical problem resulted because, among its reasons for holding the government liable, the Claims Court had included a determination that the owner's proposed activities would not cause pollution. If, however, the owner's activities truly would not cause pollution, then the Army Corps would not have had jurisdiction—meaning that the “taking” found by the Claims Court could not have occurred.⁹²

The Federal Circuit's remedy to this conundrum was straightforward: it held that there was “*de jure* pollution,”⁹³ securing jurisdiction, but found that any actual pollution would not be “very serious”⁹⁴ and was not the government's real concern.⁹⁵ It then dealt with the government's “almost exclusive[]” concern, protecting the wetland, by means of a balancing of “private and public interests.”⁹⁶ It said that the plaintiff's “*pro forma*”⁹⁷ pollution did no harm and that protecting the wetland was not preventing a harm, which the government could do without compensation,⁹⁸ but was rather a “public good.”⁹⁹ A public purpose to *avoid harm* might have out-

rhetical power, it lacks analytical power because expressions such as “avoiding harms” or “receiving benefits” each *can* be made to refer to the conventional referents of the other. (E.g., “He provided me the benefit of not kicking me”; or “she harmed the mugger by hiding some of her money from him.”)

Despite its discrediting in *Lucas*, the harm/benefit distinction still has enormous power to express a differentiation that everyone can and does make every day, even if the distinction is a little too slippery to serve as a bright line delineator for constitutional analysis.

91. *Florida Rock Indus. v. United States*, 791 F.2d 893, 897 (Fed. Cir. 1986), *aff'g in part and vacating in part* 8 Cl. Ct. 160 (1985).

92. *Id.* at 898-90.

93. *Id.* at 899. By electing to proceed in the Claims Court, the plaintiff conceded Army Corps jurisdiction—hence, *de jure* pollution.

94. *Id.* at 904. The Federal Circuit found that expected pollution impacts would be “‘short term’” and would “‘not appear to be a problem’” for nearby wells. *Id.*

True, the court appeared to be quoting a witness, perhaps the Army Corps district engineer, on these points, as well as for the conclusion that the pollution would not be “very serious.” *Id.* This is not, however, a redeeming factor inasmuch as such witnesses have no more authority than the court to decide that Congress's goals are of little weight or merit. The Army Corps might have legitimately considered such points in deciding whether to grant the permit, see 33 C.F.R. § 320.4(a) (1992), and the court might have considered them to decide if the permit denial was arbitrary and capricious, but these were not the purposes for which the points were raised in *Florida Rock*. They were raised and used to challenge congressional policy written into the Clean Water Act.

95. *Florida Rock*, 791 F.2d at 904.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

weighed the owner's interest¹⁰⁰ but, the Federal Circuit concluded, a public purpose to *secure benefit* would not. In sum, the method used by the Federal Circuit to determine the validity of Congress's decision to protect wetlands via regulation (as opposed to purchase) was to put the public's interests in balance against the owner's burden, and it found the "private interest much more deserving of compensation."¹⁰¹

The core objection to the balancing methodology of these two wetlands cases, *Loveladies* and *Florida Rock*, is its displacement of policy making power. Ultimate social outcomes are made to turn on the relative weight that a court, rather than Congress, ascribed to the Clean Water Act's purposes of preventing pollution and keeping dredged and fill materials out of wetlands.¹⁰² Unlike Congress, the Federal Circuit did not see any public "harm" at all in dredge or fill operations in wetlands, and it greatly discounted the associated pollution and resulting "'short term'" "turbidity."¹⁰³ Similarly, the Claims Court believed that the type of pollution entailed in filling wetlands "cannot be considered harmful,"¹⁰⁴ a view directly at odds with the view expressed by Congress in enacting the Clean Water Act.¹⁰⁵

Of course, it is fair for people to disagree about such things as the harmfulness of pollution or discharging fill into wetlands. Only a few decades ago, wetlands were little appreciated and natural waterbodies were usual places to disperse unwanted substances. "[C]hanged circumstances or new knowledge may make what was previously permissible no longer so,"¹⁰⁶ but change needs time to be understood. There is often an interim, as seems to be the case with wetlands, when many do not agree that knowledge or circumstances have really changed at all. Given that reasonable people disagree about how much "harm" there is in short term pollution or in dredging

100. The court provided as an example a law that frustrates a person "who wanted to put toxic wastes in drinking water." *Id.*

101. *Id.*

102. See S. REP. NO. 95-370, 95th Cong. 2d Sess. 74 (1977) (outlining the purpose of the Clean Water Act's dredge and fill permit requirements), reprinted in 1977 U.S.C.C.A.N. 4326, 4399.

103. *Florida Rock*, 791 F.2d at 904. Compare the *Florida Rock* court's following discussion:

One who remembers when wetlands were called swamps, when their draining or filling was deemed progress, and when their main environmental impact was in the production of noxious disease-bearing mosquitos, and who has observed their present status, will not be astonished if some day a mosquito bred in a swamp bites someone and infects him with malaria, and the old beliefs revive.

Id. at 902.

104. *Loveladies Harbor, Inc. v. United States*, 15 Cl. Ct. 381, 389 (1988).

105. Cf. *supra* note 102 (citing the legislative history of the Clean Water Act).

106. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2901 (1992) (citing RESTATEMENT (SECOND) OF TORTS § 827 cmt. g (1979)).

and filling wetlands, whose values should be written into legal policy? Who should make the "value judgment" that, as Justice Scalia recently reminded us, lies behind "determination of 'the public interest' "?¹⁰⁷

In *Loveladies* and *Florida Rock*, the courts used a balancing analysis to substitute their own value judgments regarding wetland pollution and dredge and fill for the judgments written into law by Congress. The courts' ideas of "harm" usurped the ideas of harm that the democratic process had put into the Clean Water Act. The Claims Court proceeded similarly in *Whitney Benefits v. United States*,¹⁰⁸ a case involving a federal ban on strip mining coal in alluvial valley floors,¹⁰⁹ a valuable agricultural resource.¹¹⁰ In *Whitney Benefits*, a "substantial portion" of the plaintiff's coal was located under an alluvial valley floor.¹¹¹ The court's takings analysis was as follows:

[1.] [P]recedent . . . teaches that in order to decide when a governmental action becomes a taking of property, the trial court must balance two quantities.¹¹²

[2.] On one side of the scale is the governmental and public interest in the action in question.¹¹³ . . . In [the other] side of the bal-

107. *City of Columbia v. Omni Outdoor Advertising, Inc.*, 111 S. Ct. 1344, 1352 (1991) (quoted more fully *supra* at text accompanying note 41).

108. *Whitney Benefits, Inc. v. United States*, 18 Cl. Ct. 394 (1989), *corrected*, 20 Cl. Ct. 324, *aff'd*, 926 F.2d 1169 (Fed. Cir.), *cert. denied*, 112 S. Ct. 406 (1991).

109. *Id.* at 397. The prohibition was contained in § 1260 of the Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, 92 Stat. 448 (1977) (codified as amended at 30 U.S.C. §§ 1201-1328 (1986)).

110. *Whitney Benefits*, 18 Cl. Ct. at 396 n.1.

111. *Id.* at 396.

112. *Id.* (citing *Agins v. City of Tiburon*, 447 U.S. 255, 260-61 (1980) (discussed *infra* text accompanying and following notes 124-36))

113. *Id.* at 406. The court added here that when the governmental interest is aimed at preventing "a classic nuisance," this side of the scale "almost automatically decides the issue." The court evidently did not believe that a "classic nuisance" was involved. The court also did not explain how the balancing it had in mind might be different from the balancing associated with common-law nuisance adjudication. See, e.g., RESTATEMENT (SECOND) OF TORTS §§ 826-28, 830-31 (1979), *cited in* *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2901 (1992).

In affirming the Claims Court decision, the Federal Circuit observed that Congress permitted some strip mining of alluvial valley floors, "indicating [Congress's] view that all AVF mining was not in itself a 'nuisance.'" *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169, 1176 (Fed. Cir.), *cert. denied*, 112 S. Ct. 406 (1991). Both the Federal Circuit and the Claims Court in *Whitney Benefits* seemed to assume that various kinds of conduct either are or are not "nuisances"—passing right over the essential *relativistic* character of nuisance as "merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard." *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926). Compare *W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS* 619-33 (5th ed. 1984).

ance the court must place the burden, in both absolute and relative terms, placed upon the holder of the property rights at issue.¹¹⁴

[3.] This case presents a dispute where a proper government purpose, protecting agricultural land, must be balanced against the absolute diminution in value of the property at issue¹¹⁵

Congress had, of course, struck this particular balance in favor of protecting the agricultural capacity of alluvial valley floors from strip mining.¹¹⁶ The court explicitly recognized that it was delimiting the power of Congress to achieve this protection by means of regulation (as opposed to purchase) according to whether the balance struck by Congress was or was not the correct balance: "The outcome of the balancing [of the public interest and private burden]. . . . answers the question: May Congress or the United States burden the instant property without just compensation?"¹¹⁷

The Claims Court did not agree with Congress's conclusion that the harm to agricultural resources of stripping alluvial valley floors was sufficiently great to justify forbidding owners the freedom to strip and destroy such lands. Rather, the court concluded that "the substantial public interest at stake does not outweigh the private interest."¹¹⁸ The court's holding was, in effect, that Congress lacked the legislative power to protect these agricultural resources by regulation.

Although the Claims Court said that it did not "question the wisdom of th[e legislative] balancing or the manner in which Congress sought to achieve an equilibrium,"¹¹⁹ and that it merely was requiring compensation, such circumlocution completely begs the question. The fundamental power issue behind these regulatory takings cases is whether the legislative branch has, or should have, the power to decide, "so as to bind all,"¹²⁰ which uses of land are, and are not too socially intolerable to allow. Congress decided that scraping out coal at the expense of the agricultural surface was too intolerable to allow,¹²¹ so owners of coal-bearing farmlands had to forego the coal. The Claims Court, affirmed by the Federal Circuit, held that such a decision was beyond Congress's reach. It was no more on point to say that Congress

114. *Whitney Benefits*, 18 Cl. Ct. at 406.

115. *Id.*

116. It is no exaggeration to say this "particular" balance because, apparently, when Congress adopted the strip mining prohibition in question it had the lands of *Whitney Benefits, Inc.* specifically in mind. *See id.* at 406-07; *see also Whitney Benefits*, 926 F.2d at 1173-74.

117. *Whitney Benefits*, 18 Cl. Ct. at 406.

118. *Id.* at 417.

119. *Id.*; *see also Whitney Benefits*, 926 F.2d at 1170.

120. *Mugler v. Kansas*, 123 U.S. 623, 660 (1887) (quoted more fully *supra* at text accompanying note 39).

121. *Id.*; *see also Whitney Benefits*, 18 Cl. Ct. at 397 (stating that Congress had acted to "strike a balance between protection of the environment and agricultural productivity and the Nation's need for coal as an essential source of energy").

has the power to buy out private rights to make the socially intolerable uses, than it would have been for the *Whitney Benefits* court to say that Congress can create courts to decide what is a nuisance.

Regulatory takings doctrine is, in the end, about the scope of the legislative power to control socially intolerable conduct by simple prohibition and, in a world of differing private views, to set overall public policy as to what is socially intolerable. "Suffice to say that government regulation—by definition—involves the adjustment of rights for the public good. Often this adjustment curtails some potential for the use or economic exploitation of private property. To require compensation in all such circumstances would effectively compel the government to regulate by *purchase*."¹²²

V. THE OSTENSIBLE *AGINS* AUTHORITY FOR JUDICIAL REWEIGHING

In each of the three cases described in the preceding section, *Loveladies*, *Florida Rock*, and *Whitney Benefits*, the courts' willingness to embark on a more activist review of legislative decisions is in contrast to the deference, described earlier, of the Supreme Court's own decisions in the land use field. Indeed, the courts' approaches in these three cases go beyond that of the Supreme Court in *Lucas* which, except for "total takings," explicitly acknowledges the traditionally "broad realm within which government may regulate without compensation."¹²³ In each of these three cases, the court found its authority for reweighing and replacing the legislative judgment in a line from *Agins v. City of Tiburon*:¹²⁴ "Although no precise rule determines when property has been taken, the question necessarily requires a *weighing* of private and public interests."¹²⁵ But does *Agins* really call for such judicial reweighing of the legislatively determined balance?

The *Agins* language on weighing is one of the more frequently quoted, and perhaps misunderstood, lines in recent takings jurisprudence.¹²⁶ There is a

122. *Andrus v. Allard*, 444 U.S. 51, 65 (1979) (upholding a ban on sales of avian artifacts).

123. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2897 (1992).

124. 447 U.S. 255 (1980).

125. *Id.* at 260-61 (emphasis added) (citation omitted). In *Loveladies*, the Claims Court cited this portion of *Agins* as its sole authority for weighing the "public benefit against the harm inflicted upon the landowner." *Loveladies Harbor, Inc. v. United States*, 15 Cl. Ct. 381, 388 (1988). In *Florida Rock*, the Federal Circuit quoted the "weighing" language and stated that it was "[c]onducting a similar weighing here." *Florida Rock Indus. v. United States*, 791 F.2d 893, 904 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987). The *Whitney Benefits* court likewise relied on and quoted the *Agins* "weighing" language as authority for revisiting the balance struck by Congress and, based on the re-balance, decided that Congress had acted beyond its constitutional power in regulating, as opposed to buying, alluvial valley floors. *Whitney Benefits*, 18 Cl. Ct. at 406.

126. *See, e.g., Lucas*, 112 S. Ct. at 2911 n.11 (Blackmun, J., dissenting); *McDougal v. County of Imperial*, 942 F.2d 668, 676 (9th Cir. 1991); *Naegele Outdoor Advertising, Inc., v. City of Durham*, 844 F.2d 172, 177 (4th Cir. 1988).

substantial question as to whether the Claims Court and the Federal Circuit applied this language correctly in *Loveladies*, *Florida Rock*, and *Whitney Benefits*.

There are a couple of different meanings that the word “weighing” as used in *Agins* could have.¹²⁷ One possible meaning of weighing, the one employed by the Claims Court and the Federal Circuit, is “balancing”—placing relevant factors, interests and concerns on one side of a scale and the opposing factors, interests and concerns on the other, and then deciding the case based on the relative “weights” on either side. However, to “weigh” might merely mean to “consider,” and the Supreme Court in *Agins* may have merely meant that the question of taking requires a court to consider both the private and the public interests involved. For several reasons, this latter understanding, interpreting weighing as considering, makes more sense in the *Agins* context.

First, to interpret weighing as balancing is to add something to the actual words of the Court in *Agins*. Nowhere does the opinion say that a court must weigh public and private interests *against* one another (“weigh” in the sense of balance). The opinion merely says that the two must be weighed.¹²⁸ Accordingly, the Claims Court in *Loveladies* attached a subtle but significant additional thought to the basic *Agins* language when it implied that *Agins* required it to weigh the “intended public benefit *against* the harm inflicted upon the landowner involved.”¹²⁹

Second, the Supreme Court’s analysis that followed and implemented the weighing language in *Agins* did not suggest anything like “weights” for any of the factors, interests or concerns that it mentioned, either as absolute quantities or relatively as against the others. Following previous Supreme Court practice in land-use cases,¹³⁰ it merely set forth the various considerations as matters of relevance.¹³¹

127. *Agins*, 447 U.S. at 261.

128. For example, the Court merely cited (and quoted in a footnote) the City Council’s legislative findings in the legislation, and the City’s purpose of protecting residents from the ill effects of urbanization, and said: “Such government purposes long have been recognized as legitimate.” *Id.* at 261. At another point, the Court explained that “[i]n assessing the fairness of the zoning ordinances, the[] benefits [to the owners] must be *considered along with* any diminution in market value” they may suffer. *Id.* at 262 (emphasis added). Neither assignments of relative weight nor counterbalancing were suggested.

129. *Loveladies*, 15 Cl. Ct. at 388 (emphasis added); see also *Whitney Benefits*, 18 Cl. Ct. at 405-06.

130. See *supra* text accompanying notes 42-48.

131. Likewise, the Court’s opinion in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), which *Agins* cited as “illustrative” of the weighing concept, 447 U.S. at 261, did not contain any suggestion that it was assigning relative weights or otherwise weighing in sense of balancing, nor did anything in the *Agins* opinion imply that it did. See *Agins*, 447 U.S. at 261-62.

Third, in its context, the *Agins* weighing statement looks like a simple recapitulation of the two-prong test, which it closely follows in the very same paragraph of the opinion.¹³² Like the sentence about weighing, the two-prong test specifies that a court must weigh or consider private and public interests, namely, whether the owner has “economically viable use” (private) and whether the regulation advances a “legitimate state interests” (public).¹³³

From the standpoint of allocating institutional power it is no small matter of concern how courts read the word weighing in *Agins*. If indeed *Agins* means to require courts to review regulatory takings by substantive balancing, it is difficult to see how a court could ever do the job without re-doing the job of the legislature. If, on the other hand, “weighing” merely means considering, the court can do its job by merely doing what the Supreme Court did in *Village of Euclid v. Ambler Realty Co.*¹³⁴ and the decades of cases that followed—by noting that relevant supporting factors, interests and concerns were there for the legislature to take into account.¹³⁵ Following this traditional approach, once a court weighs whether the legislature had a rational basis for its balance, and whether the owner retains “economically viable use,”¹³⁶ the court has no further role of making sure that the legislature balanced things “correctly.”

Reading weighing as considering also substantially reduces the risk that policy balances struck by the elected representatives of the people will occasionally be replaced by the individual predilections of single or small groups of judges. At best, judicial balancing is only a metaphor. Only in metaphor can environmental protection weigh more than (or less than) private property rights. While metaphors can be used to convey meaning, they cannot be used to *supply* meaning. Judges can use metaphors of balancing only after they have already made up their minds on some basis other than comparative gravitational attraction.

In summary, the Claims Court and the Federal Circuit may have gone well beyond the text and context of *Agins* when they set out, based on *Agins*, to revisit the legislative determinations of balance in *Loveladies*, *Florida Rock*, and *Whitney Benefits*. Congress already weighed the public interest in keeping dredged or foreign material from being deposited in wetlands and keeping alluvial valley floors from being stripped for fuel. Its statutes represent the legislative determination that such public interests outbalance owners' private interests in destroying these national natural resources by doing

132. See *Agins*, 477 U.S. at 260-61.

133. *Id.* at 260.

134. 272 U.S. 365 (1926).

135. See *id.* at 388; see also *supra* text accompanying notes 42-50.

136. *Agins*, 447 U.S. at 260.

such things. Without the clearest direction from the Supreme Court, it is hard to see why appointed judges should undertake to override the balance arrived at by Congress.

VI. THE NO-SEGMENTATION PRINCIPLE IN THE SUPREME COURT

The Supreme Court's narrow holding in *Lucas v. South Carolina Coastal Council*¹³⁷ is plainly not itself a general direction that judges should now regard the Takings Clause as a universal license to revise the judgments of balance made by legislatures. Without a doubt, however, *Lucas* is a directional change, and its new common law nuisance criterion¹³⁸ is a definite inroad into the Court's longstanding policy of deference to legislative determinations of balance in the land use field. The question is, where is this going?

As long as it is confined to the terms of *Lucas* itself, the Supreme Court's new nuisance criterion of legislative legitimacy may remain a rule of comparatively little consequence.¹³⁹ The new criterion would only apply in the "relatively rare situations" of total taking, the "extraordinary circumstance when *no* productive or economically beneficial use of land is permitted."¹⁴⁰ In most situations and under most land use regulations, the highly deferential "broad realm" rule, also ratified in *Lucas*, would continue to apply.¹⁴¹

There is reason to think, however, that the new common law nuisance criterion of taking may not remain confined to the very limited application initially staked out for it—or, at least, this is the hope of some on the Court. Total takings are "relatively rare" today for only one reason, namely, the

137. 112 S. Ct. 2886 (1992).

138. *Id.* at 2900; see *supra* notes 6-8 and accompanying text (outlining *Lucas*'s nuisance criterion).

139. Although any legislation that goes beyond the confines of judge-made nuisance law theoretically poses a risk of successful compensation claims, it is relatively easy to inoculate land use regulations against this impact of *Lucas*. Two possible techniques are (i) including a provision for "escape-valve" variances based on extreme hardship alone, and (ii) adopting subdivision regulations that prohibit the creation of parcels that would have no economically beneficial use unless they are altered at the expense of their natural resource values. See Humbach, *supra* note 9, at 27-28.

140. *Lucas*, 112 S. Ct. at 2894.

141. *Id.* at 2897; see also *supra* text following note 59. Even as it was acknowledged in *Lucas*, the "broad realm" may have suffered some territorial loss in footnote 8, where the Court described as erroneous the "assumption that the landowner whose deprivation is one step short of complete is not entitled to compensation." *Lucas*, 112 S. Ct. at 2895 n.8. One possibility is that a *Lucas*-style categorical taking rule may be extended from total takings to regulations whose effects fall "one step short of complete." See *id.* Such an extension would, of course, immediately raise the question of protecting owners from regulatory impacts that are "one step short of one step short"—until, step by step in a grand cascade, the whole thing falls away and the traditional police power is a shadow of itself.

Supreme Court's longstanding but recently questioned principle that owners are not allowed to "segment" their property for purposes of takings analysis:

"Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature of the interference with rights *in the parcel as a whole*¹⁴²

In other words, "where an owner possess a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its entirety."¹⁴³ Because most parcels of regulated land still have valuable uses "as a whole," the no-segmentation principle prevents "total" regulatory takings from ever being anything but rare and extraordinary.

The no-segmentation principle has applied for almost as long as the regulatory takings doctrine that it qualifies.¹⁴⁴ Nevertheless, questions about its future vitality arose when the *Lucas* majority troubled itself to stray from the facts at hand and, in dictum, declared the principle "unclear."¹⁴⁵ The Court gave the example of "a regulation [that] requires a developer to leave 90% of a rural tract in its natural state."¹⁴⁶ "[I]t is unclear," the Court stated, "whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in the value of the tract as a whole."¹⁴⁷

Actually, the Supreme Court's own precedents since 1927 could hardly be more clear;¹⁴⁸ the hypothetical rural developer in *Lucas* would have suffered no taking at all, as long as he or she had economically viable use in the remaining 10% of the land. Indeed, the only precedent that *Lucas* cited to

142. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987) (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 130-31 (1978)). The no-segmentation principle was questioned by Chief Justice Rehnquist in his earlier dissents in these cases. *Id.* at 515-18; *Penn Central*, 438 U.S. at 149 n.13 (Rehnquist, J., dissenting).

143. *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979).

144. The first post-*Pennsylvania Coal* case to unambiguously reject the idea that the regulatory effects on property can be validly assessed on a segment-by-segment basis was *Gorieb v. Fox*, 274 U.S. 603, 609-10 (1927) (upholding setback restrictions forbidding the placement of structures within a certain minimum distance of the street). The same principle was implicitly involved in an earlier case, *Welch v. Swasey*, 214 U.S. 91 (1909) (upholding height limitations for buildings), cited and followed in *Gorieb*, 274 U.S. at 608.

145. *Lucas*, 112 S. Ct. at 2894 n.7.

146. *Id.*

147. *Id.*

148. *E.g.*, *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497-98 (1987); *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 130-31 (1978); *Gorieb v. Fox*, 274 U.S. 675 (1927); *see also* discussion *infra* note 187.

the contrary¹⁴⁹ was a case in which the segmentation issue was not even mentioned.

What the Court probably meant in its *Lucas* digression was that some members of today's Supreme Court would like to rethink the traditional analysis of cases such as that of the hypothetical rural developer. One thing, however, is certain. If the Court allows owners to focus takings inquiries solely on the rights taken away (treating, for example, the right to build on the regulated 90% as the only relevant property at issue), then the instances of "total takings" will quickly multiply. Litigants will be able to establish "total" takings in all but the worst pleaded cases, and the applicability of the Court's new nuisance criterion will become the norm rather than the exception. Such an abrogation or substantial truncation of the no-segmentation rule would, in short, transform the Court's new nuisance criterion into a major qualification of legislatures' authority to decide public policy in the land use field.¹⁵⁰

The notion that property interests can be broken up into their component parts for regulatory takings analysis seems to rest, like the regulatory takings doctrine itself, on Justice Holmes's opinion in *Pennsylvania Coal Co. v. Mahon*.¹⁵¹ In fact, Justice Holmes's opinion did not at any point discuss whether an owner's property could be analytically segmented for takings purposes. The idea that *Pennsylvania Coal* endorses such segmentation apparently comes from a single sentence: "To make it commercially impracticable to mine *certain coal* has very nearly the same effect for constitutional purposes as appropriating or destroying it."¹⁵² It is the words "certain coal" that are key.

From this sentence one can infer, if one wishes, that the *Pennsylvania Coal* Court was only concerned with the "certain coal" that the owner had to

149. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), cited in *Lucas*, 112 S. Ct. at 2894 n.7, and discussed *infra* notes 151-161.

150. See Margaret J. Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COL. L. REV. 1667, 1677-78 (1988); see also Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1192 (1967). Professor Radin coined the term "'conceptual severance'" to refer to the segmentation idea. Radin, *supra*, at 1676. The issue of how to define the "parcel as a whole" for takings analysis is not, however, necessarily limited to severances that are merely "conceptual"—though purely conceptual severance probably presents the least tenable case for segmentation. In at least two recent cases, the Claims Court has specifically considered the possibility of including *actually* severed lands as part of the "parcel as a whole." *Tabb Lakes, Inc. v. United States*, 26 Cl. Ct. 1334, 1345 (1992); *Loveladies Harbor, Inc. v. United States*, 15 Cl. Ct. 381, 391-93 (1988); see also *infra* notes 167-204 and accompanying text (discussing the Claims Court's decisions). Accordingly, in this Article, I will use the term "segmentation," consistently with the Supreme Court's own idiom on the topic.

151. 260 U.S. 393, 413-14 (1922); see *supra* note 31.

152. *Pennsylvania Coal*, 260 U.S. at 414 (emphasis added).

leave in place. One can infer, as well, that the Court ascribed no particular importance to the possibility of contiguously owned coal whose existence might have permitted the owner to mine at an overall operational profit.¹⁵³ To draw the conclusion, however, that this one line from *Pennsylvania Coal* therefore upheld segmentation as a proper analytical technique for takings cases is to make quite a leap. The crucial factual assumption on which such a conclusion would depend—whether there actually existed any contiguously owned profitable coal to be segmented off—was not even mentioned.¹⁵⁴ The point simply was not discussed.¹⁵⁵

The dissent in *Pennsylvania Coal* did discuss segmentation. Specifically, Justice Brandeis argued in dissent that the coal owners should not be given immunity from these mining regulations merely because, before the regulations were imposed, the coal owners had sold off the surface rights to others.¹⁵⁶ Justice Brandeis did not believe that an owner should be able to abridge the regulatory power of the state “by dividing the interests in his property into surface and subsoil.”¹⁵⁷ As authority he quoted Justice Holmes’s earlier observation that one “cannot remove [rights] from the power of the State by making a contract about them.”¹⁵⁸ Justice Holmes, writing for the *Pennsylvania Coal* majority, was evidently not impressed.

Clearly the majority in *Pennsylvania Coal* was unwilling to apply the principle of no-segmentation in the rather extreme way that dissenting Justice Brandeis proposed—conceptually recombining subsurface and surface rights that had been severed long before the regulatory legislation was adopted. It was, after all, precisely because the surface owners had contracted to accept abbreviated titles that the majority perceived the statutory mining prohibi-

153. The Supreme Court has explicitly rejected these interpretations of the words “certain coal” in *Pennsylvania Coal*. *Keystone*, 480 U.S. at 498-99. However, Justice Scalia (who later authored *Lucas*) dissented in *Keystone*, and may see the words “certain coal” differently.

154. Actually, it appears more likely than not that such profitable contiguous coal did *not* exist. The gist of the coal company’s claims in *Pennsylvania Coal* was that entire “large collieries,” not individual segments of coal, had been rendered inoperable by the regulation. See *Keystone*, 480 U.S. at 482-85.

155. Accordingly, the Court’s later anti-subsidence case, *Keystone*, is not “inconsistent” with *Pennsylvania Coal* on the issue of segmentation, contrary to the implication in *Lucas*. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2984 n.7 (1992). In *Keystone* the coal companies regulated by the anti-subsidence law concededly had many other coal deposits so there was no reason to think that their operations could not be carried on at a profit, moreover, and the existence of these other coal deposits was very much before the Court. *Id.* at 493-97.

156. *Pennsylvania Coal*, 260 U.S. at 419 (Brandeis, J., dissenting).

157. *Id.*

158. *Id.* at 421 (quoting *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 357 (1908) (upholding a ban on selling water out of state)).

tion to be such an injustice.¹⁵⁹ The *Pennsylvania Coal* majority's rejection of Justice Brandeis's rather extreme version of the no-segmentation principle tells us little, however, about how the Court would have viewed two other important and distinct segmentation questions *not* before it. First, can an owner convert an already existing valid regulation into a compensable taking by subdividing his or her property interests *after* the use-restriction is in place?¹⁶⁰ Second, can a compensable taking be established by merely "conceptually" severing property, without any actual conveyances at all?¹⁶¹

Any hint in *Pennsylvania Coal* that whole property interests could be freely segmented for purposes of takings analysis was dispelled five years later in *Gorieb v. Fox*.¹⁶² Like *Pennsylvania Coal*, *Gorieb* does not discuss segmentation explicitly. However, by upholding prohibitions on houses closer than certain minimum distances from the street,¹⁶³ *Gorieb* made it clear beyond peradventure that the Court was unwilling to accept claims of loss based on mere inability to build on parts of overall buildable properties. If *Pennsylvania Coal* was about "certain coal," then *Gorieb* was about "certain square feet." One year later, in *Miller v. Schoene*,¹⁶⁴ the Court upheld a prohibition on, one might say, "certain trees." More recently, the Court has affirmed that takings analysis cannot focus solely on certain airspace¹⁶⁵ or, indeed, even on certain coal, as long as the owner's coal as a whole can be mined at a profit.¹⁶⁶

VII. THE NO-SEGMENTATION PRINCIPLE IN THE CLAIMS COURT

In 1981, the United States Court of Claims followed and applied the no-segmentation principle in *Jentgen v. United States*,¹⁶⁷ and *Deltona Corp. v.*

159. See *id.* at 416 (majority opinion) ("So far as private persons or communities have seen fit to take the risk of acquiring only surface rights, we cannot see that the fact that their risk has become a danger warrants the giving to them greater rights than they bought.").

160. See *Loveladies Harbor, Inc. v. United States*, 15 Cl. Ct. 381 (1988), discussed *infra* at text accompanying notes 173-87, which answered this question in the negative. *But cf.* *Tabb Lakes, Inc. v. United States*, 26 Cl. Ct. 1334 (1992) discussed *infra* at text accompanying notes 202-04.

161. This is the situation directly addressed by the statement of the no-segmentation principle quoted *supra* note 142 and accompanying text. See also Radin, *supra* note 150, at 1676 (discussing "conceptual severance").

162. 274 U.S. 603 (1927).

163. *Id.* at 610.

164. 276 U.S. 272 (1928) (upholding a requirement that certain cedar trees be destroyed in order to prevent the spread of arboreal disease to nearby apple trees).

165. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978) (upholding a landmark preservation ordinance that prohibited the construction of a skyscraper in the airspace above Grand Central Terminal).

166. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 493-97 (1987).

167. 657 F.2d 1210 (Ct. Cl. 1981), *cert. denied*, 455 U.S. 1017 (1982). The court dismissed a taking claim based on a fill permit denial, pointing out that the owner remained able to

United States,¹⁶⁸ both wetlands protection cases arising under the Clean Water Act.¹⁶⁹ Perhaps anticipating an eventual evisceration of the no-segmentation principle, however, the Claims Court, in its recent holdings discussed previously, *Loveladies*¹⁷⁰ and *Whitney Benefits*,¹⁷¹ has dealt somewhat more flexibly with precedent in applying the no-segmentation principle.¹⁷²

Loveladies, as we saw earlier, was a wetlands case in which the owner claimed that a taking occurred after the Army Corps of Engineers denied a fill permit affecting 12.5 acres of land.¹⁷³ The 12.5 acres were part of an original tract of 250 acres, most of which had already been profitably developed and sold.¹⁷⁴ In addition to the 12.5 acres at issue, the owner also re-

develop, and still had considerable value in approximately 40 acres of his 101.8 acre tract. The court concluded that the "case merely present[ed] an instance of some diminution in value." *Id.* at 1214. The Supreme Court's decisions "uniformly reject the proposition that diminution in property value, standing alone, can establish a 'taking.'" *Penn Central*, 438 U.S. at 131.

168. 657 F.2d 1184 (Ct. Cl. 1981), *cert. denied*, 455 U.S. 1017 (1982). The facts were a little more complicated than those in *Jentgen*. The owner had divided the project into five areas and applied for fill permits for each. It received permits to fill the first two areas. Then, when it applied for permits for the remaining 3 areas, it received only one of the requested permits. The Court of Claims noted that the wetlands acreage subject to permit denials represented (1) only 33% of the developable lots in the owner's original 10,000 acre purchase, (2) only 25% of the lots in the 3 areas included in the second round of applications, and (3) only a portion of the two areas for which permits had been denied, being 111 acres of developable uplands in those two areas. *Id.* at 1192. In short, by any calculus, "Deltona's remaining land uses are plentiful and its residual economic position [is] very great." *Id.* Hence, the case was, like *Jentgen*, merely "an instance of some diminution in value." *Id.* at 1192-93.

169. 33 U.S.C.A. §§ 1251-1387 (West 1986 & Supp. 1993); *see supra* note 73.

170. *See* discussion *supra* text accompanying notes 68-86.

171. *See* discussion *supra* text accompanying notes 108-22.

172. The United States Court of Federal Claims is not the only court that has dealt flexibly with the no-segmentation principle. For example, the New York Court of Appeals recently seemed nearly ready to accept the notion that "the permanent abrogation of [any] one of [the owner's affected] rights, without regard to its comparative value in relation to the whole, may well be sufficient to constitute a taking." *Seawall Assocs. v. City of New York*, 542 N.E.2d 1059, 1067 (N.Y.), *cert. denied*, 493 U.S. 976 (1989).

The Washington Supreme Court declared a Greenbelt Ordinance a taking because it required that "a large percentage of certain privately owned lots be retained in or restored to a natural state." *Allingham v. City of Seattle*, 749 P.2d 160, 161 (Wash.), *corrected*, 757 P.2d 160 (Wash. 1988), and *overruled by* *Presbytery of Seattle v. King County*, 787 P.2d 907 (Wash.), *cert. denied*, 498 U.S. 911 (1990). The court found "unpersuasive" the argument that "the City should be allowed to regulate away all rights of ownership to a portion of a person's property, so long as some part of the property remains usable." *Id.* at 163. The court soon reversed itself, however, citing such United States Supreme Court precedents as *Keystone* and *Penn Central*, *see supra* note 148, and stating that the inconsistent analysis in *Allingham* was "overruled." *Presbytery of Seattle*, 787 P.2d at 915.

173. *See supra* note 75 and accompanying text.

174. *Loveladies Harbor, Inc. v. United States*, 15 Cl. Ct. 381, 383 (1988).

tained 6.4 acres that were apparently developable,¹⁷⁵ but due to conveyances of intervening lands, were “no longer contiguous with the 12.5 acres.”¹⁷⁶

The *Loveladies* court’s regulatory impact analysis focused on the 12.5 acres alone. The court segmented the 12.5 acres, refusing to lump it together with any of the owner’s other acreage, yet it did not reject the no-segmentation principle.¹⁷⁷ Instead, it concluded that the no-segmentation principle did not apply to the *Loveladies* facts by resolving two open questions about segmentation in ways that simply avoided logical extension of the principle’s application.

The first of these questions concerned land that the owner previously conveyed from the original tract: Should the no-segmentation rule apply to lands previously subdivided and sold off when the owner is claiming a regulatory taking only with respect to lots still retained? There are reasons why the no-segmentation principle should apply to such situations, defining the “parcel as a whole” to include both previously disposed of lots together with the lots retained. The takings lodestone of “‘justice and fairness’ ”¹⁷⁸ does not logically compel taxpayer largess for people who already have recouped their original investments by selling part of their land and who have profited handsomely in addition. There is also substantial concern to avoid rewarding manipulative subdivision strategies or what may be, in essence, self-created hardships¹⁷⁹—considerations that especially apply if the disposition of lots occurred after the challenged regulation was put into place.¹⁸⁰ The Supreme Court has not yet explicitly addressed the question of when, if ever, previously disposed of portions of a tract should be lumped in with the owner’s remaining land in defining the parcel as a whole.¹⁸¹ Nevertheless, the *Loveladies* court asserted that, “on the basis of *Keystone*, this court can-

175. *Id.* at 393. It was determined that one of the 12.5 acres was “upland” and therefore did not require a permit. *Id.* at 396.

176. *See id.* at 393. In all, the owner still retained 57.4 acres of his original 250, but on 38.5 acres the owner was deemed not “able to obtain the permits needed for . . . utilization.” *Id.*

177. *Id.*

178. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (citing *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962)).

179. *See infra* text accompanying notes 214-20.

180. *Cf. Ciampitti v. United States*, 22 Cl. Ct. 310, 321 (1991) (stating that because owner had bought with notice of the permit requirement, court refused to “turn the Government into an involuntary guarantor of [the owner’s] gamble”); *Deltona Corp. v. United States*, 657 F.2d 1184 (Ct. Cl. 1981) (same), *cert. denied*, 455 U.S. 1017 (1982); *Claridge v. New Hampshire Wetlands Bd.*, 485 A.2d 287 (N.H. 1984) (holding that the fact that owners bought wetland with notice of the regulatory impediments is a factor in refusing to find a taking based on denial of fill permit needed for development).

181. If, for example, the owner treated the sold-off and retained lands as a unified investment project, should the courts likewise treat the property as a single “whole”? *Cf. Ciampitti*, 22 Cl. Ct. at 320. The *Ciampitti* court stated: “[The owner] treated all of Purchase 7, which encompasses virtually all of the lots at issue, as a single parcel for purposes of purchase and

not include the value of all the property originally purchased as the parcel as a whole."¹⁸²

The second open question dealt with by *Loveladies* concerned the owner's 6.4 developable but now non-contiguous acres: Should the no-segmentation rule apply to lands still retained by the owner but which, because of intervening conveyances, are no longer contiguous? The Claims Court refused to include such "sporadically held" units as part of the property as a whole.¹⁸³ The reasons given in the preceding paragraph—principles of "justice and fairness" and preventing manipulation—also apply here. These concepts support the logic of including lands that have become non-contiguous in the parcel as a whole. On this point there is also some fairly clear guidance in *Keystone*, where contiguity clearly was not a factor.¹⁸⁴ Indeed, in *Keystone*, the Supreme Court even seemed to suggest at one point that the relevant quantum of property might be as broad as the owners' "bituminous coal interests in western Pennsylvania."¹⁸⁵ In the end, *Keystone* defined the relevant property as "any reasonable unit of petitioners' coal mining operations and financial-backed expectations."¹⁸⁶ Plainly, such a definition of the parcel as a whole does not imply contiguity. The Claims Court did not, however, consider the unavoidable implications of these portions of *Keystone*, preferring instead to rely on a case from the United States Court of Appeals for the Ninth Circuit that pre-dated *Keystone*'s more encompassing definition of the parcel as a whole.¹⁸⁷

financing. It would be inappropriate to allow him now to sever the connection he forged when it assists in making a legal argument." *Id.*

182. *Loveladies Harbor, Inc. v. United States*, 15 Cl. Ct. 381, 392 (1988). The Claims Court implied that the Supreme Court had decided the issue in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987), pointing out that the Court did not "include all the property which was held at the time of the original purchase, i.e., all of the coal which was in the ground when the property was originally purchased in the early 1900's. Rather, the Supreme Court defined the value of the parcel as a whole as 'the value that remain[ed] in the property' when the taking was said to have occurred." *Loveladies*, 15 Cl. Ct. at 392. None of that was at issue in *Keystone*, however, and it is probably truer to say that the *Keystone* majority felt it had ample margin to support its conclusions by merely including the vast quantities of reserve coal that the companies still had. The Claims Court's implication that the coal previously extracted and sold *could not* have entered into the equation is pure conjecture.

183. *Loveladies*, 15 Cl. Ct. at 393.

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

185. *Id.* at 496. "[P]etitioners have not claimed, at this stage, that the Act makes it commercially impracticable for them to continue mining their bituminous coal interests in western Pennsylvania." *Id.* at 495-96.

186. *Id.* at 499.

187. *American Sav. and Loan Ass'n v. County of Marin*, 653 F.2d 364 (9th Cir. 1981). This case held that two portions of a parcel, zoned differently, may or may not be analyzed as two separate parcels for takings purposes, depending on, among other things, whether the two portions would be "treated separately at the development stage." *Id.* at 371. The court pur-

In a subsequent case, *Whitney Benefits v. United States*,¹⁸⁸ the Claims Court did not have the luxury that it enjoyed in *Loveladies* of being able to distinguish the Supreme Court's precedents on no-segmentation.¹⁸⁹ Unlike *Loveladies*, where the owner had severed economically viable components from its land, the claimant in *Whitney Benefits* had actually added potentially economically viable components to the interest that was the subject of its takings claim. To facilitate the extraction of its underground coal, the owner had bought extensive areas of valuable agricultural surface land that it could (but did not wish to) farm.¹⁹⁰

The Claims Court held that a taking of the coal rights occurred when Congress enacted a statute that prohibited strip mining in alluvial valley floors, and the Federal Circuit affirmed.¹⁹¹ The Government argued that the strip mining prohibition did not effect a taking because, although it rendered the coal rights valueless, the owner still had "a valuable property right in

ported to follow *Nectow v. Cambridge*, 277 U.S. 183 (1928), which the court saw as supporting an analysis on a segmented basis. *American Savings*, 653 F.2d at 370.

In *Nectow*, the Court struck down a residential-use limitation on substantive due process grounds. *Nectow*, 277 U.S. at 183. Although *Nectow* did indeed involve a single parcel divided in legal use by zoning, it nonetheless provides no precedent on the segmentation issue because the decision in *Nectow* was not based on the onerous impact of the regulation on the property, as a whole or otherwise. Instead, the decision was based on the fact that the "health, safety, convenience and general welfare of the inhabitants of the part of the city affected [would] not be promoted" by the restriction. *Id.* at 188. Obviously, if a use restriction lacks a rational relation to a legitimate state interest, as in *Nectow*, it is hardly relevant whether its illegitimate effects apply to all or only part of a particular piece of property. The whole point of segmentation analysis, by contrast, is to establish the constitutionally relevant quantum of land so that there is a base against which to determine the impact or economic effect of an otherwise legitimate regulation. See *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2894 n.7 (1992).

188. 18 Cl. Ct. 394 (1989), *corrected*, 20 Cl. Ct. 324 (1990), *aff'd*, 926 F.2d 1169 (Fed. Cir.), *cert. denied*, 112 S. Ct. 406 (1991).

189. Actually, the *Loveladies* court had some difficulty with a one-acre bit of non-wetland area surrounded by 11.5 acres of non-fillable wetlands. *Loveladies Harbor, Inc. v. United States*, 15 Cl. Ct. 381, 396 (1988). The court's assumption was that this one-acre bit, though not wetland, nonetheless could not be used for development given the lack of permits for the remaining contiguous 11.5 wetland acres. *Id.* There was, however, no indication that a permit for access to allow such limited construction was ever applied for. *Id.* Nevertheless, despite *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986) (requiring owner to determine maximum allowable development by obtaining state permission to develop), the Claims Court treated the case as ripe without requiring the owner to apply for permission to build an access way across the wetland area to reach the one acre. *Loveladies*, 15 Cl. Ct. at 396.

190. *Whitney Benefits*, 18 Cl. Ct. at 397. See *supra* notes 108-11 and accompanying text for further discussion of this issue.

191. *Whitney Benefits*, 926 F.2d at 1178 (upholding Claims Court award based on taking as of August 3, 1977). This date coincides with the enactment of the Surface Mining Control and Reclamation Act of 1977 (SMCRA). Pub. L. No. 95-87, 92 Stat. 448 (1977) (codified as amended at 30 U.S.C. §§ 1201-1328 (1986)).

farming and ranching the surface property.”¹⁹² Under the no-segmentation principle, the Government contended, the agricultural capacity should have been included along with the coal potential as part of the parcel as a whole.¹⁹³

Instead of attempting to distinguish *Whitney Benefits* from the Supreme Court’s no-segmentation precedents such as *Keystone*, the Claims Court simply said: “Because plaintiffs are claiming only that defendant took their coal rights, and not their surface rights, consideration of the surface rights . . . as part of plaintiffs’ bundle of property rights is not warranted.”¹⁹⁴ The Federal Circuit, in affirming, likewise dismissed the analytically awkward economic potential of the agricultural surface rights by declaring that the law’s taking of “coal rights . . . is what, and only what, this suit is about.”¹⁹⁵ “When Congress prohibited that mining of that coal, . . . it took, all the property involved in this case.”¹⁹⁶

In a way, of course, the Federal Circuit was indisputably right: If a judge says that coal rights are the only property involved in a case, then coal rights are the only property in the case. Such apodictic diktat does not mean, however, that the coal rights were the only property in the picture, and it is certainly ripe for evaluation whether the judge’s diktat has any basis in principle.

The courts’ approach in *Whitney Benefits* demonstrates that a court need not disregard or abrogate the no-segmentation principle in order to defeat it. Instead, the court can drastically curtail its application simply by allowing factors within the owner’s control to define the relevant quantum of property for constitutional purposes. In *Whitney Benefits*, for example, the court allowed the owner’s intentions for the property to supply the definition of parcel as a whole—the owner was only interested in strip mining coal; therefore, the owner’s valuable agricultural lands overlying the coal were, bluntly, not “in this case.”¹⁹⁷ According to this theory, no “economically viable use” should ever be constitutionally relevant as long as the owner can aver that he

192. *Whitney Benefits*, 18 Cl. Ct. at 405.

193. *Id.*

194. *Id.*

195. *Whitney Benefits*, 926 F.2d at 1174.

196. *Id.* at 1172. On appeal, the Federal Circuit also dismissed the government’s contention that the property had residual economic value for farming, calling it speculation “without reference to the record.” *Id.* at 1174. It was odd for the court to say this, however, inasmuch as one page earlier the court had stated that the plaintiff had proved, as an “obvious physical fact[] about the property,” that “farming and ranching had long been operated on the surface above the Whitney coal.” *Id.* at 1173. Moreover, the Claims Court’s opinion had described alluvial valley floors, such as the land in *Whitney Benefits*, as “ideal” for ranching or farming. *Whitney Benefits*, 18 Cl. Ct. at 396 n.1.

197. *Whitney Benefits*, 926 F.2d at 1174, 1176.

or she is not interested in it. If courts are willing to yield to this kind of strategy by owners who seek to gain at public expense, the no-segmentation principle could become practically a dead letter.

The recent reception of the no-segmentation principle in the Claims Court has not, however, been entirely negative or grudging. In *Ciampitti v. United States*,¹⁹⁸ for example, the Claims Court stated that “[i]n the case of a landowner who owns both wetlands and adjacent uplands, it would clearly be unrealistic to focus exclusively on the wetlands, and ignore whatever rights might remain in the uplands.”¹⁹⁹ The resulting difference in valuations was dramatic; the wetlands were appraised at only about \$3,000 by themselves while the calculated value of the parcel as a whole was \$14,000,000.²⁰⁰ Noting, however, that the “same analysis may not always be appropriate” to define the relevant quantum of property for takings purposes, the court suggested that “[f]actors such as the degree of contiguity, the dates of acquisition, the extent to which the parcel has been treated as a single unit, the extent to which the parcel has been held as a single unit, the extent to which the protected lands enhance the value of remaining lands, and no doubt many others would enter the calculus.”²⁰¹

In a post-*Lucas* decision, *Tabb Lakes, Inc. v. United States*,²⁰² the Claims Court seemed prepared to follow the *Ciampitti* factors, noting that *Loveladies* “runs contrary to the established precedents.”²⁰³ The facts were complex, but the court in *Tabb Lakes* made it clear that it was unwilling to allow an owner analytically to fragment its de facto unified development program in order to create an appearance that some portions of its development had been temporarily taken as a result of a cease and desist order by the Army Corps of Engineers.²⁰⁴

VIII. REASONS FOR RETAINING THE NO-SEGMENTATION PRINCIPLE

Although there plainly is some Supreme Court sentiment for truncating or eliminating the no-segmentation principle,²⁰⁵ there are reasons for not doing

198. 22 Cl. Ct. 310 (1991).

199. *Id.* at 318.

200. *Id.* at 319.

201. *Id.* at 318.

202. 26 Cl. Ct. 1334 (1992) (another wetlands permit case).

203. *Id.* at 1346 n.17 (citing *Deltona Corp. v. United States*, 657 F.2d 1184 (Ct. Cl. 1981), *cert. denied*, 455 U.S. 1017 (1982), discussed *supra* at note 168, and *Jentgen v. United States*, 657 F.2d 1210 (Ct. Cl. 1981), *cert. denied*, 455 U.S. 1017 (1982), discussed *supra* at note 167)).

204. 26 Cl. Ct. at 1343, 1356-57. The Corps' jurisdictional determination was later overruled as procedurally defective. *Tabb Lakes, Ltd. v. United States*, 715 F. Supp. 726 (E.D. Va. 1988), *aff'd*, 885 F.2d 866 (4th Cir. 1989).

205. See *supra* text accompanying notes 142-43. But compare the Supreme Court's post-*Lucas* decision in *Concrete Pipe & Products v. Construction Laborers Pension Trust*, 113 S.

so. One, of course, is precedent. The putative endorsement of a segmentation approach in *Pennsylvania Coal* was unprecedented²⁰⁶ and, to date, has not been followed by the Supreme Court. Other reasons may also be posited.

One reason for continuing to treat owners' actual investment packages as the constitutionally relevant quanta of property is that there does not seem to be any principled basis for drawing the line elsewhere.²⁰⁷ If some owners are permitted to escape existing land use regulations by subdividing, either actually or conceptually, when should owners ever *not* be permitted to do so? Without a no-segmentation principle, the only way to prevent a total collapse of legislative authority to make land use policy may be to embark on an endless series of hairsplitting decisions by which some owners are permitted to escape regulatory impacts while others are not.²⁰⁸ *Lucas* suggested a test based on the degree to which "the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value."²⁰⁹ However, any right of use that a regulation has totally removed is, almost by definition, one that has been legally "recognized" and, prior to the regulation's adoption, protected. One of the most notable characteristics of common law property, after all, is its almost infinite divisibility, the characteristic which makes the familiar "bundle of sticks" analogy so apt.

Another reason for retaining the no-segmentation rule is to preserve what *Lucas* described as "the *functional* basis for permitting the government, by regulation, to affect property values without compensation—that 'Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.'"²¹⁰ *Lucas* held that this "functional basis" for uncompensated legal change could be safely disregarded in the "relatively rare situations" of total takings.²¹¹ Without a no-segmentation principle, however, the "total takings" situations would become the norm instead of "relatively rare," and a

Ct. 2264, 2290 (1993), in which the Court reaffirmed the no-segmentation principle, discussed *infra* at text accompanying note 218-20.

206. Prior to *Pennsylvania Coal*, in *Welch v. Swasey*, 214 U.S. 91 (1909), the Court had upheld a height limitations for buildings.

207. See Radin, *supra* note 150, at 1677-78. As Professor Michelman points out, "[c]onceptual severance is the rock upon which [Professor Richard] Epstein grounds his argument that *every* restriction, not falling within a rather strictly defined nuisance exception, legally laid by the state upon property is *prima facie* unconstitutional, redeemable only by . . . compensation." Frank Michelman, *Takings*, 1987, 88 COLUM. L. REV. 1600, 1615 (1988) (footnote omitted); see also Michelman, *supra* note 150, at 1229-34.

208. For a possible set of initial ground rules for such decisions, see the *Ciampitti* factors quoted *supra* at text accompanying notes 198-201.

209. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2894 n.7 (1992).

210. *Id.* at 2894 (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922)).

211. *Id.*

requirement to compensate disgruntled owners would become the everyday result of changes in the "general law." In other words, having a "categorical rule"²¹² of compensation for total regulatory takings functionally requires that there also be a no-segmentation principle to keep such total takings relatively rare; otherwise, "[g]overnment hardly could go on."²¹³

Finally, a truncation or elimination of the no-segmentation principle would invite manipulation by creative pleading, compensation-seeking "fractionalization"²¹⁴ or what may be essentially self-created hardships to avoid land use regulations. An owner should certainly not be permitted to define a segment of property as the only property "in the case" simply by pleading it as such.²¹⁵ A parcel composed partly of wetlands but still able to be developed "as a whole" can be pared down to an economically "useless" piece by selling off the profitable upland portions.²¹⁶ Given the frangibility and adaptability of property interests, it should be easy work to create leaseholds or other recognized restricted interests that are without economic use unless challenged use regulations are relaxed.²¹⁷ Carried to the logical end, ordinary residential zoning could, for example, be effectively "busted" by the simple expedient of creating fee simple determinable estates limited to endure only "so long as the land is used for shopping center purposes."

Just one year after deciding *Lucas*, the Supreme Court has, in fact, given a rather strong reaffirmation of the no-segmentation principle, albeit in a non-real estate context. In *Concrete Pipe & Products v. Construction Laborers*

212. *Id.* at 2899.

213. *Id.* at 2894.

214. Shortly after *Lucas* came down, conference sponsors were already promising to tell the land use bar: "How to use Justice Scalia's 'Footnote 7' [questioning no-segmentation] to your advantage. How to define 'the parcel' or property unit to demonstrate 'deprivation of all economically-feasible use,'" and presenting the question: "How to fractionalize current property holdings to discourage regulation?" Brochure for "Tactical Workshop" entitled "How to Successfully Resolve Land Use and Real Estate Regulation Issues in the Wake of *Lucas*," sponsored by the National Real Estate Development Center in Washington, D.C. on September 1, 1992 (on file with the *Catholic University Law Review*).

215. Compare discussion of *Whitney Benefits*, *supra* text accompanying notes 188-97 with *Ciampitti*, quoted *supra* note 198-201.

216. Cf. discussion of *Loveladies* *supra* text accompanying notes 173-87.

217. As Professor Michelman has pointed out, the lease held by the Nollans in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) (discussed *supra* notes 61-62 and accompanying text), gave them an option to purchase "conditioned on their promise to demolish and replace the dilapidated bungalow" on the land, a promise that they could not keep without the building permit that they sought from the commission. Michelman, *supra* note 207, at 1605 n.28. Denial of the permit would have made the option a right with "no economically beneficial use." If the continuation of the leasehold itself had been conditioned on the Nollans replacing the existing structure, then the Nollans would have had a *possessory* interest in land with "no economically beneficial use."

Pension Trust,²¹⁸ the Court rejected the petitioner's attempt to segment its property for takings purposes, stating:

[W]e rejected this analysis years ago in *Penn Central Transportation Co. v. New York City*,²¹⁹ where we held that a claimant's parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable. To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of the parcel in question.²²⁰

IX. SEEKING A PROPER SCOPE FOR REGULATORY TAKINGS REVIEW

The courts' approaches in *Loveladies*, *Florida Rock* and *Whitney Benefits* suggest two ways in which the Supreme Court might expand the range of judicial review in regulatory takings cases. One is to follow the Claims Court and the Federal Circuit in their reading of *Agins*, treating the reference to "weighing" as a warrant for courts to redetermine the balance of factors, interests and policy concerns behind legislative determinations. The other approach is to truncate or eliminate the no-segmentation rule, thus greatly increasing the instances of "total regulatory taking" and, consequently, extending the domain of the *Lucas* nuisance criterion that applies to such cases. This section suggests some reasons, apart from precedent, why the Court may decide not to do either of these.

It is inevitable that different land uses sometimes conflict with one another and with other widely sought goals. The question inevitably arises, therefore, whether some land uses—indeed, *which* land uses—have negative external impacts that are, on balance, too intolerable to allow. The common law of nuisance provides some standards, but many believe that modern conditions require a supplementary body of environmental and land use legislation to assure public and national well-being and to fulfill our ethical obligations as a society. Others disagree and, on philosophical or pragmatic grounds, favor free market solutions with a minimum of government regulatory supervision.²²¹

There is, in short, vast room for legitimate debate about which approach to land use regulation is best and which particular land use regulations, if any, serve the interests of the public and the nation. Because these questions of appropriate land use right and wrong cannot be answered to the equal

218. 113 S. Ct. 2264 (1993).

219. 438 U.S. 104, 130-31 (1978).

220. *Concrete Pipe & Products*, 113 S. Ct. at 2290 (footnote added).

221. See *supra* text accompanying notes 20-23.

satisfaction of all, there is also the question of final say: Who decides? The Framers of the Constitution may have placed their primary faith in elected legislatures to decide such matters “so as to bind all,”²²² but that can be changed.

Although many people have their own fairly definite views on issues such as whether filling wetlands or ruining good farmland causes “intolerable” social harm, these views are ultimately based on value judgments. They are the very kinds of judgments that Justice Scalia presumably had in mind when he wrote that “determination of the ‘public interest’ . . . entails . . . value judgment.”²²³ In enacting land use regulations, legislative bodies must make exactly these sorts of judgments.

Courts have to make value judgments too—for example, when legislative direction is absent or when courts are applying some of the vaguer prescriptions of the Constitution, such as “due process of law.” However, it would be a poor constitutional strategy to give the courts the job of making *de novo* the same value judgments that an elected legislature has already made under *its* constitutional authority. To the extent that courts read the Takings Clause give this task to themselves, they relegate elected legislatures to making merely “provisional” laws—subject to ratification or veto by the courts on their substantive merits.

Professor Rose has observed that “the takings problem is so intractable” because “[o]ur traditional discourse envisions property as serving quite divergent purposes.”²²⁴ Reflecting this divergence, we find many theories of takings—arguments that courts should decide regulatory takings cases by balancing,²²⁵ by well-defined rules,²²⁶ according to the law of torts,²²⁷ ac-

222. *Mugler v. Kansas*, 123 U.S. 623, 660-61 (1887); see *supra* text accompanying notes 38-41.

223. *City of Columbia v. Omni Outdoor Advertising, Inc.*, 111 S. Ct. 1344, 1352 (1991); see also *supra* note 41.

224. Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle*, 57 *So. CAL. L. REV.* 561, 594 (1984); see also Jerry L. Anderson, *Takings and Expectations: Toward a “Broader Vision” of Property Rights*, 37 *KAN. L. REV.* 529 (1989) (comparing the various philosophical influences on the Framers and the modern cases); David Schultz, *The Locke Republican Debate and the Paradox of Property Rights in Early American Jurisprudence*, 13 *W. NEW ENG. L. REV.* 155 (1991) (reviewing different background views about property rights as reflected in developing institutions of the 19th century).

225. See, e.g., *State Dep’t of Ecology v. Pacesetter Constr. Co.*, 571 P.2d 196 (Wash. 1977) (employing balancing analysis to uphold a restriction on building); see also Michelman, *supra* note 207, at 1629 (noting that “balancing . . . [is] a part of law’s essence”); Radin, *supra* note 150, at 1684 (preferring a balancing approach with takings issues); cf. Michelman, *supra* note 150, at 1193-96, 1234-35.

226. Susan Rose-Ackerman, *Against Ad Hocery*, 88 *COLUM. L. REV.* 1697 (1988).

227. Saul Levmore, *Takings, Torts, and Special Interests*, 77 *VA. L. REV.* 1333, 1335 (1991) (on the theory that “the government must pay for what it wants in very much the same

ording to Lockian philosophy,²²⁸ with attention to ecological integrity,²²⁹ with attention to personhood,²³⁰ and with a plethora of other factors, interests and policy concerns in mind. None of these are, of course, explicitly set forth in the Takings Clause itself.²³¹ As long as they are not, they remain factors for legislative consideration and as such, are legitimate subjects for debate in our nation's democratic forums. What happens, however, if the courts decide regulatory takings cases by taking into account philosophical or moral positions that are not actually written "in" the Constitution?

Consider a specific example. Professor Fischel makes a strong case for a utilitarian approach to land use policy decisions.²³² He fashions a cogent (albeit factually conjectural) utilitarian argument that, after factoring in "[d]emoralization costs" ²³³suffered by regulated landowners, the efficient solution is to treat some regulatory impingements as "takings" while others are not.²³⁴ He then proceeds to criticize several of the Supreme Court's recent regulatory takings opinions based on their poor fit with his utilitarian land-use doctrines.²³⁵

Even accepting that Professor Fischel's utilitarian land use policy approach is one of the good ones, if it is not in the Constitution—specifically in the Takings Clause—why should his utilitarian critiques be addressed to Court decisions? They should be addressed instead to the decisions of the legislature. Suppose it was the legislature's value judgment that concerns about social equity, national security, or the fate of future generations outweighed utilitarian concerns in particular (or in all) situations.²³⁶ Should a

way that private parties must pay for their interventions with respect to existing property rights"); see also Epstein, *supra* note 14, at 35-56, 110-11.

228. Epstein, *supra* note 14, at 31.

229. David B. Hunter, *An Ecological Perspective on Property: A Call for Judicial Protection of the Public's Interest in Environmentally Critical Resources*, 12 HARV. ENVTL. L. REV. 311 (1988).

230. Radin, *supra* note 150, at 1687.

231. Some of them, indeed conflicting strands, can arguably be found in cases decided under the Clause, but for the moment I want to concentrate on the Clause itself.

232. Fischel, *supra* note 25.

233. A concept borrowed from Michelman, *supra* note 130, at 1214.

234. Fischel, *supra* note 25, at 1584-85.

235. *Id.* at 1585-89. The cases are: *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987).

236. It is not meant to imply that a comprehensive utilitarian analysis could not take satisfactory account of everybody's concerns about such matters as social equity, security, and future generations. After all, if it is legitimate to levy coercive taxation to compensate for "demoralization costs" to regulated landowners, then it is presumably also legitimate to levy taxes to compensate those demoralized by, for example, social inequities. At the moment, however, I am assuming, as Professor Fischel seems to assume, that the applicable utilitarian dogma would indicate a policy choice different from that dictated by a focus on such competing dogmas as equity, security and protecting posterity.

court be criticized for not overturning the legislative judgment and elevating utilitarian concerns over those that predominated in the value judgments made at the legislative stage?

It seems to me that a court reviewing the constitutional validity of legislation cannot properly take "efficiency" or other utilitarian concerns into account unless the Constitution either limits legislatures to making utilitarian laws or, at least, mandates that utilitarian concerns be a factor in legislative choices. If the Constitution does not incorporate utilitarian philosophy as a legislative standard, then courts, in reviewing the validity of the legislature's acts, should not give utilitarian arguments *any weight whatsoever*, except to note they are there.²³⁷ Certainly, no extra-constitutional consideration should ever be a ground for overriding a legislative choice.

What has just been said about utilitarianism can equally be said about any other belief system. Advocates of utilitarian approaches to land use policy should likewise not have to worry that a court will overturn utilitarian legislation on say, environmental grounds. To be sure, what is "in" the Constitution is not fixed. Citizens are free to advocate the inclusion of their own philosophico-moral favorites and many, no doubt, would be delighted to see their own favorite achieve constitutional status. Such an achievement would, however, immunize the newly enshrined desiderata from legislative debate, placing them above the democratic fray. This very fact of immunity is itself a compelling reason for courts to be slow to include by decree instead of constitutional amendment. Although we may regret that our own philosophico-moral favorite is not in the Constitution, we can take comfort in knowing that no one else's is either, except the policy of giving all the right to elect and lobby representatives to embody our various views in statute.

In sum, the facts are that "[o]ur traditional discourse envisions property as serving quite divergent purposes"²³⁸ and that courts perceive a need for somebody to "balance" in reaching land-use value judgments; these facts are themselves reasons to leave legislative policy decisions where the legislature's balancing has put them. The best courts can do *ex post* is to substitute the value judgment of one or a small group of individuals for that of the people's elected representatives.²³⁹ There is no evidence that, in questions of land use

237. See *supra* text accompanying notes 42-52 (describing the Supreme Court's traditional use of this approach); see also *supra* text accompanying note 134-35.

238. Rose, *supra* note 224, at 594.

239. A skeptic of regulatory legislation can, of course, find merit even in this: "[B]y imposing a tough standard of judicial review, legislation now has two hurdles instead of one to cross. Because most legislation is counterproductive in light of the interest group politics that generate it, the second barrier serves a useful function, even if we knew nothing about the relevant competence of legislatures and courts in making judgments about these systems." Richard A.

policy, the “value judgment” of the former will be better than that of the latter.²⁴⁰ On the contrary, the vast and growing body of environmental and land use regulation is proof that the courts’ system of land use controls, the common law of nuisance, is widely regarded as inadequate.

To say that regulatory takings review ought not become a pretext for substantive revisions of legislative judgments still leaves a very substantial role for regulatory takings review. Although it may be the classic province of elected legislatures to keep the laws attuned to the changing times,²⁴¹ the legislature’s own “determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts.”²⁴² What, then, does precedent provide as the proper scope of such judicial supervision?

A good guide to the proper scope of regulatory takings review is the case that established it, *Pennsylvania Coal Co. v. Mahon*.²⁴³ In the “takings” portion of *Pennsylvania Coal*,²⁴⁴ what Justice Holmes did was simply to treat as the generic equivalent of a physical taking that which had, in function and effect, exactly the same result as a physical taking.²⁴⁵ If courts deciding cases on the basis of *Pennsylvania Coal* adhere to Justice Holmes’s approach

Epstein, *Yee v. City of Escondido: The Supreme Court Strikes Out Again*, 26 LOY. L.A. L. REV. 3, 13 (1992).

240. See *supra* text accompanying note 52.

241. See *Mugler v. Kansas*, 123 U.S. 623, 660-61 (1887) (quoted *supra* text accompanying note 39); see also *supra* note 9.

242. *Lawton v. Steele*, 152 U.S. 133, 137 (1894).

243. 260 U.S. 393 (1922).

244. The Court’s decision in *Pennsylvania Coal* breaks down analytically into two parts. In the first part of the opinion the Court analyzed the case in substantive due process terms. After re-weighing the legislatively determined balance, the Court concluded that “the public interest does not warrant much of this kind of interference,” and struck down (rather than order compensation for) the legislature’s mining regulation. Then the Court added a further discussion of the “‘general validity of the Act’” in which it provided what has become the basis of modern regulatory takings doctrine. See *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 483-84 (1987) (analyzing *Pennsylvania Coal*, 260 U.S. at 413-14). For further discussion, see John A. Humbach, *Economic Due Process and The Takings Clause*, 4 PACE ENVTL. L. REV. 311, 325-26 (1987).

Notably, the balancing process that dominated the “substantive due process” part of Justice Holmes’s analysis, *Pennsylvania Coal*, 260 U.S. at 412-14, played no role at all in the takings discussion that followed. The Court’s effort to re-weigh what the legislature had already weighed was, of course, quite normal “economic due process” analysis for the times—the Lochnerian heyday of activist review. *Lochner v. New York*, 198 U.S. 45 (1905), *overruled by Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952). However, such judicial activism is quite contrary to the deferential “due process” review standards currently applied to economic legislation. See, e.g., *Pennell v. San Jose*, 485 U.S. 1 (1988); *Bowen v. Gilliard*, 483 U.S. 587 (1987); *Day-Brite*, 342 U.S. at 423 (declaring that “we do not sit as a super-legislature”).

245. “To make it commercially impracticable to mine certain coal has *very nearly the same effect* for constitutional purposes as appropriating or destroying it.” *Pennsylvania Coal*, 260 U.S. at 414 (emphasis added).

to regulatory takings, they will preserve to legislatures their essential role of selecting "so as to bind all"²⁴⁶ among the diverse competing public values that are expressed through the democratic process.

Adhering to Justice Holmes's approach, takings would, of course, include the entire originally intended ambit of the Takings Clause,²⁴⁷ namely, physically invasive impingements on private ownership, whether in the guise of regulation or otherwise. For example, Justice Brennan plainly erred in his suggestion in *Nollan v. California Coastal Commission*²⁴⁸ that a requirement forcing owners to grant public easements was merely a regulation on "use."²⁴⁹ Such a requirement denies owners the right to exclude others, "one of the most essential sticks in the bundle of rights" known as property,²⁵⁰ and it is therefore clearly the generic equivalent, in function and effect, of a physical taking.²⁵¹

Similarly equivalent to physical takings are regulations that go so far as to literally reduce ownership to an essentially theoretical status with no operational consequence in the real, physical world, as appears to have happened with respect to the subterranean coal in *Pennsylvania Coal*.²⁵² Even if the owner technically may have a right to "exclude" others, the owner's property rights are functionally gone once they cease to exist as matters of legal or other significance. If a regulation reduces the rights to a hollow shell or an empty hoax, then the regulation is the generic equivalent, in function and effect, of a physical taking, and it is the logical goal of regulatory takings analysis to treat it as such.

A regulation that removes all "value" (as distinguished from all use) can be the functional equivalent of a physical taking, even though it is not necessarily so. Property rights can lack market value and still exist as matters of genuine significance and even be highly prized by their owners.²⁵³ Nonetheless, the Supreme Court has now adopted a categorical rule that a regulation removing "all economically beneficial use" is a compensable taking,²⁵⁴ thus creating another significant category for regulatory takings review.

246. *Mugler v. Kansas*, 123 U.S. 623, 660-61 (1887) (quoted *supra* text accompanying note 39).

247. See *supra* notes 27-28.

248. 483 U.S. 825 (1987).

249. *Id.* at 848-49 n.3 (Brennan, J., dissenting).

250. *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979).

251. *Nollan*, 483 U.S. at 831.

252. See quotation from *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922), set forth *supra* note 245.

253. When use restrictions remove all value, that merely signifies that current potential buyers are only interested in acquiring the property for uses now regarded as too socially detrimental to allow.

254. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2899 (1992).

Finally, there is regulatory legislation whose wealth redistribution effects are not merely *incidental* to its legitimate public purposes but are, indeed, the very aim of the legislation itself.²⁵⁵ Though seldom mentioned in the regulatory takings context, there is firmly identifiable distinction between (i) laws that aim to reduce social costs arising from certain kinds of human interactions and that in the process, reallocate the burdens of such costs among the various interacting parties, and (ii) laws that, by contrast, aim to redistribute social fortune by imposing burdens and conferring benefits that are unrelated to any costs arising from interactions on the part of those burdened and benefitted. With respect to the former kind of laws, whose redistributive effects are deemed "incidental" to their main purpose of social cost reduction, the Court wrote in *Mugler*: "If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance by any *incidental* inconvenience which individuals or corporations may suffer."²⁵⁶

As Professor Coase has demonstrated, the costs arising from human interaction are not actually caused by any one party alone, but instead, are the result of the combined actions of all participants.²⁵⁷ There is, however, no cardinal principle of public policy that necessarily *requires* all interactions

255. See, e.g., *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980) (striking down an attempt by state to authorize courts simply to retain interest earned on money deposited with them by litigants).

It is said that a fear of wealth redistribution, once the people received democratic control, was Madison's motive for proposing a Takings Clause in the Bill of Rights. See JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY* 268 (1990).

256. *Mugler v. Kansas*, 123 U.S. 623, 670 (1887) (emphasis added) (quoting *Beer Co. v. Massachusetts*, 97 U.S. 25, 32 (1877)). The Court carefully distinguished laws whose "real object is not to protect the community, or to promote the general well-being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law." *Id.* at 668. Interestingly, by selecting these two paradigmatic examples, the Court seems to be suggesting that laws restricting property use may be adopted without compensation irrespective of whether they are aimed at "preventing harm" or "providing benefits." See *supra* notes 88-90 and accompanying text.

In the *Beer Company* case, the Court added that: "We do not mean to say that property actually in existence, and in which the right of the owner has become vested, may be taken for the public good without due compensation." 97 U.S. at 32. The Court was making a distinction between a law that takes the right to brew beer in the future and a law that takes away existing beer that has already been brewed. Translated to the land use context, the distinction is between the right to develop land, which may be restricted by new regulations, and a "vested" right to maintain a previously developed use that the owner has already invested in. See *People v. Miller*, 106 N.E. 2d 34 (N.Y. 1952); DONALD G. HAGMAN & JULIAN C. JUERGENSEMEYER, *URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW* 152-58 (2d ed. 1986); Daniel R. Mandelker, *Land Use Law* §§ 6.11-13, at 213-14 (2d ed. 1988). It is one thing to protect property rights in something that exists, but it is quite another to provide constitutional guarantees for hopes, dreams and expectancies.

257. R.H. Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960).

costs to be borne by the persons on whom they initially happen to fall. Accordingly, *Mugler* seems correct in suggesting that the Constitution does not limit the legislature's authority to reallocate or prevent various costs that arise from human interactions (through laws that define torts and crimes), even though such cost reallocations have *incidental* redistributive effects.²⁵⁸ Such "interactions cost" reallocations are pretty much the essence of social and economic regulatory legislation. By contrast, wealth redistribution that has no relation to particular social or economic interactions or their costs is something else altogether. Preventing purposeful, direct redistributions of wealth is surely a central mission and, arguably, the only mission of the Takings Clause.

Beyond these precedential roots of regulatory takings review, however, it is a matter of doubt whether there is further scope for judicial supervision:

The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. . . . There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority.²⁵⁹

X. CONCLUSION

The greatest long term importance of *Lucas v. South Carolina Coastal Council*²⁶⁰ may lie in the Supreme Court's adoption of the common law of nuisance as a criterion of regulatory legitimacy. By using this criterion, the

258. Such reallocation or prevention of social interactions costs is definitely not, as Professor Epstein has suggested, merely "declaring X to be Y's debtor, and then allowing Y to collect the sum in question" as a way to "get around the prohibitions against taking." Brief of the Institute of Justice as Amicus Curiae in Support of Petitioner at 18, *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992) (No. 91-453), *reprinted in* 25 *LOY. L.A. L. REV.* 1233, 1246. Professor Epstein's observation would be correct only if it could be said that justice requires the burdens of social interactions costs to remain with the parties on whom such costs first fall.

For a more detailed and sympathetic elaboration of the grounds for not treating interactions cost reallocations as compensable takings, see Sax, *supra* note 37 (discussing the general problem of cost allocation among conflicting resource users, suggesting a framework for analyzing such cost allocations, and positing a judicial role limited to preventing discriminatory or capricious regulations).

259. *Bowers v. Hardwick*, 478 U.S. 186, 194-95 (1986). The Court was writing of the Due Process Clauses of the Fifth and Fourteenth Amendments, but the stated rationales apply to the Takings Clause as well.

260. 112 S. Ct. 2886 (1992).

judiciary will be required to substitute its own judgments of right and wrong for that of the legislature in the land use field.

In several recent cases decided prior to *Lucas*, the Claims Court and the Federal Circuit had already begun to treat regulatory takings claims as occasions for revisiting, and rebalancing, the various public and private factors, interests and policy concerns embodied in acts of Congress. In these opinions, the courts also took a somewhat grudging approach to the no-segmentation principle, which suggests takings analysis should consider regulatory impacts with respect to parcels "as a whole." The Supreme Court in *Lucas* expressed doubt concerning the no-segmentation principle.

Although *Lucas* restricted application of the Supreme Court's new nuisance criterion to cases of total regulatory taking, a truncation of the no-segmentation principle would allow takings claimants to focus solely on the particular rights "totally" taken by regulation, while ignoring the owner's other valuable rights in the same property. The result would be to expand greatly the range of cases in which courts could revisit and re-balance legislative rationales, substituting their own policy judgments, if different, for those of the legislature.

The question is, where is this trend going? Are recent Claims Court and Federal Circuit decisions leading the way for the United States Supreme Court, as it appears from some of the more innovative speculations in *Lucas*, or are they wandering astray? If indeed they are leading the way, we are headed for a new era of unprecedented judicial activism in the land use field, an activism that may revolutionize traditional conceptions of the legislative/judicial division of labor. Whether or not one calls this new activism "imperial,"²⁶¹ it needs to be taken seriously.

261. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2882 (1992) (Scalia, J., dissenting) (borrowing a term from Justice Scalia, the author of the Supreme Court's opinion in *Lucas*); see *supra* text accompanying note 2.