
FRUITS OF THE “IMPENETRABLE JUNGLE”:
NAVIGATING THE BOUNDARY
BETWEEN LAND-USE PLANNING
AND ENVIRONMENTAL LAW

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I. INTRODUCTION

On June 24, 1994, America’s local governments, financially strapped¹ and already subject to potential liability in a number of areas,²

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1. “In 1992 . . . 65.2% of urban counties received lower own-source revenues than expected, 51.5% received less intergovernmental aid than expected, and 51.5% ended up with higher-than-expected expenditures.” Kenneth J. Drexler, *The Four Causes of the State and Local Budget Crisis and Proposed Solutions*, 26 URB. LAW. 563, 565 n.16 (1994) (citing NATIONAL ASSOCIATION OF COUNTIES (NACo), URBAN COUNTY FISCAL SURVEY: AN EXAMINATION OF THE FISCAL HEALTH OF 66 OF THE NATION’S LARGEST COUNTIES (Feb. 1993)). See also ALAN A. ALTSHULER & JOSE A. GÓMEZ-IBÁÑEZ, REGULATION FOR REVENUE: THE POLITICAL ECONOMY OF LAND USE EXACTIONS 23-32 (1993) (discussing impact on local governments of “Stagnating Incomes and the Tax

received an unwelcome gift from the United States Supreme Court—*Dolan v. City of Tigard*.³ For the third time in seven years,⁴ the Justices ended their term by releasing an opinion further extending the reach of the Fifth Amendment's Takings Clause.⁵ This decision was a cause for celebration in the ranks of private property champions⁶ and

Revolt," "Cutbacks in Federal Aid," "Infrastructure Backlogs," and "Federal and State Mandates").

2. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (invalidating affirmative action program for minority business enterprises under the Equal Protection Clause of the Fourteenth Amendment); *Rankin v. McPherson*, 483 U.S. 378 (1987) (holding discharge of county employee was unlawful because of violation of First Amendment free speech rights); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987) (requiring compensation under the Fifth Amendment for temporary and permanent regulatory takings); *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982) (refusing to extend state immunity from federal antitrust laws to "home-rule" municipality); *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658 (1978) (holding municipality liable for constitutional violations under 42 U.S.C. § 1983 (1988)); *Jenkins v. Missouri*, 807 F.2d 657 (8th Cir. 1986), cert. denied sub nom. *Kansas City Sch. Dist. v. Missouri*, 484 U.S. 816 (1987) (ordering school district to share costs of school desegregation plan with state); *Hargrove v. Town of Cocoa Beach*, 96 So. 2d 130 (Fla. 1957) (holding that municipality can be liable for torts of police officers under the doctrine of respondent superior).

3. 114 S. Ct. 2309 (1994).

4. See *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

5. "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

6. See, e.g., Richard A. Epstein & William Mellor, *Reining in the Land-Use Planners*, CHI. TRIB., July 22, 1994, at 23 (noting that *Dolan* "signalled an end to the garden-variety extortion that passes for land-use planning in many municipalities today"); Linda Greenhouse, *High Court, in a 5-4 Split, Limits Power on Private Property*, N.Y. TIMES, June 24, 1994, at 1 (recognizing that Institute of Justice general counsel William H. Mellor III labels *Dolan* "a 'dramatic victory' [whose] importance lay in the Court's recognition that the ends can no longer justify the means in the regulation of land use"); Paul D. Kamenar, *A Quest for an Invigorated Takings Clause*, THE RECORDER, Aug. 26, 1994, at 7 (including opinion of Kamenar, executive legal director of Washington Legal Foundation, who predicts that *Dolan* will "provide a new weapon to property owners seeking development permits" and "may even be of help to property owners who wish to re-open proceedings where unconstitutional exactions have been imposed"); Billy Tauzin, *"If You Take It, Pay for It!"; Something's Wrong When a Rat's Home Is More Important than an American's Home*, ROLL CALL, July 25, 1994 (providing opinion of Tauzin, then a Democrat from Louisiana who is a leading opponent of environmental regulation in the House of Representatives, who hails *Dolan* as "a huge victory for all landowners"). The Washington Legal Foundation and the Institute of Justice were joined by several other organizations as amici curiae in support of Mrs. Dolan, including the Pacific Legal Foundation, the National Association of Home Builders, the Mountain States Legal

consternation among Court critics who perceive a return to the bad old days of substantive due process,⁷ the Court's second-guessing of government decisionmaking, this time in the fields of land-use planning and environmental regulation.

Five Members of the Court, led by Chief Justice William Rehnquist, gave a sympathetic ear to Florence Dolan's assertion that the decision by the City of Tigard, Oregon to condition approval of the plans to expand her plumbing and electric supply store on the dedication of part of the parcel for the purposes of flood control and traffic improvements amounted to an uncompensated taking.⁸ In the process of redressing this possible⁹ constitutional violation, the majority cautioned Tigard and other municipalities that conditioning development permission on the dedication of real property interests¹⁰ was a serious proposition that required (1) the existence of an "essential nexus" between a "legitimate state interest" and the permit condition,¹¹ and (2) a demonstration by

Foundation, the National Association of Realtors, to name but a few.

7. See, e.g., Greenhouse, *supra* note 6, at 1 (quoting John Echeverria, Audubon Society general counsel: "This is an extraordinary intrusion by the Court into the authority of local government . . . [that] elevates the interests of property owners over the interests of the community as a whole"); Frank Shafroth, *Cities Lose Takings Case in Dolan v. City of Tigard*, NATION'S CITIES WEEKLY, July 4, 1994, at 1 (predicting that *Dolan* "could lead to a significant increase in federal court intrusion into municipal land use planning and development"); Arlene Zarembka, *A Green Light to Ignore the Environment*, ST. LOUIS POST-DISPATCH, July 14, 1994, at 7B (noting that *Dolan* "gives property owners the green light to develop with scant concern for the impact on the urban environment. In many cases, it will become prohibitively expensive for government to regulate land use in the public interest").

Joining the National Audubon Society and the National League of Cities as amici curiae in support of the City of Tigard were, among others, the State of Oregon, the City of New York, the United States, 1000 Friends of Oregon, the American Planning Association, the National Trust for Historic Preservation, the National Association of Counties, the U.S. Conference of Mayors, and the National Institute of Municipal Law Officers.

See also *Dolan*, 114 S. Ct. at 2326 (Stevens, J., dissenting) ("Even more consequential than its incorrect disposition of this case, however, is the Court's resurrection of a species of substantive due process analysis that it firmly rejected decades ago.").

8. *Dolan*, 114 S. Ct. at 2312.

9. The case was remanded to state court for a determination as to whether the city met the rough proportionality standard. *Id.* at 2322.

10. In *Dolan*, the landowner was asked to dedicate not fee simple interests but a "floodway easement" (also referred to as a "recreational easement") and a "pedestrian/bicycle pathway easement." *Id.* at 2320-21.

11. *Id.* at 2317 (quoting *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987)).

the regulatory body of “rough proportionality,” that is, an “individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.”¹² In other words, the extreme deference usually accorded to regulators of social and economic activities¹³ is not appropriate when private real property exactions are part of the bargain.

Standing alone, the majority’s holding in *Dolan* would not warrant extreme concern by localities that currently include subdivision exactions, impact fees, conditional rezoning, incentive zoning, and inclusionary zoning as part of their land-use arsenal. Indeed, most American cities—many operating under state law mandates¹⁴—already take care to ensure that direct links exist between the concessions requested of the property owner and the impact of the planned development.¹⁵ However, when viewed in the context of the Court’s most recent pronouncements in the regulatory takings area, *Dolan* appears to be part of a significant shift away from the deference traditionally accorded land-use regulators in the past and to presage even further assaults upon government attempts to balance private property rights and the public welfare. Indeed, *Dolan* surfaced while courts, commentators, and advocates were still wrestling with the effect and implications of the Justices’ most

12. *Id.* at 2319-20.

13. See, e.g., LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 8-7, at 582 (2d ed. 1988) (noting that the Supreme Court will “sustain regulation in the socioeconomic sphere if any state of facts either known or reasonably inferable afforded support for the legislative judgment,” and that the Court is “willing to resort to purely hypothetical facts and reasons to uphold legislation”).

14. See, e.g., Arthur C. Nelson, *Development Impact Fees: The Next Generation*, 26 *URB. LAW* 541, 560-61 (1994) (“[N]ineteen states representing roughly half of the United States population have adopted development impact fee enabling legislation . . .”). See also ALTSHULER & GÓMEZ-IBÁÑEZ, *supra* note 1, at 53 (“In general, it is developers who have taken the lead in pursuing legislation—primarily to secure state protection against new local practices that they find threatening.”).

15. See Nelson, *supra* note 14, at 561. Nelson notes that state enabling laws explicitly, or in certain other words, require that new development not be assessed more than its proportionate share of the cost of new or expanded facilities needed to accommodate the development based on level of service standards, service area analysis, and an analysis of land-use and facility needs over a planning horizon.

Id. The wide range of devices utilized by local governments is analyzed in Gus Bauman & William H. Ethier, *Development Exactions and Impact Fees: A Survey of American Practices*, 50 *LAW & CONTEMP. PROBS.* 51 (1987); and John J. Delaney et al., *The Needs-Nexus Analysis: A Unified Test for Validating Subdivision Exactions, User Impact Fees and Linkage*, 50 *LAW & CONTEMP. PROBS.* 139 (1987).

recent takings offerings.

The primary architect of this shift is Associate Justice Antonin Scalia who, on the last day of the 1991-1992 Term, five years after shocking land-use and constitutional commentators with his *Lochnerian*¹⁶ opinion in *Nollan v. California Coastal Commission*,¹⁷ delivered the second part of his one-two punch to “traditional” takings clause analysis. The topographical and regulatory setting for *Lucas v. South Carolina Coastal Council*¹⁸ was a perfect match for *Nollan*: Both cases involved the (il)legitimacy of state commission controls on real estate development in the coastal zone, under the aegis of the federal Coastal Zone Management Act.¹⁹ The outcomes of the two cases were a perfect match as well—both resulted in victories for the landowners in their struggle against an environmentally directed state agency.²⁰

That a majority of the Rehnquist Court would render yet another ecologically unfriendly decision in the area of coastal regulation was not unexpected.²¹ The novel “categorical”²² framework that Justice Scalia employs for resolving this conflict (and it is to be supposed, future conflicts) between environmental protection and private property rights is somewhat surprising, even given Scalia’s reputation for innovation and unorthodoxy.²³ Just when judges, lawyers, and commentators had

16. See Robert A. Williams, Jr., *Legal Discourse, Social Vision, and the Supreme Court's Land Use Planning Law: The Genealogy of the Lochnerian Recurrence in First English Lutheran Church and Nollan*, 59 U. COLO. L. REV. 427 (1988).

17. 483 U.S. 825 (1987).

18. 112 S. Ct. 2886 (1992).

19. Coastal Zone Management Act of 1972 (CZMA) §§ 302-318, 16 U.S.C. §§ 1451-1464 (1988) (cited in *Nollan*, 483 U.S. at 846-48 (Brennan, J., dissenting), and *Lucas*, 112 S. Ct. at 2889).

20. *Nollan*, 483 U.S. at 841-42 (state required to pay compensation for easement across Nollans’ property); *Lucas*, 112 S. Ct. at 2901-02 (state required to show principles of nuisance and property law that prohibit landowner’s intended uses of property).

21. See, e.g., Erwin Chemerinsky, *Is The Rehnquist Court Really That Conservative?: An Analysis of the 1991-92 Term*, 26 CREIGHTON L. REV. 987, 987, 992 (arguing that in areas including the environment the Rehnquist Court “consistently accepts and endorses conservative views,” and that “the Endangered Species Act, wetlands preservation laws, and coastal protection laws might be vulnerable after *Lucas*”).

22. *Lucas*, 112 S. Ct. at 2893. See also Michael Allan Wolf, *Takings Term II: New Tools for Attacking and Defending Environmental and Land-Use Regulation*, 13 N. ILL. U. L. REV. 469, 477-80 (1993).

23. See William W. Fisher III, *The Trouble with Lucas*, 45 STAN. L. REV. 1393 (1993). Professor Fisher writes:

reconciled themselves to the give-and-take of an *ad hoc* regime for resolving regulatory takings puzzles,²⁴ Justice Scalia introduced a new variety of *per se* violations.²⁵

Critics of federal takings jurisprudence who often bemoan the absence of bright lines and functional tests²⁶ had reason, at first glance, to embrace Scalia's approach to cases where the plaintiff alleged total deprivation attributable to government action. However, such delight lasted only until they discovered the two fundamental ambiguities that promise to bedevil the interpretation and application of the Court's new formula.

The first element of uncertainty involves the determination whether the complaining party indeed has suffered a *total* deprivation at the hands

[Scalia] surely has a strong set of political inclinations, most of which could be described as libertarian. But those inclinations are not connected to a stable constitutional theory. Instead, Justice Scalia selects from a large and eclectic set of constitutional principles those that best suit his purposes in a given case. If the principles he employs in one case prove inconvenient in the next, he casually abandons them. The result is that, although it is usually easy to predict how he will vote in a constitutional case, it is often difficult to predict how he will justify his vote.

Id. at 1394. See also Symposium, *The Jurisprudence of Justice Antonin Scalia*, 12 CARDOZO L. REV. 1583 (1991).

24. See, e.g., Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1089 (1993) (bemoaning the Supreme Court's decision in *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978), and stating that "the Court . . . forswore the pursuit of general principles to resolve takings cases and held that judges must instead engage in 'essentially ad hoc, factual inquiries'").

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

26. See, e.g., Jeremy Paul, *The Hidden Structure of Takings Law*, 64 S. CAL. L. REV. 1393, 1400 (1991) ("According to one view, the Court should seek to develop a unified theory that would enable it to distinguish rather predictably between takings requiring compensation and mere regulations under the police power."). Professor Paul, *id.* at 1400 n.18, cites the following as examples of "scholars seeking a general solution to the takings problem": RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985); John J. Costonis, *Presumptive and Per Se Takings: A Decisional Model for the Taking Issue*, 58 N.Y.U. L. REV. 465 (1983); John A. Humbach, *A Unifying Theory for the Just-Compensation Cases: Takings, Regulation and Public Use*, 34 RUTGERS L. REV. 243 (1982); Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles: Part I—A Critique of Current Takings Clause Doctrine*, 77 CAL. L. REV. 1299 (1989); Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles: Part II—Takings as Intentional Deprivations of Property Without Moral Justification*, 78 CAL. L. REV. 53 (1990); Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

of the government.²⁷ In fact, more than one Justice expressed doubt that *Lucas*, the petitioner in the very case before the Court that gave rise to the new test, retained no value in his property once the new coastal regime was implemented.²⁸ If those suffering under confiscatory statutes, ordinances, or regulations can still salvage even a small amount of value, the *Lucas* test will not apply. This was the lesson learned, for example, by the First English Evangelical Lutheran Church when the Justices remanded the case to a state court that sifted through the facts to find *some* remaining value.²⁹

The second area of ambiguity concerns Justice Scalia's evocation of common-law nuisance as a way for the governmental unit responsible for the offending regulation to justify (and thereby avoid financial responsibility for) the total deprivation.³⁰ Just as Rehnquist's opinion in *Dolan* contemplated the validity of real property dedications for floodplain protection and traffic control, the essence of *Lucas* lies in this intersection of common-law and regulatory land-use controls. The exploration of that critical, outcome-determinative intersection, within the framework of the dispute before the court and within a wider context of decades of American land-use planning jurisprudence, is the central concern of this Article.

Dolan and *Lucas* provide a contemporary lens through which we can revisit some key land-use and environmental regulation cases, decisions that also challenged jurists to reconcile private and public law approaches to the basic problem of governmental controls over real estate and natural resource development. As we rethink the narrative formed by these by-now familiar fact patterns and opinions, a pervasive, though somewhat hidden, theme emerges: the links between our centuries-old methods for reconciling discordant uses—private and public nuisance—and their modern, regulatory legacies—local land-use regulation and comprehensive federal and state environmental law—are undeniable and persistent. To the informed jurist, these links provide insights for

27. See, e.g., *Lucas*, 112 S. Ct. at 2896 ("The trial court found *Lucas*'s two beachfront lots to have been rendered valueless by respondent's enforcement of the coastal-zone construction ban.").

28. *Id.* at 2903 (Kennedy, J., concurring).

29. *First English Evangelical Lutheran Church v. County of Los Angeles*, 258 Cal. Rptr. 893 (Cal. Ct. App. 1989) (finding ordinance did not preclude all uses of property), *on remand from* 482 U.S. 304 (1987).

30. *Lucas*, 112 S. Ct. at 2901-02.

understanding and resolving contemporary disputes and, perhaps, for harmonizing some of the cacophony of regulatory takings jurisprudence.

Parts II and III of this Article discuss the more salient attributes of the Court's most recent contributions to the regulatory takings dialogue, with particular emphasis on Rehnquist's curious excursion into state law to establish the *Dolan* standard of review, and Scalia's skillful weaving of nuisance law into the fabric of the *Lucas* holding. Thus is the stage set for the backward glances that follow.

Part IV reconsiders *Village of Euclid v. Ambler Realty Co.*³¹ as the case that forged the integral links between private nuisance law and its "civil" legacy: local land-use controls, chiefly the height, area, and use regulation we now call "Euclidean zoning."³² Viewed as the logical, progressive extension of the common law's protection of neighbors' rights to use and enjoy their real property, locally controlled zoning—though entitled to great deference (one of *Euclid*'s basic propositions)—is still subject to judicial veto if the court perceives either confiscation³³ or irrationality.³⁴ Zoning is thus legitimated and insulated from routine challenges because it seeks to protect the same values as private nuisance, and not because it is a logical extension of the quasi-criminal protections afforded the targeting of generally harmful activities that we associate with public nuisance.

31. 272 U.S. 365 (1926).

32. See, e.g., *Save Our Rural Environment v. Snohomish County*, 662 P.2d 816, 819 (Wash. 1983) ("We are aware of the growing disenchantment with traditional 'euclidean' zoning philosophy and practices under which a municipality is divided into different types of zoning districts, each of which is assigned particular uses."); *Amcon Corp. v. City of Eagan*, 348 N.W.2d 66, 72-73 n.5 (Minn. 1984) ("The term 'Euclidean' zoning is taken from the landmark United States Supreme Court case of [*Euclid*], in which zoning was first sustained as a constitutional exercise of the police power. The zoning plan upheld in *Euclid* contemplated, rather than case-by-case zoning, cumulative uses in a pyramid-type configuration.") (citation omitted). See also PETER W. SALSICH, JR., *LAND USE REGULATION* § 9.01 n.1 (1991) ("*Euclidean zoning* refers to a particular type of land use control characterized by a 'cookie cutter' pattern of rigid, rectangular districts that was upheld [in *Euclid*].") (citation omitted).

33. See, e.g., *Vernon Park Realty, Inc. v. City of Mount Vernon*, 121 N.E.2d 517, 521 (N.Y. 1954) ("[T]he validity of the ordinance is assumed but that does not operate to confer validity if, in fact, as here, the zoning ordinance is clearly confiscatory.").

34. See, e.g., *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 448 (1985) ("Because in our view the record does not reveal any rational basis for believing that the Featherston home would pose any special threat to the city's legitimate interests, we affirm the judgment below insofar as it holds the ordinance invalid as applied in this case.").

Part V revisits *Southern Burlington County NAACP v. Township of Mount Laurel*³⁵ and *Fasano v. Board of Commissioners of Washington County*,³⁶ two highly influential land-use cases that illustrate the limits to the deference and tolerance exhibited by the Court in *Euclid*. The New Jersey Supreme Court's refusal to indulge local government officials' representations that large-lot zoning was environmentally based involves a segregation of local land-use controls from environmental law, thus accentuating the split of private from public nuisance. The Oregon high court, concerned about the susceptibility of local land-use regulators to undue pressure, employs substantive and procedural protections for landowners who are negatively affected by planning and zoning decisions.

Part VI centers on the Supreme Court's decision in *Keystone Bituminous Coal Ass'n v. DeBenedictis*,³⁷ a holding that might appear to be tenuous in the wake of more recent Court decisions, particularly given the *Dolan* Court's narrow focus on the deprivation of the right to exclude.³⁸ Viewed from the perspective of the twin legacy of nuisance law, however, the majority opinion in *Keystone* emerges as a paradigmatic method for adjudging the validity of broad-based environmental regulations that cause substantial, even total, deprivation.

Part VII concludes this Article with a warning. The Justices' efforts to ratchet-up the level of scrutiny appropriate to takings challenges and to reintroduce nuisance elements into the regulatory taking formula are problematic, not only because of their potential chilling impact on well-crafted regulations affecting private property,³⁹ but also because they could accelerate the pattern and practice of merging together traditional land-use and modern environmental controls in judicial and legal analysis. For several reasons, our responsibility for future cases entails maintaining and using the twin legacy of nuisance (private and public)

35. 336 A.2d 713 (N.J.), *cert. denied*, 423 U.S. 808 (1975).

36. 507 P.2d 23 (Or. 1973).

37. 480 U.S. 470 (1987).

38. *Dolan*, 114 S. Ct. at 2320-21. *See also infra* text accompanying notes 310-12.

39. *See, e.g.*, Thomas G. Pelham, *Innovative Growth Control Measures: The Potential Impacts of Recent Federal Legislation and the Lucas Decision*, 25 URB. LAW. 881, 881 (1993) (arguing that *Lucas* "may have a chilling effect on some state and local growth management initiatives"); Terry D. Morgan, *Exactions as Takings Tactics for Dealing with Dolan*, LAND USE L. & ZONING DIG., Sept. 1994, at 3, 4 ("[S]ome traditional exactions formerly thought to be safe may now be at risk.").

as a guidepost for creative and responsible regulation.

II. CREATIVE FEDERALISM: *DOLAN* AND THE QUEST FOR A PROPER FIT

Chief Justice Rehnquist's opinion for the majority in *Dolan* is noteworthy for its simplicity, an uncommon characteristic of Supreme Court takings opinions. The Court emphasized four basic points: (1) the Oregon courts misinterpreted *Nollan* by failing to go beyond the "essential nexus" requirement when they adjudged the validity of the city's conditional approval of petitioner's expansion plans;⁴⁰ (2) in order to provide guidance for future unconstitutional conditions cases involving land-use regulation, the Supreme Court must determine what kind of connection between exactions and development impact is required by the Constitution;⁴¹ (3) a review of state court decisions convinced the Court that localities must meet a "rough proportionality" standard to survive federal takings challenges of this sort;⁴² and (4) Tigard had not yet met its burden of making an individualized determination that the dedication of an easement for a public greenway and of a fifteen-foot strip of land for a public pedestrian/bicycle pathway were reasonably related to the legitimate goals of controlling flood hazards and offsetting traffic demands.⁴³

As with any court decision that generates dissenting opinions, quibbling with the majority's conclusions is fair game. For example, is the majority splitting hairs, as Justice Souter suggests in his dissent,⁴⁴ when it faults state decisionmakers for misreading and misapplying *Nollan*? After all, the Land Use Board of Appeals and the state intermediate appellate and supreme courts all employed the "reasonable

40. *Dolan*, 114 S. Ct. at 2315, 2317-18. See also *Dolan v. City of Tigard*, 832 P.2d 853, 855-56 (Or. Ct. App. 1992), *aff'd*, 854 P.2d 437, 441-43 (Or. 1993), *rev'd and remanded*, 114 S. Ct. 2309 (1994).

41. *Dolan*, 114 S. Ct. at 2318-19.

42. *Id.* at 2318-20.

43. *Id.* at 2320-22.

44. *Id.* at 2330 (Souter, J., dissenting). Justice Souter believes that "the Court does not apply [the rough proportionality] test to these facts, which do not raise the question the Court addresses." *Id.* Indeed, he concludes that the majority's application of *Nollan* is not "sound"! *Id.* at 2331.

relationship" standard embraced (though renamed) by the *Dolan* Court.⁴⁵

Or, does the majority adequately address Justice Stevens's claims that "the 'unconstitutional conditions' doctrine has . . . long suffered from notoriously inconsistent application" and that in the area of local land-use regulation, the doctrine is anything but "well-settled"?⁴⁶ Consider Professor Epstein's description of the doctrine's pedigree:

[T]he doctrine of unconstitutional conditions tenaciously endures, notwithstanding charges by figures no less distinguished than Justice Holmes that it is both logically incoherent and corrosive of sovereign power . . . Like the police power, it is a creature of judicial implication. It roams about constitutional law like Banquo's ghost, invoked in some cases, but not in others. It has been used as an aid in construing the scope of Congress' spending power and of the states' police power. It has been engrafted onto substantive protections afforded to speech, religion, and property. It also has found expression in decisions under the equal protection and due process clauses.⁴⁷

Even the author of the majority opinion in *Dolan* has endorsed the notion that the states' greater power to ban activities under the police power includes the lesser power to condition approval of that same activity even if the condition arguably impinges a constitutional right.⁴⁸

Because the two published dissents in *Dolan* do a commendable job of countering these and other potential weak spots in the majority's presentation,⁴⁹ we can turn our attention to *Dolan*'s two major contributions to the regulatory takings dialogue: first, the adoption of a rough

45. See *Dolan v. City of Tigard*, 832 P.2d 853, 854-55 (Or. Ct. App. 1992), *aff'd*, 854 P.2d 437, 440-44 (Or. 1993), *rev'd and remanded*, 114 S. Ct. 2309, 2319 (1994).

46. *Dolan*, 114 S. Ct. at 2328 n.12 (Stevens, J., dissenting).

47. Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 1, 5, 10-11 (1988) (footnotes omitted).

48. See *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 345-46 (1986) (Rehnquist, J.) ("In our view, the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling.")

49. See, e.g., *Dolan*, 114 S. Ct. at 2323 (Stevens, J., dissenting). Justice Stevens carefully and critically reads the cases cited by the majority as representative of the "rough proportionality" standard, concluding in a sharp put-down that "although these state cases do lend support to the Court's reaffirmance of *Nollan*'s reasonable nexus requirement, the role the Court affords them in the announcement of its newly minted second phase of the constitutional inquiry is remarkably inventive." *Id.*

proportionality standard for adjudging the validity of permit conditions requiring the dedication of real property interests and second, the placement of the burden of justifying that dedication on the public regulator.

After detailing the petitioner landowner's dogged quest for relief from the Tigard Planning Commissions' conditional grant of approval (including unsuccessful challenges before the Oregon Land Use Board of Appeals (LUBA), the Oregon Court of Appeals, and the Oregon Supreme Court), Rehnquist distills the dispute to its critical issue. The key question, Rehnquist remarks, is whether "the 'city's unchallenged factual findings' supporting the dedication conditions . . . are constitutionally sufficient to justify the conditions imposed by the city on petitioner's building permit."⁵⁰ For guidance, the majority turns to "representative" state cases for the basic reason that "state courts have been dealing with this question a good deal longer than we have."⁵¹ Even Justice Stevens concedes the legitimacy of this excursion, though his journey yields far different conclusions.⁵²

Rehnquist's expedition takes him through three groupings of cases. Like Goldilocks, he rejects the two extremes: those state courts that take a "too soft" approach and are satisfied with regulators who provide merely "very generalized statements as to the necessary connection between the required dedication and the proposed development,"⁵³ and those "too hard" jurisdictions that "require a very exacting correspondence, described as the 'specific and uniquely attributable' test."⁵⁴ The majority deems "just right" those states occupying the "intermediate position, requiring the municipality to show a 'reasonable relationship' between the required dedication and the impact of the proposed development."⁵⁵ However, in order to avoid confusion with equal

50. *Id.* at 2318 (citing *Dolan v. City of Tigard*, 854 P.2d 437, 443 (Or. 1993)).

51. *Id.*

52. *Id.* at 2322-23 (Stevens, J., dissenting) (stating that cases cited by the majority "either fail to support or decidedly undermine the Court's conclusions in key respects"). The most prominent example of the Court's sampling of state land-use decisions for guidance on a federal constitutional question is found in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 390-93 (1926). *See also infra* text accompanying notes 160-65.

53. *Dolan*, 114 S. Ct. at 2318-19.

54. *Id.* at 2319 (quoting *Pioneer Trust & Sav. Bank v. Mount Prospect*, 176 N.E.2d 799, 802 (Ill. 1961)).

55. *Id.* (citing *Simpson v. North Platte*, 292 N.W.2d 297, 301 (Neb. 1980)).

protection and due process analysis, the majority coins the term "rough proportionality" for the preferred, middle standard.⁵⁶

Is there anything more than the pursuit of the golden mean⁵⁷ offered to justify Rehnquist's selection? Unfortunately the answer appears to be "no," unless one counts three conclusory (though revealing) statements by the Court. The first and most accommodating standard is rejected because it "is too lax to adequately protect petitioner's right to just compensation if her property is taken for a public purpose."⁵⁸ However, the Court in *Dolan* is not concerned with the *adequacy* of compensation once property has been taken (either through the positive exercise of the power of eminent domain or through inverse condemnation),⁵⁹ but with the question of *whether* a taking has occurred in the first place.

The majority does not adopt the second, most demanding, state court test because it "[did] not think the Federal Constitution requires such exacting scrutiny, given the nature of the interests involved."⁶⁰ Rehnquist does not amplify this statement in the text or in the footnotes,

56. *Id.* The term "rough proportionality" appeared in a 1987 article that discussed "[t]he trend toward requiring a better cost account for exactions." Fred P. Bosselman & Nancy Stroud, *Legal Aspects of Development Exactions*, in DEVELOPMENT EXACTIONS 95, 101, 103 (James E. Frank & Robert M. Rhodes eds., 1987) (cited in Eric D. Kelly, *Supreme Court Strikes Middle Ground on Exactions Test*, LAND USE L. & ZONING DIG., July 1994, at 6, 7).

57. Professor Delgado provides a provocative take on the golden mean, one that holds special meaning in the environmental context, in an imaginary exchange between himself and Rodrigo, his "alter ego and interlocutor." Richard Delgado, *Rodrigo's Fifth Chronicle: Civitas, Civil Wrongs, and the Politics of Denial*, 45 STAN. L. REV. 1581, 1581 n.1 (1993).

"Take, for example, Aristotle's famous doctrine of the Golden Mean. Everyone reveres that, but a moment's reflection shows that it is completely wrong for our times. A hundred years ago, it would have served some useful purpose. Then, we were in an age of unchecked development, in which we mined the hillsides, dammed the rivers, laid the forests to waste, and killed or relocated the Indians. Moderation would have been a good philosophy to have had back then. But it came too late, just as it did for ancient Greece. Today, the challenge is not for the U.S. to go on doing what it has been doing all along, but moderately and judiciously. Our bubble is drifting downward. We need to arrest the fall, but we won't discover the solution through the discourse of moderation."

Id. at 1593-94 (footnote omitted).

58. *Dolan*, 114 S. Ct. at 2319.

59. See generally CHARLES M. HAAR & MICHAEL ALLAN WOLF, LAND-USE PLANNING 831-69 (4th ed. 1989) for an overview of the theory of just compensation.

60. *Dolan*, 114 S. Ct. at 2319.

so we can only assume that what he means is that the right to just compensation for a taking, though important, is not “fundamental” enough to warrant strict scrutiny of government interference with that right.⁶¹

The *Dolan* Court is no more forthcoming when it discusses the reasons for choosing the intermediate state court standard. Although the Court stated that “the ‘reasonable relationship’ test adopted by a majority of the state courts is closer to the federal constitutional norm” than the first two standards,⁶² the Court nowhere describes just what those norms are. Nor does the majority explain why “‘rough proportionality’ best encapsulates what [it] hold[s] to be the requirement of the Fifth Amendment.”⁶³

Only when answering Justice Stevens’s claim that Tigar’s permit condition is just a run-of-the-mill “species of business regulation that heretofore warranted a strong presumption of constitutional validity”⁶⁴ does the majority drop a valuable hint as to their motives for choosing the middle course. Rehnquist, after citing a number of cases in which the Court invalidated business regulations,⁶⁵ concludes, “We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances.”⁶⁶ The majority in *Dolan*, like the *Nollan* Court that insisted that “our opinions do not establish that these standards [of review for takings cases] are the same as those applied to due process or

61. Cf. *TRIBE*, *supra* note 13, § 16-7, at 1454 (“Legislative and administrative classifications are to be strictly scrutinized and thus held unconstitutional absent a compelling governmental justification if they distribute benefits or burdens in a manner inconsistent with fundamental rights.”).

62. *Dolan*, 114 S. Ct. at 2319.

63. *Id.*

64. *Id.* at 2320 (quoting *id.* at 2325 (Stevens, J., dissenting)).

65. *Id.* at 2320 (citing *New York v. Burger*, 482 U.S. 691 (1987); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of New York*, 447 U.S. 557 (1980) (holding a New York order designed to reduce electricity consumption violated the First Amendment because the order prohibited advertising by a utility company that promoted electricity consumption); *Marshall v. Barlow’s, Inc.*, 436 U.S. 307 (1978) (holding a statute that authorized warrantless searches of business premises violated the Fourth Amendment); *Air Pollution Variance Bd. v. Western Alfalfa Corp.*, 416 U.S. 861 (1974)).

66. *Dolan*, 114 S. Ct. at 2320.

equal protection claims,⁶⁷ is offended by the low esteem in which public regulators and their legal advocates hold private property rights, particularly the Fifth Amendment right to just compensation. The Court's active employment of the "unconstitutional conditions" doctrine⁶⁸ is thus an effort to redress the exercise of police power at the expense of private property ownership and use.

Enhancing that effort is the Court's decision to place upon the government regulators the burden of justifying the dedication. Again, as in its selection of a standard for evaluating required dedications, the Court made little effort to support its holding. The Court simply reasoned that the city government properly bears the burden because "the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel."⁶⁹ To bolster this proposition the Court cited only *Nollan*;⁷⁰ yet nowhere in that 1987 opinion is there a discussion of assignment of burdens for adjudicative (as opposed to legislative) decisions.

Because the majority includes so many conclusory and unsupported statements, the door is open to speculation as to the motives and agenda of the Court. Professor Epstein's discourse on unconstitutional conditions,⁷¹ though published eight years before *Dolan*, sheds some light on this dim landscape. Epstein notes that the doctrine is "beset with the serious problem of being a 'second best' approach to controlling government discretion."⁷² Faced with situations in which federal or state lawmakers "have absolute discretion," the Court has used the doctrine "to 'take back' some of the power which had been conferred

67. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 n.3 (1987).

68. *Dolan*, 114 S. Ct. at 2317. The Court explained that under the "unconstitutional conditions doctrine:"

[T]he government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the property sought has little or no relationship to benefit.

Id. (citing *Perry v. Sindermann*, 408 U.S. 593 (1972); *Pickering v. Board of Educ.*, 391 U.S. 563 (1968)).

69. *Dolan*, 114 S. Ct. at 2320 n.8.

70. *Id.* (citing *Nollan*, 483 U.S. at 836).

71. Epstein, *supra* note 47.

72. *Id.* at 28.

upon government officials in the first instance.”⁷³ This approach is “second best” because the doctrine would be unneeded “if the Court had restricted the scope of the government power in the first instance.”⁷⁴

As discussed in Part IV below, it has been nearly seven decades since the Court conceded to local governments the power to control the use and enjoyment of real property through comprehensive, state-sponsored, land-use regulation.⁷⁵ While one or more Justices might be sympathetic to a rescission of the original concession, a move advocated by some leading land-use commentators and politicians,⁷⁶ the majority of the *Dolan* Court endorses a less drastic correction. The Court has chosen to retool substantive (rough proportionality) and procedural (governmental burden) elements in limited regulatory takings settings—in those cases involving required dedications of real property interests as a condition to development approval.

The *Dolan* Court’s reconsideration of the deference accorded to land-use regulators in “classic” land-use cases gains added significance when coupled with the analytical shifts included in another recent regulatory takings case—one that has already garnered a fair share of criticism.⁷⁷ *Lucas*, though its holding is directly applicable only to cases involving regulations effecting total deprivation (an even narrower context than *Dolan*), also holds a special bond with important land-use and environmental law precedents, particularly as the Court invokes common-law nuisance principles long eclipsed by modern statutes and regulations.

73. *Id.*

74. *Id.*

75. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

76. See, e.g., PRESIDENT’S COMM’N ON HOUS., THE REPORT OF THE PRESIDENT’S COMMISSION ON HOUSING 200-02 (1982) (advocating adoption of the “vital and pressing governmental interest” standard in state and local legislation and urging Attorney General to analyze whether the Supreme Court should be encouraged to adopt a new test); Douglas W. Kmiec, *Protecting Vital and Pressing Governmental Interests—A Proposal for a New Zoning Enabling Act*, 30 WASH. U. J. URB. & CONTEMP. L. 19 (1986); Daniel R. Mandelker & A. Dan Tarlock, *Shifting the Presumption of Constitutionality in Land-Use Law*, 24 URB. LAW. 1 (1992). See also Epstein, *supra* note 47, at 63-64 (“In a cautious second-best sense, *Nollan* is a fit case for using the [unconstitutional conditions] doctrine. But it is a far cry from the best solution, which is a return to the police power to its traditional confines.”).

77. See, e.g., Symposium, *Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1369 (1993); AFTER *LUCAS*: LAND USE REGULATION AND THE TAKING OF PROPERTY WITHOUT COMPENSATION (David L. Callies ed., 1993); Wolf, *supra* note 22, at 470 n.9.

III. BACK TO THE FUTURE: *LUCAS* AND THE NUISANCES-PLUS EXCEPTION

Some might lay the blame (or credit) on Justice Scalia's⁷⁸ doorstep for the introduction of the concept of a nuisances-plus exception⁷⁹ to the modern law of regulatory takings.⁸⁰ In fairness, however, we should acknowledge that Scalia was not the first appellate jurist in the *Lucas* dispute to play the nuisance card. The responsibility for raising the nuisance topic goes instead to the two South Carolina Supreme Court justices who dissented from the view that no constitutional violation had occurred when they recognized that provisions of the state's Beachfront Management Act⁸¹ might very well have effected a total taking of David H. Lucas's two residential lots on the Isle of Palms.⁸² As Scalia

78. Although the majority opinions in cases such as *Lucas* and *Nollan* "belong" to the Court, we are able to identify many of the concepts, strategies, and techniques found therein with their chief author. For more on Scalia's jurisprudence, see *supra* note 23.

79. See Wolf, *supra* note 22, at 479-80. The Court in *Lucas* did not mandate compensation for a total taking effected by a regulation that would merely "duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise." *Lucas*, 112 S. Ct. at 2900. Thus, Court observers are technically a bit misleading when they refer to a "nuisance exception." See, e.g., Richard A. Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 STAN. L. REV. 1369, 1377-79 (1993) (discussing "Reasonable Expectations and the Nuisance Exception").

80. More than one hundred years ago, when the Court was much more confident in its ability to distinguish police power cases from takings cases, principles of nuisance law were also quite relevant. See *Mugler v. Kansas*, 123 U.S. 623 (1887):

The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner.

Id. at 669.

81. S.C. CODE ANN. §§ 48-39-10 to -360 (Law. Co-op. 1976 & Supp. 1995).

82. *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895, 906 (S.C. 1991) (Harwell, J., dissenting) ("Other regulations may provide for the prevention of a nuisance and as such will not require compensation to an affected landowner. . . . In my opinion the Beachfront Management Act does not have as its *primary* purpose the prevention of a nuisance and is therefore not subject to the *Mugler* analysis."), *rev'd and remanded*, 112 S. Ct. 2886 (1992).

notes, at the first point in which nuisance appears in his opinion, the dissenters

acknowledged that our *Mugler* line of cases recognizes governmental power to prohibit “noxious” uses of property—*i.e.*, uses of property akin to “public nuisances”—without having to pay compensation. But they would not have characterized the Beachfront Management Act’s “primary purpose [as] the prevention of a nuisance.” To the dissenters, the chief purposes of the legislation, among them the promotion of tourism and the creation of a “habitat for indigenous flora and fauna,” could not fairly be compared to nuisance abatement.⁸³

Now that the door was opened by others, the majority apparently felt free to explore the connections between nuisance and takings even further—and with surprising results.

This exploration in *Lucas* begins in somewhat familiar territory, as Scalia reaches back past Justice Holmes’s “too far” approach in *Pennsylvania Coal Co. v. Mahon*⁸⁴ to early Supreme Court precedent on direct appropriation by the government of private property for public use.⁸⁵ Unfortunately, even seventy years after Holmes’s contribution to the regulatory takings dialogue, we still do not have a shared understanding of the point at which regulation has gone “too far.”⁸⁶ This inadequacy was acknowledged by Justice Brennan when, speaking for the majority in *Penn Central Transportation Co. v. New York City*,⁸⁷ he described the Justices’ practice of engaging in “essentially ad hoc, factual inquiries.”⁸⁸ The *Lucas* Court then concludes that before the Court can employ bright-line distinctions, the facts must reveal that the land-use

83. *Lucas*, 112 S. Ct. at 2890 (quoting *Lucas*, 404 S.E.2d at 906) (Harwell, J., dissenting) (alteration in original) (citations omitted) (referring to *Mugler v. Kansas*, 123 U.S. 623 (1887)).

84. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (“[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”) (cited in *Lucas*, 112 S. Ct. at 2893).

85. *Lucas*, 112 S. Ct. at 2892 (citing *Transportation Co. v. Chicago*, 99 U.S. 635, 642 (1879); *Gibson v. United States*, 166 U.S. 269, 275-76 (1897)).

86. See, e.g., *Lucas*, 112 S. Ct. at 2893 (“[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.”). See also Carol Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984).

87. 438 U.S. 104 (1978).

88. *Id.* at 124.

regulation either causes a permanent physical occupation⁸⁹ or denies the owner "economically viable use of his land."⁹⁰

Only after this precedential excursion, and immediately following Scalia's skillful deconstruction of the "harm-preventing"/"benefit-concurring" dichotomy,⁹¹ does the analytical leap occur. Scalia states that in complete deprivation cases, "we think [the state] may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."⁹² What can then be taken from the majority opinion in *Lucas* is a new "total takings" test to accompany the *Loretto per se* test for permanent physical occupations,⁹³ *Penn Central's ad hoc* test for less-than-total-deprivation regulatory takings,⁹⁴ and the unconstitutionality analysis introduced in *Nollan*⁹⁵ and employed in *Dolan*.⁹⁶ According to the *Lucas* majority, when presented with "confiscatory regulations, *i.e.*, regulations that prohibit all economically beneficial use of land,"⁹⁷ the court must find in the challenged regulation a direct link with common-law restraints on the use and ownership of property—"[a]ny limitation so severe cannot be newly legislated or

89. *Lucas*, 112 S. Ct. at 2893 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (holding that offending cable wires and boxes caused a permanent physical occupation)).

90. *Id.* at 2894 (quoting the familiar dictum from *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)). The language in *Agins* is dictum because, despite the challenged regulation, the land apparently retained development potential. See *Agins*, 447 U.S. at 262 ("Although the ordinances limit development, they neither prevent the best use of appellant's land, . . . nor extinguish a fundamental attribute of ownership.") (citations omitted).

91. *Lucas*, 112 S. Ct. at 2897-99. Scalia observes that "the distinction between 'harm-preventing' and 'benefit-conferring' regulation is often in the eye of the beholder," *id.* at 2897, and that "the distinction between regulation that 'prevents harmful use' and that which 'confers benefits' is difficult, if not impossible, to discern on an objective, value-free basis." *Id.* at 2899.

92. *Id.* at 2899 (footnote omitted).

93. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) ("We conclude that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve.").

94. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

95. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 835-37 (1987). See also Epstein, *supra* note 47, at 60-64.

96. *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2316-17 (1994).

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

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."⁹⁸ Justice Scalia then moves from the general to the specific:

A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.⁹⁹

The Court's illustrations of permitted total takings include the denial of a landfill permit to the owner of a lake bed where the landfill would result in the flooding of neighboring property¹⁰⁰ (assumedly preventing what would be a private nuisance because of the unreasonable interference with the use and enjoyment of the neighbor's real property), and the requirement that a nuclear power plant company remove its facility because it sits astride an earthquake fault¹⁰¹ (apparently abating a public nuisance owing to the potential general harm to the community).

Further examining this area long-dominated by common law analysis, Scalia refers to the nuisance formulas contained in the Second Restatement of Torts.¹⁰² Although long-standing use suggests the absence of a common-law prohibition, the law is by no means static. The majority opinion cites two ways in which the common law (and, it must be assumed, regulatory analogues) can adapt and evolve—"changed circumstances or new knowledge may make what was previously permissible no longer so."¹⁰³ Thus, even the most narrow, accurate reading of *Lucas*—one that binds modern regulatory restrictions on land use tightly to private and public nuisance—must include this potential for growth and change. After all, the Court might have concluded that the

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 2900-01.

102. *Lucas*, 112 S. Ct. at 2901 (citing RESTATEMENT (SECOND) OF TORTS §§ 826-28, 830-31 (1979)).

103. *Id.* Although Scalia cites the Restatement (Second) of Torts § 827 cmt. g., that comment, regarding "character of the locality" as one element used in determining the gravity of harm in a private nuisance case, refers only impliedly to "changed circumstances" and not at all to "new knowledge."

challenged regulation “must do no more than duplicate the result that *had* [rather than ‘could have’]¹⁰⁴ been achieved in the courts.”

Four Justices objected to the majority’s use of nuisance law, each proffering his own reasons. Justice Kennedy was concerned with the Procrustean challenge posed by the majority to states and localities, noting that “[t]he common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent society.”¹⁰⁵ Justice Stevens echoed Kennedy’s sentiment that “[t]he Takings Clause does not require a static body of state property law,”¹⁰⁶ observing that the majority’s “holding . . . effectively freezes the State’s common law, denying the legislature much of its traditional power to revise the law governing the rights and uses of property.”¹⁰⁷

At the other extreme, Justice Blackmun chided the majority for resorting to, in Dean Prosser’s terms, the “impenetrable jungle”¹⁰⁸ of nuisance law, not because of its narrowness, but instead owing to its amorphousness:

Common-law public and private nuisance law is simply a determination whether a particular use causes harm. There is nothing magical in the reasoning of judges long dead. They determined a harm in the same way as state judges and legislatures do today. . . . There simply is no reason to believe that new interpretations of the hoary common law nuisance doctrine will be particularly “objective” or “value-free.” Once one abandons the level of generality of *sic utere tuo ut alienum non laedas*, one searches in vain, I think, for anything resembling a principle in the common law of nuisance.¹⁰⁹

Moreover, in his exploration of the framers’ intent, Justice Blackmun contended that the majority’s inclusion of nuisance factors in the takings calculus is ahistorical as well, for “[n]othing in the discussions in Congress concerning the Takings Clause indicates that the Clause was

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

105. *Id.* at 2903 (Kennedy, J., concurring).

106. *Id.*

107. *Id.* at 2921 (Stevens, J., dissenting).

108. *Id.* at 2914 n.19 (Blackmun, J., dissenting) (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 86, at 616 (5th ed. 1984)).

109. *Lucas*, 112 S. Ct. at 2914 (citations omitted).

limited by the common-law nuisance doctrine.”¹¹⁰

In a statement concluding that the writ of certiorari was improvidently granted, Justice Souter cut through these encrustations of public policy and history with laser-like logic. First, neither *Lucas* nor the trial court demonstrated that a total deprivation had occurred.¹¹¹ Second, even if total deprivation is conceivable in the abstract, it is highly unlikely that nuisance abatement would leave an offending landowner with absolutely no value.¹¹² “Indeed,” Souter observed, “it is difficult to imagine property that can be used only to create a nuisance, such that its sole economic value must presuppose the right to occupy it for such seriously noxious activity.”¹¹³ In other words, Justice Blackmun’s metaphor that “[t]oday the Court launches a missile to kill a mouse”¹¹⁴ was misdirected. Instead, according to Souter, there might not even *be* a mouse!

In fact, Justice Souter’s contribution should console those critics of the majority’s categorical approach who fear widespread invalidation of land-use and environmental regulation.¹¹⁵ Even the most brazen champion of private property rights should concede that cases in which total deprivation is admitted by the state, is discovered by the trial court, or is not addressed by the savings provisions in a challenged regulation are rare, and will remain so. Thus, except for cases that fit within the unconstitutional conditions doctrine, and unless a majority of the Court abandons the parcel-as-a-whole approach,¹¹⁶ the great majority of regulatory takings challenges will be analyzed under *Penn Central’s ad hoc* approach, allowing the court to consider not only the extent of harm to the private landowner, but also the benefit to the general public as expressed in nuisance and non-nuisance contexts.¹¹⁷ Moreover, as discussed previously, the broad reading of the majority’s nuisance

110. *Id.* at 2916. For a careful (and critical) appraisal of Scalia’s use of history, particularly the notion of an “historical compact recorded in the Takings Clause that has become part of our constitutional culture,” see Fisher, *supra* note 23, at 1397-1402.

111. *Lucas*, 112 S. Ct. at 2925 (statement of Souter, J.) (criticizing grant of writ of certiorari).

112. *Id.* at 2926.

113. *Id.*

114. *Id.* at 2904 (Blackmun, J., dissenting).

115. *See supra* note 7.

116. This is a real possibility. *See infra* text accompanying notes 303-12.

117. *See Wolf, supra* note 22, at 498-500.

exception is careless at best, and alarmist at worst.¹¹⁸

It is time now to leave *Dolan*, *Lucas*, and 1990s takings law, and to reconsider three earlier, pivotal attempts by the judiciary to reconcile private property rights and public regulation. Even while looking backward we should keep in mind Rehnquist's abrupt dismissal of judicial deference and Scalia's singular merger of takings theory and nuisance law. For when, at the conclusion of this Article, we revisit Tigard's Central Business District and the South Carolina oceanfront, our return will be informed by a greater appreciation of the intricate interrelationship of land-use and environmental regulation and their common-law precursors.

IV. FROM FURNACES TO PIGS: *EUCLID* AND THE MODERNIZATION OF PRIVATE NUISANCE

The centrality of the Supreme Court's opinion in *Village of Euclid v. Ambler Realty Co.*¹¹⁹ is beyond dispute.¹²⁰ Indeed, it is commonplace to identify the predominant mode of land-use regulation—the comprehensive employment of height, area, and use classifications—as Euclidean zoning.¹²¹ Justice George Sutherland's majority opinion holds its important place in American law as much for its notoriety as for its continued applicability to planning and zoning disputes.¹²²

As we glance backward from the perspective of *Lucas* and *Dolan*, the present focus is not solely on the zoning aspects of *Euclid*, but on the way in which the opinion resonates with the concerns, rhetoric, and perspective of the "civil" branch of common-law nuisance: private nuisance.

118. See *supra* text accompanying notes 102-03.

119. 272 U.S. 365 (1926).

120. See, e.g., Michael Allan Wolf, *The Prescience and Centrality of Euclid v. Ambler*, in *ZONING AND THE AMERICAN DREAM: PROMISES STILL TO KEEP* 252, 252-53 and 271-72 nn.10-11 (Charles M. Haar & Jerold S. Kayden eds., 1989).

121. See, e.g., James H. Wickersham, Note, *The Quiet Revolution Continues: The Emerging New Model for State Growth Management Statutes*, 18 HARV. L. REV. 489 (1994).

122. *Euclid* "is much more than a milestone, more than a reference point cited out of habit or to appeal to the audience's familiarity gained over generations of use. . . . [The *Euclid* opinion] anticipate[s] key challenges to the Euclidean regime raised over the subsequent six decades (and, from all indications, beyond)" Wolf, *supra* note 120, at 253.

Although definitional problems are legion, there is general agreement that private nuisance involves nontrespassory invasion that unreasonably interferes with the use and enjoyment of one's real property.¹²³ In essence, then, private nuisance is a real property tort.¹²⁴ It is not an all-purpose tool designed to limit, abate, or inhibit activities that pose harm to the community-at-large, but a limited cause of action that enables a court to ensure that neighboring or adjoining uses are reasonably compatible.¹²⁵ Moreover, the oft-recited incantation, *sic utere tuo*,¹²⁶ merely reminds us that the rights of ownership and enjoyment of land are not absolute.

Because Euclid was merely segregating and restricting uses in a comprehensive manner,¹²⁷ and because the growing practice of separating neighborhoods of detached homes from businesses and apartment buildings was not clearly a matter of protecting the public from

123. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 86, at 618 (5th ed. 1984) [hereinafter PROSSER & KEETON] (defining private nuisance as "a civil wrong, based on a disturbance of rights in land"); RESTATEMENT (SECOND) OF TORTS § 821D (1979) (defining private nuisance as "a nontrespassory invasion of another's interest in the private use and enjoyment of land").

124. See PROSSER & KEETON, *supra* note 123, § 87, at 619 ("The essence of private nuisance is an interference with the use and enjoyment of land.").

125. See, e.g., DANIEL R. MANDELKER, LAND USE LAW § 4.02, at 100 (3d ed. 1993). Professor Mandelker notes that

[Private n]uisance actions are an extension of the private tort of trespass to land. In the trespass action, the landowner sues for a physical invasion of her property by another. No physical invasion occurs in nuisance cases. The plaintiff landowner complains that the use of adjacent land detrimentally affects her land, and that a court can enjoin this use and award damages for any injury suffered.

Id.

126. See, e.g. *Bove v. Donner-Hana Coke Corp.*, 258 N.Y.S. 229, 231 (N.Y. App. Div. 1932). The court writes:

As a general rule, an owner is at liberty to use his property as he sees fit, without objection or interference from his neighbor, provided such use does not violate an ordinance or statute. There is, however, a limitation to this rule; one made necessary by the intricate, complex, and changing life of today. The old and familiar maxim that one must so use his property as not to injure that of another (*sic utere tuo ut alienum non laedas*) is deeply imbedded in our law. An owner will not be permitted to make an unreasonable use of his premises to the material annoyance of his neighbor, if the latter's enjoyment of life or property is materially lessened thereby.

Id.

127. *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 379-83 (1926) (describing Euclid's zoning scheme).

significant harms,¹²⁸ public nuisance law alone did not control. Because the interests protected by comprehensive zoning so closely matched the interests protected by private nuisance, it made great sense for Sutherland and his colleagues to pursue private nuisance analogies along with the public nuisance precedent. When we sift through Sutherland's *Euclid* text, there are strong suggestions that the goals, effects, and application of zoning laws have much in common with private nuisance.

First, Sutherland describes the physical layout of Ambler's property in *Euclid*: sixty-eight acres bordered on two sides by residential neighborhoods.¹²⁹ The use classification detailed in the opinion is designed to ensure that many of these neighbors and others situated in the new residential-use zones, like residential plaintiffs in so many private nuisance cases, will not be disturbed in the use and enjoyment of their homes by intensive and discordant land uses. Such uses include the operation of stores,¹³⁰ gasoline stations,¹³¹ public garages,¹³² factories,¹³³ laundries,¹³⁴ dry cleaners,¹³⁵ vehicle repair shops,¹³⁶ sewage disposal plants,¹³⁷ scrap iron and junk businesses,¹³⁸ and correctional facilities.¹³⁹

Second, the disgruntled landowner negatively affected by the assignment of a zoning classification (here the Ambler Realty Company) has much in common with the defendant in a private nuisance suit. Like

128. *Id.* at 390.

129. *Id.* at 379.

130. *See, e.g., Stodder v. Rosen Talking Mach. Co.*, 135 N.E. 251 (Mass. 1922) (describing nuisance caused by retail shoe store).

131. *See, e.g., Carney v. Penn Oil Co.*, 140 A. 133 (Pa. 1928).

132. *See, e.g., George v. Goodovich*, 135 A. 719 (Pa. 1927).

133. *See, e.g., Susquehanna Fertilizer Co. v. Malone*, 20 A. 900 (Md. 1890).

134. *See, e.g., Abend v. Royal Laundry Serv., Inc.*, 192 A. 239 (N.J. Ch.), *aff'd*, 192 A. 241 (N.J. 1937).

135. *See, e.g., Burdick v. Stebbins*, 231 N.W. 57 (Mich. 1930).

136. *See, e.g., Mitchell v. Guaranty Corp.*, 129 A. 114 (Pa. 1925).

137. *See, e.g., Thompson v. Kraft Cheese Co.*, 291 P. 204 (Cal. 1930).

138. *See, e.g., Hagaman v. Slaughter*, 354 S.W.2d 818 (Tenn. Ct. App. 1961).

139. *See, e.g., Arkansas Release Guidance Found. v. Needler*, 477 S.W.2d 821 (Ark. 1972).

those common-law defendants,¹⁴⁰ Ambler urged the Court to consider its economic plight. According to Ambler, "the ordinance attempts to restrict and control the lawful uses of appellee's land so as to confiscate and destroy a great part of its value,"¹⁴¹ and "operates greatly to reduce the value of appellee's lands and destroy their marketability for industrial, commercial and residential uses."¹⁴²

Third, as the Court moves from description (the facts of the extant dispute) to prescription (the resolution of this and analogous cases), Sutherland openly invites comparisons regarding the operation of a zoning ordinance and the application of private nuisance principles. When a doubtful situation arises, according to Sutherland, "the maxim *sic utere tuo ut alienum non laedas*, which lies at the foundation of so much of the common law of nuisances, ordinarily will furnish a fairly helpful clew"¹⁴³ to the decisionmaker. Moreover, the resolution of the typical public or private law land-use case depends upon the specific context of the dispute, not on *per se* rules,¹⁴⁴ a point immortalized by the aphorism, "A nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard."¹⁴⁵ In fact, one of the classic English private nuisance cases, *Aldred's Case*,¹⁴⁶ con-

140. See, e.g., *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870, 872-73 (N.Y. 1970) (accepting the argument that enjoining defendant's cement plant, which represented a forty-five million dollar investment and employed over 300 people, would be an "immediately drastic remedy"); *Whalen v. Union Bag & Paper Co.*, 101 N.E. 805, 805-06 (N.Y. 1913) (rejecting defendant's argument that enjoining defendant's mill that represented an investment of over one million dollars and employed between 400 and 500 people would cause greater injury than "the small injury done to the plaintiff's land by that portion of the pollution which was regarded as attributable to the defendant").

141. *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926).

142. *Id.* at 386.

143. *Id.* at 387.

144. For recent zoning cases in which courts have stressed the specific context of the dispute, see *Harris Bank of Hinsdale v. County of Kendall*, 625 N.E.2d 845, 849 (Ill. App. Ct. 1993) ("A court should base its determination of the validity of a zoning ordinance on the facts and circumstances of each case. No single factor is controlling.") (citation omitted); *Red Roof Inns, Inc. v. People's Counsel*, 624 A.2d 1281, 1285 (Md. Ct. Spec. App. 1993) ("Zoning matters . . . depend upon the unique facts and circumstances of a particular location and must be analyzed individually."); *State ex rel. Barber & Sons Tobacco Co. v. Jackson County*, 869 S.W.2d 113, 118 (Mo. Ct. App. 1993) ("[R]eviewing courts must look at the particular facts and circumstances of each case in determining the reasonableness of existing zoning.").

145. *Euclid*, 272 U.S. at 388.

146. *William Aldred's Case*, 77 Eng. Rep. 816 (K.B. 1611).

cerned a pig sty that disturbed the plaintiff in the enjoyment of his residence.¹⁴⁷

Unfortunately, because Sutherland does not identify which type of nuisance is relevant to the case before the Court, he contributes to the profound confusion that already plagued nuisance law. On the one hand, Sutherland leaves some helpful clues that he is referring to private nuisance: the recitation of *sic utere tuo* (a maxim that originally emphasized the protection of one's interest in land),¹⁴⁸ the "pig in the

147. Those searching for the out-of-place "pig" and the pristine "parlor" located in Euclid, Ohio need only turn a few pages until reaching Sutherland's menacing portrayal of the apartment house, the "parasite" of the single-family, residential district:

[T]he coming of one apartment house is followed by others . . . until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed. Under these circumstances, apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances.

Euclid, 272 U.S. at 394-95.

As I have noted elsewhere, Sutherland's decision to change the analogy offered by Alfred Bettman in his *amicus* brief has disturbing exclusionary connotations. See Wolf, *supra* note 120, at 273 n.50 (quoting Alfred Bettman, *Village of Euclid v. Ambler Realty Company Brief, amici curiae*, in, CITY AND REGIONAL PLANNING PAPERS 157, 172 (Arthur Coleman Comey ed., 1946) (asserting that "put[ting] the furnace in the cellar rather than in the living room may improve taste and aesthetics, but more significantly creates a healthier living environment"). Our current concern, however, is with what Sutherland's language suggests about the type of nuisance that provides the court with its "helpful clew."

148. For example, the maxim appears in *Aldred's Case*, a private nuisance action. 77 Eng. Rep. at 821. See also *Camfield v. United States*, 167 U.S. 518, 522-23 (1897). The Court writes:

There is no doubt of the general proposition that a man may do what he will with his own, but this right is subordinate to another, which finds expression in the familiar maxim: "*Sic utere tuo ut alienum non laedas.*" His right to erect what he pleases upon his own land will not justify him in maintaining a nuisance, or in carrying on a business or trade that is offensive to his neighbors. Ever since *Aldred's Case*, 9 Coke, 57, it has been the settled law, both of this country and of England, that a man has no right to maintain a structure upon his own land, which, by reason of disgusting smells, loud or unusual noises, thick smoke, noxious vapors, the jarring of machinery or the unwarrantable collection of flies, renders the occupancy of adjoining property dangerous, intolerable or even uncomfortable to its tenants. No person maintaining such a nuisance can shelter himself behind the sanctity of private property.

Id.

By the early nineteenth century, as reflected in two landmark Supreme Court cases, the maxim was used to help limit the boundaries of the states' police and penal powers as well. See *Gibbons v. Ogden*, 22 U.S. 1, 53-54 (1824) ("The right to use all property, must

parlor" reference, and the emphasis on the positive effect that segregating undesirable uses has on the enjoyment and value of nearby real (particularly residential) property.

On the other hand, Sutherland identifies such public-nuisance-like general harms to the community as "the danger of fire or collapse, the evils of overcrowding, and the like."¹⁴⁹ Despite the growth of legislative and administrative controls in the wake of *Euclid*, the confusing nature of nuisance law still presents significant challenges for jurists resolving disputes concerning the use and abuse of land.¹⁵⁰

Sutherland informs us that he is consulting nuisance law, "not for the purpose of controlling, but for the helpful aid of its analogies in the

be subject to modification by municipal law. *Sic utere tuo ut alienum non laedas* [sic], is a fundamental maxim. It belongs exclusively to the local State Legislatures, to determine how a man may use his own, without injuring his neighbour."); *Cohens v. Virginia*, 19 U.S. 264, 374 (1821) ("Nobody objects to a State enforcing its own penal laws: all that is claimed is, that in executing them, it should not violate the laws of the Union, which are paramount: *Sic utere tuo ut alienum non laedas*.").

149. *Euclid*, 272 U.S. at 388.

150. See, e.g., *Harrison v. Indiana Auto Shredders Co.*, 528 F.2d 1107, 1120 (7th Cir. 1975). The court writes:

This case is representative of the new breed of lawsuit spawned by the growing concern for cleaner air and water. The birth and burgeoning growth of environmental litigation have forced the courts into difficult situations where modern hybrids of the traditional concepts of nuisance law and equity must be fashioned. Nuisance has always been a difficult area for the courts; the conflict of precedents and the confusing theoretical foundations of nuisance, led Prosser to tag the area a "legal garbage can."

Id. (footnotes omitted). See also PROSSER & KEETON, *supra* note 123, for a list of seven reasons for the continuing confusion: (1) the tendency of courts to "seize upon a catchword as a substitute for any analysis of a problem;" *id.* § 86; (2) "two lines of development, the one narrowly restricted to the invasion of interests in the use or enjoyment of land, and the other extending to virtually any form of annoyance or inconvenience interfering with common public rights," *id.*; (3) the "fact that a public nuisance may also be a private one, when it interferes with the enjoyment of land, and that . . . there are circumstances in which a private individual may have a tort action for the public offense itself," *id.* (footnotes omitted); (4) the existence of "a considerable number of cases which have applied the term to matters not connected either with land or with any public right," *id.* (footnote omitted); (5) "the line between trespass and nuisance has become wavering and uncertain," a development attributable to the reality that "[w]ith the abandonment of the old procedural forms, direct and indirect invasions have lost their significance," *id.* § 87; (6) courts' "failure to make [the] clear distinction between the requirements for injunctive relief [unreasonable conduct] and the requirements for damages [unreasonable interference]," *id.*; (7) "the use of the term 'nuisance' to describe all nontrespassory but actionable interferences with the use and enjoyment of land." *Id.*

process of ascertaining the scope of, the [police] power.”¹⁵¹ If *Euclid* were a public nuisance case, in which the local government sought to abate outright activities perceived as harmful to the community,¹⁵² analogies would not be needed. Indeed, the set of legitimate goals of the police power found in *Euclid* and numerous other cases involving constitutional challenges to governmental activity—“public health, safety, morals, or general welfare”¹⁵³—restates the bases upon which public nuisance abatement actions have and can be brought.¹⁵⁴

The private nuisance aspects of *Euclid* were key to the legitimization of state-authorized, locally controlled zoning law as a special form of police power regulation.¹⁵⁵ In essence, the Supreme Court sent a message to municipalities throughout the country that they no longer needed to rely on private plaintiffs to bring lawsuits alleging loss of value or incompatibility in order to realize the benefits of a livable and compatible community.¹⁵⁶

151. *Euclid*, 272 U.S. at 387-88. The *Lucas* Court violated at least the spirit of this caveat when it imbued nuisance law with “controlling” force in cases involving police power regulations effecting total deprivation.

152. See, e.g., *Ex parte Wood*, 227 P. 908, 910 (Cal. 1924) (“As a public nuisance concerns the public generally, it is the duty of the government to take measures to abate or enjoin it.”) (quoting 5 POMEROY’S EQUITY JURISPRUDENCE 4296 (4th ed. n.d.)).

153. See *Euclid*, 272 U.S. at 395. Included among the Supreme Court zoning cases that cite the *Euclid* formula are *Moore v. City of East Cleveland*, 431 U.S. 494, 498 n.6 (1977); *City of Eastlake v. Forest City Enters.*, 426 U.S. 668, 676 (1976); *Nectow v. City of Cambridge*, 277 U.S. 183, 187-88 (1928); and *Gorieb v. Fox*, 274 U.S. 603, 610 (1927). Before *Euclid*, the Court used this formula in some of its most notorious substantive due process cases. See, e.g., *Coppage v. Kansas*, 236 U.S. 1, 16 (1915); *Lochner v. New York*, 198 U.S. 45 (1905). According to the *Lochner* court,

There are . . . certain powers, existing in the sovereignty of each State in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals and general welfare of the public.

Id. at 53.

154. See, e.g., *Schnitzer v. Excelsior Powder Mfg. Co.*, 160 S.W. 282 (Mo. Ct. App. 1912) (abating storage of explosives posing threat to public safety); *Respass v. Commonwealth*, 115 S.W. 1131 (Ky. 1909) (abating gambling house posing threat to public morals); *Board of Health v. Copcutt*, 24 N.Y.S. 625 (N.Y. Sup. Ct.), *aff’d* 35 N.E. 443 (N.Y. 1893) (abating maintenance of polluted mill pond posing threat to public health).

155. *Euclid*, 272 U.S. at 388.

156. *Id.* at 395.

Local governments could act preemptively and administratively, as long as the landowners who were negatively affected by zoning regulations were left with reasonable use of their property,¹⁵⁷ a caveat that apparently did not apply in public nuisance abatement cases.¹⁵⁸ Zoning was a powerful weapon that localities could add to a regulatory arsenal that already included public nuisance. Indeed, Sutherland spends much of the *Euclid* opinion reviewing, à la *Dolan*, state court decisions regarding the legality of existing local planning and zoning regimes.¹⁵⁹

The “serious question” posed to the Justices by the facts in *Euclid* concerned “provisions of the [local zoning ordinance] excluding from residential districts, apartment houses, business houses, retail stores and shops, and other like establishments.”¹⁶⁰ The Court could find sufficient precedent in its own opinions for segregating homes from more intensive industrial and commercial uses.¹⁶¹ On the “validity of what is really the crux of the more recent zoning legislation, namely, the creation and maintenance of residential districts, from which business and trade of every sort . . . are excluded,” Sutherland turned to state decisions he deemed “numerous and conflicting.”¹⁶²

Unlike the somewhat choppy excursion through state waters taken

157. Professor Mandelker writes:

The Supreme Court and a clear majority of the state courts hold that a landowner is not denied an economically viable use unless the land use regulation does not allow him to make any reasonable use of his land. Courts adopting the majority view sometimes state that a landowner’s property is “confiscated” if he is not allowed a reasonable use of his land.

See MANDELKER, *supra* note 125, § 2.05, at 23.

158. See, e.g., *Mugler v. Kansas*, 123 U.S. 623 (1887). According to Justice John M. Harlan:

The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not . . . burdened with the condition that the State must compensate such individual for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.

Id. at 669.

159. *Euclid*, 272 U.S. at 392-93.

160. *Id.* at 390.

161. *Id.* at 388 (citing *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (prohibiting brick works in a residential area); *Reinman v. Little Rock*, 237 U.S. 171 (1915) (prohibiting livery stables in certain areas); *Welch v. Swasey*, 214 U.S. 91 (1909) (allowing height restrictions for residential district)).

162. *Id.* at 390.

by Rehnquist before emerging with the requirement that the government demonstrate "rough proportionality" before it conditions development permission,¹⁶³ Sutherland's smoother and unchallenged¹⁶⁴ expedition revealed that the predominant and growing trend favored allowing local government experimentation with comprehensive zoning schemes to proceed.¹⁶⁵ Because the *Euclid* majority had no reason to believe that the village's ordinance on its face was "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare,"¹⁶⁶ the landowner's challenge was dismissed. With the Supreme Court's blessing, as embodied in this extremely deferential standard, zoning flourished in the United States and dominated the urban and suburban scene by mid-century.¹⁶⁷

The *Euclid* Court did reserve the right to invalidate a zoning ordinance as "concretely applied to particular premises . . . or to particular conditions,"¹⁶⁸ an invitation for challenges such as Mrs. Dolan's. Yet the standard for such challenges remained "clearly arbitrary and unreasonable," a heavy (though not impossible)¹⁶⁹ burden for any private landowner to carry. *Euclid*'s approach to land-use regulation, supported by "commissions and experts,"¹⁷⁰ easily satisfied this test. Tigar, held to a more demanding standard, would have to try again.

How can we explain these contrasts? Critics of the holding in *Dolan* will join Justice Stevens in accusing the majority of "resurrect[ing] . . . a species of substantive due process analysis that it firmly rejected

163. See *supra* text accompanying notes 51-56.

164. Unlike Justice Stevens (who was joined by Justices Blackmun and Ginsburg) and Justice Souter in *Dolan*, the dissenters filed no opinion in *Euclid*.

165. *Euclid*, 272 U.S. at 390-93.

166. *Id.* at 395.

167. See HAAR & WOLF, *supra* note 59, at 189 ("At the close of 1930, zoning ordinances were in effect in 981 municipalities throughout the United States, representing a population of more than 46 million, some 67 percent of the urban population.") (citation omitted). See also KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 241-43 (1985) (noting that the introduction and growth of zoning ordinances served to segregate economic classes).

168. *Euclid*, 272 U.S. at 395.

169. See, e.g., *Nectow v. City of Cambridge*, 277 U.S. 183 (1928) (finding zoning ordinance invalid as applied to plaintiff in error).

170. *Euclid*, 272 U.S. at 394.

decades ago.”¹⁷¹ Ironically, the Justice who penned the deferential *Euclid* opinion is more (in)famous as one of the chief adherents of judicial activism in the name of liberty and property.¹⁷² Handwringing and namecalling, while they may serve some cathartic function, do little to advance the debate over line-drawing in the areas of land-use and environmental regulation. The explanation for the seeming gap between *Euclid* and *Dolan* lies not in rhetoric but in the Courts’ divergent perceptions of the motives and abilities of local government regulators.

The *Euclid* Court, though it could have discounted the importance of the village as a minor player in a major metropolitan region, greater Cleveland,¹⁷³ chose instead to emphasize the petitioner local government’s autonomy and self-determination. “[T]he village, though physically a suburb of Cleveland, is politically a separate municipality, with powers of its own and authority to govern itself as it sees fit. . . .”¹⁷⁴ Although Rehnquist pays some lip service to the “commendable” performance of suburban local governments,¹⁷⁵ the substantive

171. *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2326 (1994) (Stevens, J., dissenting). For a fascinating exchange between two leading conservative legal thinkers on the advisability of a revival of judicial protection of property rights, compare Richard Epstein, *Judicial Review: Reckoning on Two Kinds of Error*, 4 CATO J. 711, 717-18 (1985) (“One only has to read the opinions of the Supreme Court on economic liberties and property rights to realize that these opinions are intellectually incoherent and that some movement in the direction of judicial activism is clearly indicated.”) with Antonin Scalia, *Economic Affairs as Human Affairs*, 4 CATO J. 703, 705-06 (1985) (“I will . . . say that in my view the position the Supreme Court has arrived at is good—or at least that the suggestion that it change its position is even worse.”). See also *United States v. Carlton*, 114 S. Ct. 2018, 2026 (1994) (Scalia, J., concurring) (“If I thought that ‘substantive due process’ were a constitutional right rather than an oxymoron . . .”), cited in *Dolan*, 114 S. Ct. at 2329 n.13 (Stevens, J., dissenting).

By employing, as in *Nollan*, the “second-best” strategy of unconstitutional conditions to check regulatory abuse, Justice Scalia can have his jurisprudential cake (that is, maintaining his disdain for substantive due process) while eating it, too (that is, invalidating private property controls). See *supra* text accompanying notes 71-74.

172. See JOEL FRANCIS PASCHAL, MR. JUSTICE SUTHERLAND: A MAN AGAINST THE STATE (1951); Michael A. Wolf, *George Sutherland*, in THE SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY 449 (Melvin I. Urofsky ed., 1994).

173. See *Euclid*, 272 U.S. at 389 (“It is said that the Village of Euclid is a mere suburb of the City of Cleveland . . .”).

174. *Id.*

175. See, e.g., *Dolan*, 114 S. Ct. at 2322 (“Cities have long engaged in the commendable task of land use planning, made necessary by increasing urbanization particularly in metropolitan areas such as Portland.”).

legacy of *Dolan*—elevated scrutiny and a shift in burden—is quite to the contrary. In revisiting two other “classic” land-use planning cases, we will gain some insight on this discernible¹⁷⁶ and potentially outcome-determinative¹⁷⁷ shift in attitudes.

V. RETHINKING DEFERENCE: *MT. LAUREL I*, *FASANO*, AND CHECKING LOCAL ABUSE

The suburban boom following the end of World War II posed new challenges to land-use planners, to local government officials, and, ultimately, to advocates and judges involved in the litigation that, in America, inevitably accompanies economic progress.¹⁷⁸ Each municipality, without regard to size or access to planning expertise, had been deemed worthy of respect by the *Euclid* Court.¹⁷⁹ As middle-class families sought to escape the problems of the central cities—crowding, crime, pollution, and the like—farming towns were swiftly transformed into bedroom communities.¹⁸⁰ The height, area, and use regulations of Euclidean zoning held great promise as tools for ensuring that urban

176. See, e.g., *id.* at 2326 (Stevens, J., dissenting) (stating that the majority has “abandon[ed] the traditional presumption of constitutionality and impos[ed] a novel burden of proof”).

177. The Court remanded *Dolan* to the state court so that Tigard would have the opportunity to carry its burden of demonstrating rough proportionality. *Dolan*, 114 S. Ct. at 2322. More specifically, the city would have to show “why a public greenway, as opposed to a private one, was required in the interest of flood control,” *id.* at 2320, and “make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway beyond the conclusory statement that it could offset some of the traffic demand generated.” *Id.* at 2322.

178. See, e.g., JACKSON, *supra* note 167.

A Bureau of Labor Statistics survey of home building in 1946-1947 in six metropolitan regions determined that the suburbs accounted for at least 62 percent of construction. By 1950 the national suburban growth rate was ten times that of central cities, and in 1954 the editors of *Fortune* estimated that 9 million people had moved to the suburbs in the previous decade.

Id. at 238.

179. See *supra* text accompanying notes 173-74.

180. See, e.g., JACKSON, *supra* note 167, at 275-76 (“After World War II, the racial and economic polarization of large American metropolitan areas became so pronounced that downtown areas lost their commercial hold on the middle class. Cities became identified with fear and danger rather than with glamour and pleasure.”).

problems remained confined within the city's political boundaries.¹⁸¹

In the 1950s a few voices cried out about the exclusionary tendencies of favored suburban zoning devices such as large-lot zoning (one- and two-acre minima were quite popular) and minimum square footage requirements.¹⁸² The seeds of protest were planted in dissenting opinions by judges who were skeptical about the motives of local government officials and in law review commentaries by experts concerned about the implications and propriety of socioeconomic and racial segregation.

On the judicial side, Justice John C. Bell, Jr. of the Pennsylvania Supreme Court took his colleagues to task for endorsing "the doctrine of *unlimited* police power"¹⁸³ in upholding a one-acre lot minimum, a practice Bell labeled "an intentional and exclusionary interdiction [that] is contrary to our constitutional guarantees and to the American Way of Life."¹⁸⁴ Similarly, Justice A. Dayton Oliphant cautioned fellow members of the New Jersey Supreme Court in *Lionshead Lake, Inc. v. Wayne Township*¹⁸⁵ that their indulgence of Wayne Township's minimum dwelling size scheme advanced the cause of socioeconomic segregation.¹⁸⁶ He warned that "[c]ertain well-behaved families will be barred from these communities, not because of any acts they do or conditions they create, but simply because the income of the family will not permit them to build a house at the cost testified to in this case."¹⁸⁷

Law reviews of the day featured voices in support of the jeremiads of Bell, Oliphant, and others.¹⁸⁸ For example, the holding in *Lionshead*

181. Jackson notes that "in suburbs everywhere, North and South, zoning was used by the people who already lived within the arbitrary boundaries of a community as a method of keeping everyone else out. Apartments, factories, and 'blight,' euphemisms for blacks and people of limited means, were rigidly excluded." *Id.* at 242.

182. See, e.g., Charles M. Haar, *Zoning for Minimum Standards: The Wayne Township Case*, 66 HARV. L. REV. 1051 (1953); Norman Williams, Jr., *Planning Law and Democratic Living*, 20 LAW & CONTEMP. PROBS. 317 (1955).

183. *Bilbar Constr. Co. v. Board of Adjustment*, 141 A.2d 851, 859 (Pa. 1958) (Bell, J., dissenting).

184. *Id.* at 865.

185. 89 A.2d 693 (N.J. 1952).

186. *Id.* at 701 (Oliphant, J., dissenting).

187. *Id.*

188. See also *Vickers v. Township Comm.*, 181 A.2d 129, 147 (N.J. 1962) (Hall, J., dissenting) (contending that although municipality could legitimately use the zoning power to bar trailer camps from industrial district, that ability should not "encompass the right

Lake inspired Charles Haar's quick and incisive retort, in which he noted that

[s]egregation of many kinds is on the increase in the land-use field. . . . [S]egregation is being increasingly accomplished in terms of levels of prices and rentals, of home ownership versus renting, even of age and of veteran status. Exclusionary planning devices which are designed to accomplish such segregation should not be saved by dint of "liberal" cosmetics or "progressive" polish.¹⁸⁹

Similarly, Norman Williams bemoaned the fact that "courts, constitutional lawyers, and the leaders of democratic thought and action remain unconcerned" about exclusionary planning and zoning practices.¹⁹⁰ He pulled no punches when he characterized and explained this apathy:

This remarkable and widespread lack of interest is due in part to a lack of realization of the significance of a mis-planned environment, and in part to sheer muddleheadedness. The leaders of liberal-democratic thought are all too often so confused with abstractions ("health, safety, morals and welfare," "character of the neighborhood," etc.), so full of respect for local autonomy, and so fearful of judicial review generally, as to be unable to understand the implications of what is going on.¹⁹¹

Though there were further stirrings, the 1950s ended with no significant shift in direction by the nation's courts.

Because of the daunting barriers to federal judicial relief, the fight against exclusionary local land-use practices was (and continues to be) fought primarily in state courts. The Supreme Court offered a cautionary signal to potential litigants in *Warth v. Seldin*¹⁹² when the Justices strictly interpreted federal standing requirements.¹⁹³ In *Arlington*

to erect barricades on their boundaries through exclusion or too tight restriction of uses where the real purpose is to prevent feared disruption with a so-called chosen way of life").

189. Haar, *supra* note 182, at 1062-63 (footnotes omitted).

190. Williams, *supra* note 182, at 349.

191. *Id.* at 349-50.

192. 422 U.S. 490 (1975).

193. The Supreme Court warned that

Petitioners must allege facts from which it reasonably could be inferred that, absent the respondents' restrictive zoning practices, there is a substantial probability that they would have been able to purchase or lease . . . and that, if the court affords the

Heights v. Metropolitan Housing Development Corp.,¹⁹⁴ the Court instructed those alleging racial exclusion that the Fourteenth Amendment required proof of discriminatory intent.¹⁹⁵ Use of the Fair Housing Act¹⁹⁶ remains a crucial strategy for litigants who can demonstrate a pattern of racial bias, although the High Court has yet to confirm that a showing of discriminatory intent is not mandated by that federal statute.¹⁹⁷

Finally, in *Memphis v. Greene*¹⁹⁸ a majority of the Court searched in vain for a Civil Rights Act or a Thirteenth Amendment violation occasioned by the city's decision to close off a predominantly white neighborhood from traffic to and from the predominantly African-American neighborhood to the north.¹⁹⁹ One of the justifications offered for the decision by Memphis was the reduction of "'traffic pollution' in a residential area, e.g., noise, litter, interruption of community living."²⁰⁰

This primitive form of local environmental protection is evocative of the *Euclid* Court's concern that

the coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing, as their necessary accompaniments, the disturbing noises incident to increased traffic

relief requested, the asserted inability of petitioners will be removed.

Id. at 504.

194. 429 U.S. 252 (1977).

195. *Id.* at 265 ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.").

196. 42 U.S.C. §§ 3601-19 (1994) (Title VIII of the Civil Rights Act of 1968).

197. See, e.g., *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir.), *aff'd*, 488 U.S. 15 (1988). Six Justices, in a *per curiam* opinion, stated that "[s]ince appellants conceded the applicability of the disparate-impact test for evaluating the zoning ordinance under Title VIII, we do not reach the question whether that test is the appropriate one." 488 U.S. at 18. See also *HAAR & WOLF*, *supra* note 59, at 456-60; *MANDELKER*, *supra* note 125, §§ 7.04-.06.

198. 451 U.S. 100 (1981).

199. See *id.* at 128-29 ("This case does not disclose a violation of any of the enabling legislation enacted by Congress pursuant to § 2 of the Thirteenth Amendment . . . [T]he impact of the closing of West Drive on nonresidents of Hein Park is a routine burden of citizenship; it does not reflect a violation of the Thirteenth Amendment.").

200. *Id.* at 104.

and business, and the occupation, by means of moving and parked automobiles, of larger portions of the streets, thus detracting from their safety and depriving children of the privilege of quiet and open spaces for play²⁰¹

In neither Supreme Court case did it appear that the local government was concerned with the environmental well-being of those fenced out by the challenged decision.²⁰²

By the end of the turbulent civil rights era, the New Jersey and Pennsylvania high courts had taken the lead in the struggle against exclusionary zoning. They ordered the blatant and recalcitrant offenders to break down their barriers to affordable housing and, in some cases, to implement affirmative measures to provide low- and moderate-income dwellings.²⁰³ In order to reach this point, judges and advocates had to overcome a significant rationale for large-lot zoning: proponents of this land-use tool pointed out the environmental harms posed by crowding too many residences into ecologically sensitive parcels that offered pastoral escapes from the urban throng.

In *Oakwood at Madison, Inc. v. Township of Madison*,²⁰⁴ for example, the New Jersey township proffered an ecological rationale for the large-lot zoning—"namely that low population density zoning provides protection against floods and other surface drainage problems and against diversion of water from an aquifer, an underground water resource."²⁰⁵ Superior Court Judge David D. Furman concluded that the necessary engineering data, ecological data, and expert opinions "were lacking both in the legislative process and at the trial."²⁰⁶

The most significant attempt to justify "snob zoning" as environ-

201. *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394 (1926).

202. Because dirty industry and hazardous waste disposal sites are rarely found in bedroom communities and upper-middle-class suburbia, exclusionary zoning is the chief environmental justice issue facing many of the nation's local governments. See generally Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787 (1993).

203. The leading cases are *Southern Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713 (N.J.) (*Mount Laurel I*), cert. denied, 423 U.S. 808 (1975); and *National Land & Inv. Co. v. Kohn*, 215 A.2d 597 (Pa. 1965). See HAAR & WOLF, *supra* note 59, at 376-445; CHARLES M. HAAR, *SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES* (1996).

204. 283 A.2d 353 (N.J. Super. Ct. Law Div. 1971).

205. *Id.* at 358.

206. *Id.* at 359.

mental planning is found in *Mount Laurel I*,²⁰⁷ the most notorious state exclusionary zoning case. In the first round before the New Jersey Supreme Court, the justices in *Mount Laurel I* were asked to consider allegations of potential environmental harm posed by multi-family and smaller detached dwellings.²⁰⁸ Specifically, it was alleged "that the area is without sewer or water utilities and that the soil is such that this plot size is required for safe individual lot sewage disposal and water supply."²⁰⁹

As in *Township of Madison*, the supreme court was not persuaded. Justice Frederick W. Hall, speaking for the *Mount Laurel I* majority, conceded the general importance of "ecological or environmental factors or problems,"²¹⁰ but dismissed the specific objections raised by Mount Laurel. The court's skepticism was palpable. Hall concluded that "[t]he present environmental situation of the area is . . . no sufficient excuse in itself for limiting housing therein to single-family dwellings on large lots."²¹¹ Faced with allegations that middle-class communities were using land-use regulation for purposes of socioeconomic segregation, the *Mt. Laurel I* court was unwilling to defer unconditionally to the wisdom of local officials.

The wisdom of this break with Euclidean tradition is hard to deny, particularly when the facts strongly suggest that local officials are attempting to employ environmentalism to cloak their exclusionary practices. This is not to say that there is no place for local implementation and enforcement of environmental protection programs. Indeed, many localities have responded responsibly and creatively to federal and state mandates regarding wetlands,²¹² floodplains,²¹³ and development

207. 336 A.2d 713 (N.J.), *cert. denied*, 423 U.S. 808 (1975). *See, e.g.*, *Oakwood at Madison, Inc. v. Township of Madison*, 371 A.2d 1192, 1198-99 n.3 (N.J. 1977) (providing early reactions to *Mt. Laurel I*).

208. *Mount Laurel I*, 336 A.2d at 731.

209. *Id.*

210. *Id.*

211. *Id.* *See also* Brian W. Blaesser et al., *Advocating Affordable Housing in New Hampshire: The Amicus Curiae Brief of the American Planning Association in Wayne Britton v. Town of Chester*, 40 WASH. U. J. URB. & CONTEMP. L. 3, 14 (1991) (noting that "[t]he desire to preserve the environment is often cited as a reason for imposing severe restrictions on land development," and that "[e]cological concerns may mask exclusionary motives").

212. *See, e.g.*, HAAR & WOLF, *supra* note 59, at 709-22; LINDA A. MALONE, ENVIRONMENTAL REGULATION OF LAND USE §§ 4.01-.10 (6th ed. 1995); MANDELKER,

in the coastal zone.²¹⁴ Moreover, courts have employed regulatory takings law to check abuses in all three of these areas, at times penalizing overzealous or careless officials who have gone "too far."²¹⁵

When we move beyond these areas and others like them in which the locality is proceeding in accordance with the commands of a centralized authority (that is, state and federal legislators or environmental agencies), local environmental regulation poses special challenges. First, local governments, which are often hard pressed to perform comprehensive planning and zoning duties,²¹⁶ are rarely equipped *on their own* to devise, implement, and enforce environmental control schemes.²¹⁷ Second, multi-jurisdictional regulation is often required

supra note 125, §§ 12.02-.06; SALSICH, *supra* note 32, § 10.07.

213. See, e.g., HAAR & WOLF, *supra* note 59, at 702-08; MALONE, *supra* note 212, §§ 7.01-.08; MANDELKER, *supra* note 125, §§ 12.07-.08.

214. See, e.g., HAAR & WOLF, *supra* note 59, at 756-61; MALONE, *supra* note 212, §§ 2.02-.04; MANDELKER, *supra* note 125, §§ 12.13-.14; SALSICH, *supra* note 32, § 10.08. Cf. Linda A. Malone, *The Coastal Zone Management Act and the Takings Clause in the 1990's: Making the Case for Federal Land Use to Preserve Coastal Areas*, 62 U. COLO. L. REV. 711 (1991).

215. See, e.g., *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (prohibiting the California Coastal Commission from conditioning a rebuilding permit on granting a public easement in the coastal zone); *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994) (holding a regulation restricting building on wetlands to be a regulatory taking); *Dooley v. Town Plan and Zoning Comm'n*, 197 A.2d 770 (Conn. 1964) (holding a zoning change making plaintiff's realty part of a floodplain district was unreasonable and confiscatory in violation of the Fourteenth Amendment).

216. One scholar observes:

The texts of zoning ordinances, more than other laws, are fashioned and debated by the citizenry. Few small cities have the legislative drafting resources of state or national legislatures. A city ordinance, particularly in a small city, is unlikely to bring out a battery of private lawyers with a prolix array of language proposals that tends to iron the character out of the drafted word. Instead, the individual members of the city council, together with the volunteer planning and zoning commission and an often overworked city staff, try their own hands-on approach to proposing legal language.

Lea S. VanderVelde, *Local Knowledge, Legal Knowledge, and Zoning Law*, 75 IOWA L. REV. 1057, 1065 (1990). For the equally grim rural version, see Contemporary Studies Project, *Rural Land Use Regulation in Iowa: An Empirical Analysis of County Board of Adjustment Practices*, 68 IOWA L. REV. 1083 (1983). Cf. Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CAL. L. REV. 837, 868 (1983) ("[I]n local governments' land changes, technical expertise is no assurance at all, because local governments simply do not have it.").

217. The federal government has responded to the scarcity of local resources with mixed success. See, e.g., Sidney A. Shapiro, *Lessons from a Public Policy Failure: EPA*

because many environmental externalities such as acid deposition,²¹⁸ groundwater pollution,²¹⁹ and oil spills²²⁰ fail to respect artificial political boundaries.²²¹ Third, there is a greater likelihood that without

and Noise Abatement, 19 *ECOLOGY L.Q.* 1 (1992). Shapiro writes:

After congressional oversight hearings revealed that EPA's original mandate was inadequate to foster state and local initiatives, Congress passed the Quiet Communities Act of 1978. The Act authorized ONAC [EPA's Office of Noise Abatement and Control] to create a grants program and offer technical assistance to stimulate state and local noise abatement.

After receiving its new authority, ONAC embarked on an ambitious and innovative program of support for local and state governments. ONAC offered a limited amount of direct financial assistance to a small number of states and cities, but most of its efforts consisted of providing technical support through regional technical centers, creating the ECHO (Each Community Helping Others) program, and hosting over 100 training programs attended by 4000 noise officials. ONAC also wrote and distributed model state and local noise ordinances. Lastly, ONAC established a "buy-quiet" program that offered communities model contract specifications for the purchase of low noise emission products.

The demise of state and local programs after 1981, when ONAC's funding was eliminated, strongly suggests that ONAC's support activities were crucial to local noise abatement efforts.

Id. at 17-18 (footnotes omitted).

Similar problems face state officials and taxpayers, who are often the victims of "unfunded mandates." Congress is much more likely to issue commands to states and localities than to foot the bill for nonfederal environmental controls. *See, e.g.*, Malone, *supra* note 214. Professor Malone notes that

state governments are stuck between a rock and a hard place when it comes to any environmental regulation of land use. On the one hand, they confront the public pressures for a better environment, expanding federal requirements for environmental programs, and the need for experimentation with regional, statewide, and interstate land use controls. On the other hand, they are confronted with decreased federal funding, resistance from private landowners to growth restrictions, and the inestimable risk of monetary damages for a regulatory taking.

Id. at 770.

218. *See, e.g.*, Clean Air Act (CAA) § 401(a)(1), 42 U.S.C. § 7651(a)(1) (1994) (stating congressional finding that "the presence of acidic compounds and their precursors in the atmosphere and in deposition from the atmosphere represents a threat to natural resources, ecosystems, materials, visibility, and public health").

219. *See, e.g.*, WILLIAM H. RODGERS, JR., *ENVIRONMENTAL LAW* § 7.7, at 629 (2d ed. 1994) ("Groundwater monitoring and protection is the subject of a vast legal machine that stretches across state and federal law in ways that resist comfortable understanding.")

220. *See, e.g.*, Oil Pollution Control Act of 1990, 33 U.S.C. §§ 2701-61 (1994).

221. Moreover, environmental NIMBY problems, such as attempts by local governments to use their zoning and planning powers to prevent the siting of waste treatment and disposal facilities within their jurisdictions, often call for regional solutions.

the safety net provided by variances²²² and special exceptions²²³ a relatively small number of landowners will be forced to submit to substantial or total deprivation when the challenged regulation is environmentally based. Fourth, the harms that environmental regulations are designed to minimize or eliminate are more likely to pose a threat to the general community, not merely to those residing or working nearby.²²⁴

The third and fourth challenges posed by local environmental regulation are evocative of public nuisance. The affinity between traditional land-use regulation and private nuisance that we can trace to *Euclid* is often lacking when courts are asked to consider the impact of environmental regulation. We can better understand the *Mount Laurel I* court's *Dolan*-like skepticism—its refusal to defer—first when we recall that height, area, and use regulation is the administrative version of private nuisance and second, when we consider environmental regulation as the regulatory analogue to, and twentieth-century legacy of, public

See, e.g., *Town of Warren v. Hazardous Waste Facility Site Safety Council*, 466 N.E.2d 102 (Mass. 1984); Lawrence S. Bacow & James R. Milkey, *Overcoming Local Opposition to Hazardous Waste Facilities: The Massachusetts Approach*, 6 HARV. ENVTL. L. REV. 265 (1982); Denis J. Brion, *An Essay on LULU, NIMBY, and the Problem of Distributive Justice*, 15 B.C. ENVTL. AFF. L. REV. 437 (1988); Bernd Holznagel, *Negotiation and Mediation: The Newest Approach to Hazardous Waste Facility Siting*, 13 B.C. ENVTL. AFF. L. REV. 329, 337-40 (1986).

222. *See, e.g.,* HAAR & WOLF, *supra* note 59, at 343-57; MANDELKER, *supra* note 125, §§ 6.40-52. *See also* SALSICH, *supra* note 32, §§ 5.19-.20. Salsich writes:

The zoning variance is a technique for creating exceptions to the zoning laws when their strict application would result in special hardship to individual landowners. . . . The variance is a "safety valve" of flexibility that allows public agencies "to bend" their rules in situations where rigid application of the rules may have the effect of taking private property in violation of the Fourteenth Amendment.

Id. § 5.19 (footnote omitted).

223. *See, e.g.,* HAAR & WOLF, *supra* note 59, at 357-62; MANDELKER, *supra* note 125, §§ 6.53-61; SALSICH, *supra* note 32, §§ 5.13-18. *See* *North Shore Steak House, Inc. v. Board of Appeals*, 282 N.E.2d 606, 609 (N.Y. 1972) ("A variance is an authority to a property owner to use property in a manner forbidden by the ordinance while a special exception allows the property owner to put his property to a use expressly permitted by the ordinance.").

224. Such is the intent of modern federal environmental regulation. *See, e.g.,* National Environmental Policy Act of 1969 § 101(a), 42 U.S.C. § 4331(a) (1994) (stating congressional recognition of the "profound impact of man's activity on the interrelations of all components of the natural environment" and the "critical importance of restoring and maintaining environmental quality to the overall welfare and development of man").

nuisance.

Environmental law and public nuisance share not only a common purpose (the protection of the general community from serious harms) but also common methods of enforcement (abatement of use, fines, criminal prosecution).²²⁵ Because of these and other shared characteristics, courts and lawmakers over the past few decades have wrestled with the issue of preemption, seeking to determine when modern environmental statutes do or should override common law protective devices.²²⁶ The targets of English and early American public nuisance law included pollution,²²⁷ noise,²²⁸ and hazardous materials²²⁹—all of which are

225. See, e.g., *State v. Chicago Great W. Rail*, 147 N.W. 874 (Iowa 1914) (upholding criminal conviction for maintaining livestock pens, constituting a public nuisance); *Polsgrove v. Moss*, 157 S.W. 1133 (Ky. 1913) (upholding abatement of unsafe and unsanitary dwelling house, constituting a public nuisance); *Illinois Cent. Rail v. Commonwealth*, 96 S.W. 467 (Ky. 1906) (imposing fine for allowing water to leak from water tower and freeze on public street, constituting a public nuisance). Professor Rodgers observes:

To a surprising degree, the legal history of the environment has been written by nuisance law. . . . Nuisance actions reach pollution of all physical media—air, water, land, groundwater—by a wide variety of means. Nuisance actions have challenged virtually every major industrial and municipal activity that today is the subject of comprehensive environmental regulation. . . . Nuisance theory and case law is the common law backbone of modern environmental and energy law.

RODGERS, *supra* note 219, § 2.1, at 112-13.

226. See, e.g., *Renken v. Harvey Aluminum*, 226 F. Supp. 169, 176 (D. Or. 1963) (holding Oregon air pollution law does not preempt state common law of nuisance and trespass); *Biddix v. Henredon Furniture Indus.*, 331 S.E.2d 717, 722 (N.C. Ct. App. 1985) (holding state and federal water pollution laws do not preempt state common law of nuisance and trespass).

See also David R. Hodas, *Private Actions for Public Nuisance: Common Law Citizen Suits for Relief from Environmental Harm*, 16 *ECOLOGY L.Q.* 883 (1989). Hodas writes:

In certain instances . . . state or federal environmental statutes may preempt or limit the relief available under a state common law public nuisance cause of action. When a plaintiff's public nuisance suit relates to airports or to nuclear facilities, the courts have held that federal law preempts state court injunctive relief, although plaintiffs may seek damages. The courts have also held that where interstate issues arise, federal statutes can preempt federal common law public nuisance claims. Although state law public nuisance suits generally are not preempted in interstate pollution cases, the suit must be brought under the law of the state where the discharging source is located.

Id. at 903-04 (footnotes omitted).

227. See, e.g., *Rex v. White and Ward*, 97 Eng. Rep. 338 (K.B. 1757) (holding it is a public nuisance to make "acid spirit of sulfur, and thereby impregnate the air with noisome stinks").

the subject of contemporary comprehensive state and federal environmental regulation.²³⁰ Regardless of whether a court or legislature decides in a specific instance that a statute or regulation takes precedence over common law,²³¹ the existence of a significant body of trial and appellate litigation on the subject provides further proof of the strong link between public nuisance and environmental regulation.

As with private nuisance, common law and primitive statutory controls proved inadequate to redress and, perhaps more importantly, to prevent serious public harms.²³² State and federal lawmakers responded with the statute-based administrative systems that dominate modern environmental law.²³³ Unlike zoning and planning, however, the *primary* responsibility for implementing and enforcing environmental laws remained with central authorities, typically state and federal

228. See, e.g., *Rex v. Smith*, 93 Eng. Rep. 795 (K.B. 1726) (holding it is a public nuisance to "make great noises in the night with a speaking trumpet").

229. See, e.g., *Rex v. Taylor*, 93 Eng. Rep. 1104 (K.B. 1742) (holding it is a public nuisance to keep large quantities of gunpowder).

230. See, e.g., Federal Water Pollution Control Act (Clean Water Act (CWA)), §§ 101-607, 33 U.S.C. §§ 1251-1387 (1994); Federal Noise Pollution Control Act of 1972, 42 U.S.C. §§ 4901-4918 (1994); Clean Air Act (CAA) §§ 101-618, 42 U.S.C. §§ 7401-7671q (1994); Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), §§ 101-405, 42 U.S.C. §§ 9601-9675 (1994).

231. The issue is further complicated in disputes that pit polluters in one state with victims in another. See, e.g., *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987) (holding Vermont common law preempted by the Clean Water Act). See also Randolph L. Hill, *Preemption of State Common Law Remedies by Federal Environmental Statutes: International Paper Co. v. Ouellette*, 14 *ECOLOGICAL L.Q.* 541 (1987).

232. This is not to suggest that common law controls play no role in modern environmental law. See ZYGMUNT J.B. PLATER ET AL., *ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY* (1992). The authors write:

Governmental regulation at the national, state, and local levels typically complements the legal system's common law remedies. The most significant development in modern environmental law in the second half of the twentieth century has been the growth in environmental statutes that take on the anticipatory, proactive regulatory function that the common law does not.

Id. at 244.

233. The modern era of environmental law is generally traced to the passage of the National Environmental Policy Act (NEPA) of 1969. NEPA was followed by a succession of landmark environmental statutes in the 1970s regulating air pollution, water pollution, solid and hazardous waste, endangered species, and drinking water among other environmental concerns.

MALONE, *supra* note 212, § 1.01 (footnote omitted).

regulatory agencies.²³⁴ This meant that the full panoply of state and federal administrative law would help shape the final environmental law product.²³⁵ And, because these decisions would be made at a statewide or even national level, special interest group influence would play a prominent role as well.²³⁶

234. The Environmental Protection Agency carries the major responsibility for implementing and enforcing federal environmental statutes, while state environmental agencies play increasingly significant roles. *See, e.g.*, DEBORAH H. JESSUP, *GUIDE TO STATE ENVIRONMENTAL PROGRAMS* (2d ed. 1990). Jessup writes:

Two more years of "The New Federalism," whereby power and responsibility pass from the federal government to state and local governments, have elapsed since the first edition . . . was published in April 1988. The years have served only to deepen the commitment of the 50 states and the District of Columbia to the management of their own environmental programs. In fact, many new federal regulatory programs require state action because funding from Washington simply is not there.

Id. at v.

Comprehensive federal land-use planning legislation has never materialized, although during the heyday of federal environmental lawmaking in the early 1970s, dozens of proposals for subsidizing state planning with federal funding were considered by Congress. Malone notes that "the proposals would have left the actual planning process to the states." MALONE, *supra* note 212, § 1.01.

235. The leading case is *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971) (establishing the "hard-look" or "substantial inquiry" standard of review under the Administrative Procedure Act, 5 U.S.C. §§ 551-583, 701-706 (1994), for environmental agency action). Rodgers calls *Overton Park* "the most frequently cited decision in the history of environmental law." RODGERS, *supra* note 219, § 1.8, at 91. Additionally, Rodgers notes that "[t]he 'substantial inquiry' or hard-look doctrine of *Overton Park* has become a tenet of modern administrative law and a catechism of environmental law." *Id.* § 1.8, at 93. *But cf.* *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (establishing a deferential standard for judicial review of statutory interpretations by environmental agencies); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978) (questioning hard-look approach in environmental area). *See generally* Richard E. Levy & Richard L. Glicksman, *Judicial Activism and Restraint in the Supreme Court's Environmental Law Decisions*, 42 VAND. L. REV. 343 (1989); Richard B. Stewart, *Vermont Yankee and the Evolution of Administrative Procedure*, 91 HARV. L. REV. 1805 (1978); Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071 (1990).

236. The most influential work on interest groups and their impact on administrative law remains Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1713 (1975) ("It has become widely accepted, not only by public interest lawyers, but by academic critics, legislators, judges, and even by some agency members, that the comparative over-representation of regulated or client interests in the process of agency decision results in a persistent policy bias in favor of these interests.").

There are, of course, varying interpretations of the effect and rationality of interest group influence on the crafting of legislation, even among adherents to "public choice" theory. *See, e.g.*, DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE*:

Counsel representing individual regulated concerns and industry trade groups have challenged environmental statutes and regulations at every conceivable stage, sometimes with great success.²³⁷ Federal lawmakers and regulators know that given such oversight it makes little sense to craft and implement environmental controls that (1) without providing for exceptions, would confiscate property or halt significant economic activity;²³⁸ or (2) are targeted to substances or activities where there is little or no scientific evidence indicating a significant

A CRITICAL INTRODUCTION (1991). According to Farber and Frickey,

Some public choice models portray the political process as an arena of pure greed, in which self-interested voters, avaricious politicians, and self-seeking interest groups meet to do business. Much of the early public choice literature embraced this viewpoint. . . . [H]owever, recent scholarship gives us good grounds for rejecting this model of politics as informing the content of public law. To view politics as wholly deliberative would be quixotic, but there is (perhaps surprisingly) solid evidence that voters and politicians are actually motivated in part by factors other than greed. Careful statistical studies have shown that ideology—beliefs about the public interest—does indeed influence congressional votes.

Id. at 7. Because my point is simply that interest groups are important players in the legislative and administrative lawmaking process, I need not choose sides in this intriguing debate.

237. *See, e.g.,* Chemical Mfrs. Ass'n v. EPA, 28 F.3d 1259 (D.C. Cir. 1994) (holding rule designating methylene diphenyl diisocyanate as a high risk pollutant under the Clean Air Act arbitrary and capricious); Horsehead Resource Dev. Co. v. Browner, 16 F.3d 1246 (D.C. Cir. 1994) (remanding portion of EPA rule (BIF Rule) promulgated under Resource Conservation and Recovery Act (RCRA) that lacked an adequate basis in the record and gave inadequate notice and comment); AFL/CIO v. OSHA, 965 F.2d 962 (11th Cir. 1992) (holding OSHA failed to establish that permissible exposure limits (PEL) under air contaminants standard were economically or technologically feasible); Shell Oil Co. v. EPA, 950 F.2d 741 (D.C. Cir. 1992) (holding EPA failed to give sufficient notice and opportunity for comment in promulgating "mixture" and "derived-from" rules classifying substances as hazardous wastes under RCRA); Corrosion Proof Fittings v. EPA, 947 F.2d 1201, 1215 (5th Cir. 1991) (holding that in promulgating final rule that prohibited asbestos manufacture, importation, processing, and distribution under the Toxic Substances Control Act (TSCA), EPA failed to give adequate public notice and adequate weight to language requiring agency to promulgate the "least burdensome, reasonable regulation required to protect environment adequately"); Chemical Mfrs. Ass'n v. EPA, 899 F.2d 344 (5th Cir. 1990) (holding that EPA failed to articulate standards or criteria for finding that quantities of cumene entering the environment from facilities and the potential human exposure were "substantial" pursuant to TSCA).

238. *See, e.g.,* Safe Drinking Water Act (SDWA) § 1416, 42 U.S.C. § 300g-5 (1994) (allowing exemption for compelling factors including economic problems); CAA § 125, 42 U.S.C. § 7425 (1994) (providing measures to prevent economic disruption or unemployment).

potential of public harm.²³⁹

Although, unfortunately, there may be some exceptions,²⁴⁰ the same factors tend to influence and temper comprehensive environmental regulation on the state level.²⁴¹ These same administrative processes and interest group realities are not generally part of the local land-use regulatory setting, a point made most persuasively in Professor Rose's critique of "piecemeal land controls."²⁴² Even so, because the harm of

239. See, e.g., CAA §§ 108-109, 42 U.S.C. §§ 7408-7409 (1994); CWA § 307, 42 U.S.C. § 1311 (1994); National Primary and Secondary Ambient Air Quality Standards, 40 C.F.R. § 50.2 (1995); 40 C.F.R. pts. 125, 136 (1995). For recent critiques of agencies' abilities to determine risks with scientific certainty, see STEPHEN G. BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* (1993); John S. Applegate, *Worst Things First: Risk, Information, and Regulatory Structure in Toxic Substances Control*, 9 YALE J. ON REG. 277 (1992).

240. See, e.g., *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992) (holding state beachfront management statute effected a total taking). See also *Department of Agric. & Consumer Servs. v. Mid-Florida Growers, Inc.*, 521 So. 2d 101 (Fla.) (nursery owner entitled to compensation for inverse condemnation resulting from state's destruction of citrus plants), *cert. denied*, 488 U.S. 870 (1988).

241. See, e.g., BERNARD SCHWARTZ, *ADMINISTRATIVE LAW* § 1.13, at 32-33 (3d ed. 1991) (noting the spread of state administrative procedure legislation, the majority of which is based upon versions of the Model State Administration Procedure Act (1946, revised in 1961 and 1981)). I am suggesting that many of the interest group dynamics and procedural protections found in Washington are in place at the state level, not that federal and state administrative law realities are identical. For a thoughtful appraisal of how state and federal administrative processes differ, see Arthur Earl Bonfield, *State Law in the Teaching of Administrative Law: A Critical Analysis of the Status Quo*, 61 TEX. L. REV. 95 (1982). Bonfield writes:

The practical politics and interest group diversity surrounding the operation of the various state processes may also be different in some respects from that surrounding the federal administrative process. While federal agencies are usually staffed by full-time officials dedicated only to executing the functions of those agencies, many state agencies are run by part-timers whose primary allegiance lies elsewhere. Further, most federal agencies are not structured to ensure direct and formal representation of interest groups affected by their actions. State agencies, on the other hand, are often structured to accomplish that result. . . .

In addition, state agencies are generally not as well-financed as federal agencies. . . . Partly as a consequence of this underfinancing, state agencies usually cannot obtain the quantity or quality of technical expertise and legal assistance available to similar federal agencies. Because they are smaller, more poorly financed, and less technically competent, state agency staffs are often characterized by somewhat less professionalism than the staffs of most federal agencies. . . .

Id. at 126-27 (footnotes omitted).

242. Professor Rose notes:

In a small-scale government . . . there may be no clash of multiple interests leading

a faulty or misdirected zoning decision is typically not widespread,²⁴³ and because safety nets (such as variances, special use permits, conditional zoning, and transferable development rights) can cushion the otherwise confiscatory blows rendered by local planning and zoning decisionmakers,²⁴⁴ most jurisdictions continue the Euclidean tradition and give deference to local land-use regulators.

When widespread suspicion arises concerning the legitimacy and legality of local zoning and planning decisions—particularly approvals

to at least temporary stasis and ultimately to an adequate and careful consideration of the public well-being. Moreover, . . . there may not be enough items of political interest to permit the development of coalitions and the benefit-trading and mutual forbearance they entail. . . .

[I]n making specific piecemeal land decisions . . . legislatures are restrained neither by a coalition-building process that assures the fairness of the decisions, nor by a clash of interests that gives time for sober consideration.

Rose, *supra* note 216, at 855-56 (footnotes omitted).

243. *Id.* at 910-11. Professor Rose also observes:

[I]t may well be that despite all the official boilerplate of health and safety (and recently, environmental protection) in the preambles of land use controls, the most serious spillovers or externalities of land use fall within the vague field of aesthetics: the way the area looks, sounds, feels, smells. Reactions to matters of the senses are likely to be limited in physical range; such externalities are most deeply felt within the neighborhood.

Id. (footnote omitted). *But see id.* at 840 & n.4 (citing “criticism [that] concentrates on the extralocal effects of local land use decisions, particularly the exclusion of low income outsiders, and the shifting of environmental problems to neighboring communities”); *Miller v. Upper Allen Township Zoning Hearing Bd.*, 535 A.2d 1195 (Pa. Commw. Ct. 1987) (holding landowners from neighboring locality had standing to intervene in zoning appeal); *Borough of Cresskill v. Borough of Dumont*, 104 A.2d 441 (N.J. 1954) (allowing neighboring localities to check effort to rezone parcel because of negative effect on contiguous neighborhoods).

244. See *supra* notes 222-23 for a discussion of variances and special exceptions. For materials on conditional zoning, see HAAR & WOLF, *supra* note 59, at 283-88; MANDELKER, *supra* note 125, §§ 6.64-67; SALSICH, *supra* note 32, § 4.29. For discussions on transferable development rights (TDRs), see *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 137 (1978) (noting that TDRs “undoubtedly mitigate whatever financial burdens the law has imposed on appellants, and, for that reason, are to be taken into account in considering the impact of regulation”); HAAR & WOLF, *supra* note 59, at 269-76; MANDELKER, *supra* note 125, § 11.34; SALSICH, *supra* note 32, § 4.28. *But see Fred F. French Inv. Co. v. City of New York*, 350 N.E.2d 381 (N.Y.) (holding city’s earlier TDR scheme did not render landowner just compensation), *appeal dismissed*, 429 U.S. 990 (1976).

of small-scale rezonings ("spot zoning")²⁴⁵—some jurisdictions have responded by imposing administrative-law-type ("quasi-judicial") protections. These protections are designed to ensure that local legislative bodies articulate the reasons for their decisions and show how the change sought by the landowner conforms with the comprehensive plan.²⁴⁶ In this way, a reviewing court has more information upon which to make its finding concerning the alleged arbitrariness of the decision—the charge typically raised by disgruntled neighbors.²⁴⁷

Interestingly, Oregon, the geographical setting for *Dolan*, is the jurisdiction that has led the way in viewing local government decisionmaking in small-scale rezoning cases "as the exercise of judicial rather than of legislative authority."²⁴⁸ Perhaps this explains the majority's first reason for distinguishing Mrs. Dolan's case from

245. Professor Mandelker provides a very workable definition of spot zoning: "A 'spot zoning' is a zoning map amendment that rezones a tract of land from a less intensive to a more intensive use district. Spot zoning comes under attack because objectors believe it confers a zoning 'favor' on a single landowner without justification." MANDELKER, *supra* note 125, § 6.28, at 248.

246. Professor Mandelker writes:

The presumption of constitutionality accorded legislative actions disappears when a court holds a rezoning quasi-judicial, and the proponent of the zoning amendment has the burden of proof to justify the zoning change. The legislative body must also adopt adjudicative procedures for zoning changes and make adequate findings of fact.

See MANDELKER, *supra* note 125, § 6.26 at 246. See also Osborne M. Reynolds, Jr., "Spot Zoning"—A Spot That Could Be Removed From the Law, 48 WASH. U. J. URB. & CONTEMP. L. 117 (1995). Professor Rose writes:

The ["plan jurisprudence"] model first postulates that some form of plan is necessary. Then, drawing heavily on administrative law doctrines, it regards all piecemeal changes as "judicial" or "quasi-judicial." According to this model, then, piecemeal land use decisions must conform to the standards set out in preexisting plans; moreover, because the individual decision applies a general standard to a specific instance, the decision is to be made according to adjudicative procedures.

Rose, *supra* note 216, at 844.

247. See, e.g., *Fasano v. Board of County Comm'rs*, 507 P.2d 23 (Or. 1973). The court stated that the quasi-judicial approach

is adequate to provide meaningful guidance for local governments making zoning decisions and for trial courts called upon to review them. . . . Parties at the hearing before the county governing body are entitled to an opportunity to be heard, to an opportunity to present and rebut evidence, to a tribunal which is impartial in the matter . . . and to a record made and adequate findings executed.

Id. at 30 (citation omitted).

248. *Id.* at 29.

landowner challenges in *Euclid, Pennsylvania Coal*, and *Agins*.²⁴⁹ Those cases “involved essentially legislative determinations classifying entire areas of the city, whereas [in *Dolan*] the city made an adjudicative decision to condition petitioner’s application for a building permit on an individual parcel.”²⁵⁰ In oral argument, counsel for the city detailed the significant (and atypical) administrative protections afforded landowners in Oregon’s legislatively mandated comprehensive planning and zoning structure.²⁵¹

Justice Souter took issue with the *Dolan* majority’s departure from “the usual rule in cases involving the police power that the government is presumed to have acted constitutionally,”²⁵² and challenged Rehnquist’s characterization of Mrs. Dolan’s “case as involving an ‘adjudicative decision’ to impose permit conditions.”²⁵³ Courts in a majority of American jurisdictions might well agree. However, the Oregon Supreme Court in *Fasano v. Board of County Commissioners*,²⁵⁴ viewed these issues otherwise:

Ordinances laying down general policies without regard to a specific piece of property are usually an exercise of legislative authority, are subject to limited review, and may only be attacked upon constitutional grounds for an arbitrary abuse of authority. On the other hand, a determination whether the permissible use of a specific piece of property should be changed is usually an exercise

249. *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2316 (1994) (citing *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922)).

250. *Dolan*, 114 S. Ct. at 2316.

251. See Official Transcript of Proceedings Before the Supreme Court of the United States at 39, *Dolan* (No. 93-518).

MR. [TIMOTHY V.] RAMIS: . . . The decision is made by, in the first instance, the planning commission, and then, on appeal, to the city council. Under the law in Oregon, this is an adjudicatory process, with all the safeguards of an impartial decisionmaker, a decision on the record, a decision under written criteria. That decision is then subject to review by the land use board of appeals. And a property owner such as this one can introduce evidence at that [sic] trial level about constitutional violations and procedural violations.

Id.

252. *Dolan*, 114 S. Ct. at 2331 (Souter, J., dissenting).

253. *Id.* at 2331 n.* (Souter, J., dissenting) (quoting the majority opinion, *id.* at 2320 n.8).

254. 507 P.2d 23 (Or. 1973).

of judicial authority and its propriety is subject to an altogether different test.²⁵⁵

Fasano involved a challenge brought by landowners to a neighbor's successful application for a zoning change to build a mobile home park. Unsatisfied with the "arbitrary and capricious" standard, the *Fasano* court mandated procedural and substantive changes to assure that the approved change was "in conformance with the comprehensive plan."²⁵⁶

The Oregon justices anticipated that some critics would accuse the court of tying the hands of local planning authorities, but found that "the dangers of the almost irresistible pressures that can be asserted by private economic interests on local government"²⁵⁷ outweighed the dangers of inflexible planning.²⁵⁸ Certainly the history of American municipal government supports some judicial concern over local government corruption and undue economic influence.²⁵⁹ Bribery and graft in land-use planning decisionmaking have inspired Hollywood screenwriters²⁶⁰ and finished countless political careers.²⁶¹ The Oregon approach is but one attempt to counter these real and "almost irresistible pressures."²⁶²

Our glance backward from the perspective of *Dolan* at these judicial and legislative attempts to counterbalance undue pressure by land developers yields an important insight. In the eyes of a court considering

255. *Id.* at 26.

256. *Id.* at 27-28. See also Charles M. Haar, *In Accordance with the Comprehensive Plan*, 68 HARV. L. REV. 1154 (1955).

257. *Fasano*, 507 P.2d at 30.

258. *Id.* While Oregon courts refuse to apply the *Fasano* standard in cases in which the landowner seeking a zoning change loses, such is not the case universally. See, e.g., *Golden v. City of Overland Park*, 584 P.2d 130, 137 (Kan. 1978).

259. See, e.g., JOHN A. GARDINER & THEODORE R. LYMAN, DECISIONS FOR SALE: CORRUPTION IN LAND-USE AND BUILDING REGULATION (1978); NATIONAL INSTITUTE OF LAW ENFORCEMENT & CRIMINAL JUSTICE, U.S. DEP'T OF JUSTICE, AN ANALYSIS OF ZONING REFORMS: MINIMIZING THE INCENTIVE FOR CORRUPTION (1979) [hereinafter NATIONAL INSTITUTE].

260. See, e.g., *AGAINST ALL ODDS* (Columbia Pictures 1984); *CHINATOWN* (Long Road Productions 1974).

261. See FRANK J. POPPER, *THE POLITICS OF LAND-USE REFORM* 52 (1981) ("Zoning and subdivision regulation have traditionally been the greatest single source of corruption in local government. Zoning personnel rarely constitute even 2 percent of a city government's work force, but zoning scandals seem to account for nearly half the convictions of local officials.").

262. *Fasano*, 507 P.2d at 30. See, e.g., NATIONAL INSTITUTE, *supra* note 259.

a landowner challenge to land-use regulation, local governments can be “captured” by environmental, anti-development interests as well as by pro-development forces.²⁶³ The *Dolan* majority’s concern about regulators’ motives is best represented by Chief Justice Rehnquist’s reference to the California Coastal Commission’s attempt to gain lateral public access to the Nollans’ beach property as “simply trying to obtain an easement through gimmickry.”²⁶⁴ Moreover, the *Dolan* Court’s demanding actions—rejecting the most lax state standard for measuring the validity of local government exactions and subjecting Tigard officials to the “rough proportionality” test²⁶⁵—speak much louder than the Justices’ supportive words: “No such gimmicks are associated with the permit conditions imposed by [Tigard] in this case.”²⁶⁶ Much like the *Fasano* court was concerned about local officials bowing to undue economic pressure, the *Dolan* Court seemed worried that the Tigard City Planning Commission may have been so anxious to realize an agenda that included public open spaces and alternative forms of transportation that it overlooked the legitimate grievances of the landowner who would bear the brunt of its regulatory decision.

Dolan’s use of elevated judicial scrutiny to solve Tigard’s possible overindulgence of public needs and desires mirrors the approach taken by state courts in *Mt. Laurel I* and *Fasano* to combat an undesirable government agenda (socioeconomic exclusion) and municipal corruption. These are not the only examples of judicial and legislative attempts to redress local government excesses.

Other checks on local government abuse exist. First, the Constitution requires balancing or elevated scrutiny when the challenged land-use

263. In her discussion of Stewart’s notion of “interest representation,” see Stewart, *supra* note 236, Professor Rose noted this possibility:

Interest representation proposals normally attempt to counteract the “capture” of the regulators by the regulated interest; in the land use area, “capture” arguments usually refer to the undue influence on the local government that developers and real estate interests may exercise to the exclusion of other interested citizens, although the developers may regard the local council as the “captive” of an implacably antidevelopment majority.

Rose, *supra* note 216, at 897 (footnotes omitted).

264. *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2317 (1994).

265. See *supra* text accompanying notes 53-56.

266. *Dolan*, 114 S. Ct. at 2317.

regulation has a negative impact on first amendment protections²⁶⁷ or other constitutionally recognized rights,²⁶⁸ or discriminates on the basis of a suspect classification.²⁶⁹ Second, legislation exists that selectively (especially to protect environmentally sensitive regions of the state)²⁷⁰ or, in a few cases, on a statewide basis,²⁷¹ returns significant planning and zoning power to a central authority.²⁷² Third, state statutes and

267. See, e.g., *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) (holding that the statutory delegation of a governmental power to a religious institution—the ability to veto alcoholic beverage licenses—violated the First Amendment's Establishment Clause); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981) (holding locality's live entertainment ban violated First Amendment free speech protections).

268. See, e.g., *Moore v. City of East Cleveland*, 431 U.S. 494, 498-99 (1977) (determining that Euclidean deference is inappropriate for a city zoning provision that defined families too narrowly).

269. See, e.g., *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181 (2d Cir. 1987) (holding city liable for intentional racial discrimination for practices that included using zoning power to preserve segregated neighborhoods), *cert. denied*, 486 U.S. 1055 (1988). Localities engaging in arbitrary and irrational land-use regulation can also be checked under minimal review standards. See, e.g., *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985) (finding that city failed rational basis test when it required a special use permit for a group home for the mentally retarded).

270. See, e.g., MALONE, *supra* note 212, §§ 13.01-.04 (discussing "Critical Area Regulations," including programs in Florida (Administration Commission designates critical areas), New Jersey (Pinelands Commission), New York (Adirondack Park Agency), and Virginia (Chesapeake Bay Local Assistance Board)). See Florida Environmental Land & Water Management Act of 1972, FLA. STAT. ANN. §§ 380.012-.12 (West 1988 & Supp. 1995); Pinelands Protection Act, N.J. STAT. ANN. §§ 13.18A-1 to -49 (West 1991 & Supp. 1995); Adirondack Park Agency Act, N.Y. EXEC. LAW §§ 800-820 (McKinney 1982 & Supp. 1996); Chesapeake Bay Preservation Act, VA. CODE ANN. §§ 10.1-2100 to -2116 (Michie 1991 & Supp. 1995).

271. One of the most ambitious programs, embodied in the Oregon Land Use Planning Act of 1973, OR. REV. STAT. §§ 197.005-.860 (1991 & Supp. 1994), determined the contours of the *Dolan* dispute. See GERRIT KNAAP & ARTHUR C. NELSON, *THE REGULATED LANDSCAPE: LESSONS ON STATE LAND USE PLANNING FROM OREGON* (1992); Robert L. Liberty, *Oregon's Comprehensive Growth Management Program: An Implementation Review and Lessons from Other States*, 22 *Envtl. L. Rep.* (Envtl. L. Inst.) 10,367 (1992). See also Wickersham, *supra* note 121, at 490, 522-23 (explaining that the Oregon statute, which "served as the model for a second wave of state growth management statutes adopted from the mid-1980s through 1993," differs from previous schemes in that it "relies on state oversight of local planning and zoning, rather than on direct state or regional regulation of major projects or critical areas").

272. The classic treatment of state and regional planning schemes is FRED BOSSELMAN & DAVID L. CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROL* (1971). For the early history of the "recapture by state government of its power to regulate land development," see MODEL LAND DEV. CODE 248-54 (1976) (commentary on article 7).

regulations exist that are designed to combat exclusionary zoning and to force recalcitrant municipalities to implement inclusionary devices such as mandatory set-asides and density bonuses.²⁷³ Fourth, state and federal regulatory takings case law may invalidate or make cost-prohibitive confiscatory local regulations.²⁷⁴ It is to this last factor that we now turn our attention, as we examine a pivotal regulatory takings case through the lens provided by *Dolan* and *Lucas*.

VI. THE KEYS TO KEYSTONE: WHOLE PARCELS AND NEW KNOWLEDGE

More than six decades intervened between the Supreme Court's consideration of the legitimacy of two Pennsylvania statutory responses to coal mine subsidence—the Kohler Act,²⁷⁵ invalidated by the Court in *Pennsylvania Coal Co. v. Mahon* in 1922,²⁷⁶ and the Subsidence Act,²⁷⁷ upheld by the Court in *Keystone Bituminous Coal Ass'n v. DeBenedictis* in 1987.²⁷⁸ During that interim, state and federal regulators confronted a significant body of evidence regarding the harms posed to the public by coal mining that is conducted in close proximity to residences and commercial uses.²⁷⁹ Following passage of the Federal

Recent contributions to the growing literature on the subject include JOHN M. DEGROVE, *PLANNING AND GROWTH MANAGEMENT IN THE STATES* (1992); STATE AND REGIONAL COMPREHENSIVE PLANNING: IMPLEMENTING NEW METHODS FOR GROWTH MANAGEMENT (Peter A. Buschbaum & Larry J. Smith eds., 1993); David L. Callies, *The Quiet Revolution Revisited: A Quarter Century of Progress*, 26 URB. LAW. 197 (1994).

273. See, e.g., CAL. GOV'T CODE §§ 65580-65589.3, 65915-65918 (West 1983 & Supp. 1995) (recognizing housing element in comprehensive plans; density bonuses and other inclusionary devices); MASS. GEN. LAWS ANN. ch. 40B, §§ 20-23 (West 1994 & Supp. 1995) (citing provisions regarding low and moderate income housing, commonly referred to as the "Anti-Snob Zoning Act"); N.J. STAT. ANN. §§ 52.27D-301 to -329 (West 1986 & Supp. 1995) (describing Fair Housing Act that sets up Council on Affordable Housing to promulgate and enforce statutory and *Mt. Laurel* mandates). Cf. *United States v. City of Parma*, 661 F.2d 562 (6th Cir. 1981) (modifying trial court's broad remedy in federal Fair Housing Act case involving an egregious pattern of racial discrimination), *cert. denied*, 456 U.S. 1012 (1982).

274. In addition to *Lucas* and *Nollan*, see the successful takings challenges cited *infra*, notes 294 and 366.

275. 1921 Pa. Laws 1198.

276. 260 U.S. 393 (1922).

277. PA. STAT. ANN. tit. 52, §§ 1406.1-1407 (Purdon Supp. 1995).

278. 480 U.S. 470 (1987).

279. *Id.* at 473-76, 485-94.

Surface Mining Control and Reclamation Act (SMCRA)²⁸⁰ and its accompanying regulations,²⁸¹ Pennsylvania expanded the reach of its restrictions on mining that were “designed to minimize subsidence in certain areas.”²⁸²

Although four Justices, led by Chief Justice Rehnquist, could see no meaningful (that is, outcome-determinative) distinction between the two Pennsylvania coal-mining statutes,²⁸³ the majority thought otherwise.²⁸⁴ In a carefully drawn opinion that serves as a paradigm for future regulatory takings cases where it is necessary to adjudge the validity of comprehensive, expert-based, federal and state environmental restrictions, Justice Stevens distinguished *Pennsylvania Coal* in two key ways:

First, unlike the Kohler Act, the character of the governmental action involved here leans heavily against finding a taking; the Commonwealth of Pennsylvania has acted to arrest what it perceives to be a significant threat to the common welfare. Second, there is no record in this case to support a finding, similar to the one the Court made in *Pennsylvania Coal*, that the Subsidence Act makes it impossible for petitioners to profitably engage in their business, or that there has been undue interference with their investment-backed expectations.²⁸⁵

The Court's attention to two key factors—the intensity of the perceived public harm and the degree of diminution of private property interests—derives from a line of regulatory takings cases that concern not only comprehensive federal and state environmental regulations of land use,²⁸⁶ but also concern local planning and zoning regulations.²⁸⁷

280. 30 U.S.C. §§ 1201-1328 (1994). See *Keystone*, 480 U.S. 476-77 n.6.

281. Surface Coal Mining & Reclamation Operations, 44 Fed. Reg. 14,902 (1979).

282. *Keystone*, 480 U.S. at 485; see *id.* at 476-77 n.6.

283. See *id.* at 508-09 (Rehnquist, J., dissenting) (“Examination of the relevant factors presented here convinces me that the differences between them and those in *Pennsylvania Coal* verge on the trivial.”).

284. See *id.* at 481 (Stevens, J.) (“Although there are some obvious similarities between the cases, we agree with the Court of Appeals and the District Court that the similarities are far less significant than the differences, and that *Pennsylvania Coal* does not control this case.”).

285. *Id.* at 485.

286. See, e.g., *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985) (wetlands); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 295-96 (1981) (coal mining). See also Wolf, *supra* note 22, at 498-500 (identifying these two factors with Holmes's majority and Brandeis's dissenting opinions in *Pennsylvania*

The *Keystone* Court's direct source for these factors is *Agins v. City of Tiburon*,²⁸⁸ a 1980 case that addressed the legitimacy of an open-space ordinance.²⁸⁹ Justice Lewis F. Powell, speaking for the Court, noted, "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, or denies an owner economically viable use of his land."²⁹⁰

In two subsequent, *successful* takings challenges, the *Agins* test reached beyond its original turf of a local government's "general zoning law."²⁹¹ The *Nollan* majority, considering the coastal commission's conditional approval of a landowner's construction plans, applied the two-factor test to "land use regulation" by local and regional planning officials.²⁹² Similarly, the Court in *Lucas* employed the *Agins* framework to evaluate a state's environmentally based beachfront protection scheme.²⁹³

State and federal courts have taken Scalia's lead and applied the *Agins* formulation in lawsuits that challenge a wide range of land-use and environmental regulations.²⁹⁴ It is probably too late to reconsider the

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

287. See, e.g., *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 628 (1981) (open-space ordinance); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (open-space ordinance).

288. 447 U.S. 255 (1980). See *Keystone*, 480 U.S. at 485 (quoting *Agins*, 447 U.S. at 260).

289. *Agins*, 447 U.S. at 257.

290. *Id.* at 260.

291. See *Wolf*, *supra* note 22, at 478-79 (quoting *Agins*, 447 U.S. at 260).

292. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987); see also *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2316 (1994) ("land use regulation").

293. See *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2893-95 (1992) (applying the *Agins* test to find a taking when the owner was forced to sacrifice "all economically beneficial . . . use[s]" of his property).

294. In the months following the *Lucas* decision, several state and federal courts applied the *Agins* formulation in a variety of land-use and environmental regulatory takings settings. The courts in the following cases refused to find that the challenged regulations effected a taking: *Tabb Lakes, Ltd. v. United States*, 10 F.3d 796, 800-02 (Fed. Cir. 1993) (Corps of Engineers order to suspend construction activities until permit granted); *Outdoor Sys., Inc. v. City of Mesa*, 997 F.2d 604, 615-18 (9th Cir. 1993) (ordinances restricting billboard placement); *Christensen v. Yolo County Bd. of Supervisors*, 995 F.2d 161, 164-65 (9th Cir. 1993) (city agreement with county to reject plans for urban development in

county areas covered by city's general plan); *O'Connor v. Corps of Engineers*, 801 F. Supp. 185, 197-98 (N.D. Ind. 1992) (Corps of Engineers denial of permit to fill wetlands and order to return filled wetlands to original condition); *Tahoe Keys Property Owners' Ass'n v. State Water Resources Control Bd.*, 28 Cal. Rptr. 2d 734 (Cal. Ct. App.) (refusal to enjoin challenged regulation conditioning building permits on payment of mitigation fee prior to trial of takings issue), *cert. denied*, 115 S. Ct. 485 (1994); *People ex rel. Dep't of Transp. v. Diversified Properties Co. III*, 17 Cal. Rptr. 2d 676, 680 (Cal. Ct. App. 1993) ("de facto taking" prior to eminent domain action); *Tim Thompson, Inc. v. Village of Hinsdale*, 617 N.E.2d 1227, 1242-46 (Ill. App. Ct.) (rezoning of lot to increase minimum size for development), *cert. denied*, 622 N.E.2d 1229 (Ill. 1993); *Offen v. County Council*, 625 A.2d 424, 431-43 (Md. Ct. Spec. App. 1993) (denial of sewer upgrade permit and subsequent rezoning of property to preclude commercial development), *rev'd on other grounds*, 639 A.2d 1070 (Md. 1994); *Steinbergh v. City of Cambridge*, 604 N.E.2d 1269, 1273-77 (Mass. 1992) (city rent control board's refusal to allow sale of individual condominium units), *cert. denied*, 113 S. Ct. 2338 (1993); *Kelly v. Tahoe Regional Planning Agency*, 855 P.2d 1027, 1032-35 (Nev. 1993) (denial of permits to construct single-family homes based on criteria designed to protect water quality of Lake Tahoe), *cert. denied*, 114 S. Ct. 684 (1994); *Bernardsville Quarry, Inc. v. Borough of Bernardsville*, 608 A.2d 1377, 1381-90 (N.J. 1992) (ordinance imposing licensing requirements for quarry operations and limiting depth below which land could not be quarried); *Patzau v. New Jersey Dep't of Transp.*, 638 A.2d 866, 872 (N.J. Super. Ct. App. Div.) (restrictions on development in "airport safety zones"), *cert. denied*, 649 A.2d 1288 (N.J. 1994); *Dodd v. Hood River County*, 855 P.2d 608, 613-17 (Or. 1993) (en banc) (denial of conditional use permit to construct single-family home in forestry zone); *Stevens v. City of Cannon Beach*, 854 P.2d 449, 458-59 (Or. 1993) (en banc) (denial of permit to build seawall), *cert. denied*, 114 S. Ct. 1332 (1994); *Commonwealth v. Rogers*, 634 A.2d 245, 247-54 (Pa. Super. Ct. 1993) (conviction for maintaining 95-foot tall Dairy Queen sign penetrating airport approach airspace); *Rainey v. City of Norfolk*, 421 S.E.2d 210, 212-14 (Va. Ct. App. 1992) (contempt sanctions for failure to bring property into compliance with building code); *McFillan v. Berkeley County Planning Comm'n*, 438 S.E.2d 801, 809-10 (W. Va. 1993) (refusal to allow expansion of mobile home park).

In the following cases, takings were found: *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1178-82 (Fed. Cir. 1994) (Corps of Engineers order prohibiting construction on wetlands); *Bowles v. United States*, 31 Fed. Cl. 37, 44-46 (Cl. Ct. 1994) (denial of permit to fill wetlands to install sewer system); *Moroney v. Mayor of Old Tappan*, 633 A.2d 1045, 1047-48 (N.J. Super. Ct. App. Div. 1993) (denial of hardship variance from zoning requirements), *cert. denied*, 642 A.2d 1004 (N.J. 1994).

See also *Creppel v. United States*, 41 F.3d 627, 631-34 (Fed. Cir. 1994) (government blocked wetlands reclamation project; temporary takings claim barred by statute of limitations and permanent takings case remanded); *Resolution Trust Corp. v. Town of Highland Beach*, 18 F.3d 1536, 1549-50 (11th Cir.) (zoning commission's reinterpretation of ordinance resulting in premature expiration of zoning designation), *vacated en banc*, 42 F.3d 626 (11th Cir. 1994); *Carpenter v. Tahoe Regional Planning Agency*, 804 F. Supp. 1316, 1325-27 (D. Nev. 1992) (authority's eight-month moratorium on new construction banning single family residential use; landowner's as-applied takings claim survived summary judgment); *Department of Transp. v. Weisenfeld*, 617 So. 2d 1071, 1072-74 (Fla. Dist. Ct. App. 1993) (case remanded to determine if department's filing of map of reservation deprived owner of economic use), *aff'd*, 640 So. 2d 73 (Fla. 1994) (per curiam); *Galbraith v. Planning Dep't*, 627 N.E.2d 850, 854 (Ind. Ct. App. 1994) (action

expansion of the *Agins* test; and it would not be an easy task to limit the test to one "genus" of regulation. Efforts to distinguish environmental regulation from land-use planning often prove wanting. For example, Justice Sandra Day O'Connor opined that two distinct forms of regulation are at work: "Land use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits."²⁹⁵ Justice Powell was not alone in the skepticism evident in his observation that the Court's "distinction is one without a rational difference."²⁹⁶

Even if we choose not to engage in fine line-drawing, we can note that local Euclidean and post-Euclidean²⁹⁷ zoning devices rarely encounter difficulty with the *Agins* substantial advancement prong, particularly when such regulation is specifically authorized by state zoning enabling acts.²⁹⁸ Even the *Dolan* Court in its "essential nexus"

challenging rezoning of property as floodway deemed premature); *Woodbury Place Partners v. City of Woodbury*, 492 N.W.2d 258, 260-63 (Minn. Ct. App. 1992) (case remanded to determine economic impact of two-year moratorium on development of land zoned for commercial use), *cert. denied*, 113 S. Ct. 2929 (1993); *Powers v. Skagit County*, 835 P.2d 230, 236-39 (Wash. Ct. App. 1992) (denial of permit to build in floodway; remanded for a determination of whether economically viable use remained).

295. *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 587 (1987). This was a nontakings case involving federal preemption of a coastal permit requirement.

296. *Id.* at 603 n.5 (Powell, J., concurring in part and dissenting in part). *See also id.* at 607 (Scalia, J., dissenting) (agreeing with the majority that land-use laws are preempted but concluding that "the permit [the challenged state] statute requires Granite Rock to obtain is a land use control device"); Eric T. Freyfogle, *Granite Rock: Institutional Competence and the State Role in Federal Land Planning*, 59 U. COLO. L. REV. 475, 487 (1988) ("Down the road courts will have trouble with this distinction, unless the Court literally limits the land use category to those exceedingly few statutes that prescribe particular uses for parcels of federal land."); John D. Leshy, *Granite Rock and the States' Influence Over Federal Land Use*, 18 ENVTL. L. 99, 103 (1987) (noting the "slipperiness of the distinction").

297. Professor Haar and I use this term to describe planning and zoning

approaches [that] often involve landowners and regulators in a bargaining process that results in permission to develop above and beyond established limits (TDR [transferable development rights], conditional zoning), the provision of public amenities (incentive zoning), the elimination of harmful spillovers and unimaginative rigidity (performance standards), and the integration of traditionally segregated uses (mixed-use development, PUD [planned-unit development]).

HAAR & WOLF, *supra* note 59, at 256.

298. The Standard State Zoning Enabling Act (SZA) is the antecedent for the great bulk of state zoning legislation. SZA includes among the "Purposes in View" for local

analysis acknowledged that Tigard's flood prevention and traffic reduction goals were "legitimate public purposes."²⁹⁹ In the event local regulations stray too far from the letter and spirit of state law, they are invalidated under *ultra vires* principles.³⁰⁰

Although landowner litigants frequently include "total takings" claims in their pleadings, the second *Agins* prong—prohibiting government action that deprives the private user of all economically viable use—is rarely violated in the local land-use planning and zoning context for three major reasons. First, local ordinances typically include safety nets such as variances and special exceptions, devices that effectively shield local governments from claims of confiscatory regulation.³⁰¹

Second, planning-based Euclidean and post-Euclidean zoning devices are designed to segregate and manage discordant uses—not to abate them outright. In those comparatively rare instances in which local planning and zoning decisionmakers have crossed the line that divides reasonable from arbitrary and confiscatory confiscation, state and federal courts have reacted by outlawing the offending restrictions or by forcing local governments to compensate the victims.³⁰²

zoning the following legitimate state interests: lessening street congestion, securing fire safety, promoting health and general welfare, and preventing overcrowding. U.S. DEP'T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT UNDER WHICH MUNICIPALITIES MAY ADOPT ZONING REGULATIONS (recommended 1926) [hereinafter SZEA], reprinted in 5 ARDEN H. RATHKOPF & DAREN A. RATHKOPF, RATHKOPF'S THE LAW OF ZONING AND PLANNING app. A (Edward H. Ziegler, Jr. ed., 4th ed. 1983 & Supp. 1995).

299. *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2317-18 (1994).

300. See, e.g., *Rockhill v. Chesterfield Township*, 128 A.2d 473, 478-79 (N.J. 1957) (invalidating overly discretionary zoning ordinance as *ultra vires* and contrary to spirit of enabling act).

301. See *supra* notes 222-23, 244, and accompanying text. See also *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194-95 (1985) (involving landowner who failed to seek variances from zoning and subdivision ordinances before bringing regulatory takings claim). In *Dolan*, the City Planning Commission denied the landowner's variance requests from the standards contained in the Community Development Code. *Dolan*, 114 S. Ct. at 2314. In *Lucas*, after the landowner filed his legal challenge, the state legislature passed an amendment to the Beachfront Management Act that "authorize[d] the Council, in certain circumstances, to issue 'special permits' for the construction or reconstruction of habitable structures seaward of the baseline." *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2890-91 (1992). The majority rejected the Council's argument that because *Lucas* might still be able to obtain permission the case was unripe. *Id.* at 2891-92.

302. See, e.g., *Corrigan v. City of Scottsdale*, 720 P.2d 513 (Ariz. 1986) (en banc) (holding that plaintiff was entitled to monetary damages owing to ordinance restricting development in Hillside Conservation Area); *Burrows v. City of Keene*, 432 A.2d 15 (N.H.

The third reason why local planning and zoning regulations rarely effect a total deprivation, unlike the first two, is the subject of considerable debate among jurists and commentators. Courts in regulatory takings cases have generally followed the parcel-as-a-whole approach articulated by Justice William Brennan in the *Penn Central* majority opinion:³⁰³

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

. . . .³⁰⁴

Because a court under this method considers the economic effect of the challenged regulation on the entire parcel, even a drastic reduction in overall value can survive takings scrutiny.³⁰⁵

Not all jurists agree with Brennan’s dismissal of what Professor Radin calls “conceptual severance,” that is, “delineating a property interest consisting of just what the government action has removed from the owner, and then asserting that that particular whole thing has been permanently taken.”³⁰⁶ The most significant opponent of the parcel-as-a-whole approach is Chief Justice Rehnquist, who, in dissent, considered the air rights above Grand Central Terminal in *Penn Central*³⁰⁷ and the

1981) (holding that inclusion of property in conservation zone constituted a regulatory taking that entitled owner to damages); *Vernon Park Realty, Inc. v. City of Mount Vernon*, 121 N.E.2d 517 (N.Y. 1954) (declaring invalid and void confiscatory zoning ordinance as applied); *Arverne Bay Constr. Co. v. Thatcher*, 15 N.E.2d 587 (N.Y. 1938) (invalidating confiscatory zoning ordinance as applied).

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

304. *Id.* at 130-31.

305. See, e.g., *id.* at 131 (citing “75% diminution in value” caused by the zoning law in *Euclid*, and “87 1/2% diminution in value” in *Hadacheck v. Sebastian*, 239 U.S. 394 (1915)). But see Norman Williams & Holly Ernst, *And Now We Are Here on a Darkling Plain*, 13 VT. L. REV. 635, 660 n.62 (figuring *Hadacheck* reduction to be 92.5%). See also William C. Haas & Co. v. City of San Francisco, 605 F.2d 1117, 1120 (9th Cir. 1979) (involving 95% reduction in value), *cert. denied*, 445 U.S. 928 (1980).

306. Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1676 (1988).

307. *Penn Central*, 438 U.S. at 142 (Rehnquist, J., dissenting).

coal companies' "coal in place" and support estate in *Keystone*³⁰⁸ as the discrete private property interests that were depleted, if not confiscated, by local and state regulators.

There are signs in the Supreme Court's latest takings decisions that this issue is far from resolved. In footnote seven of his opinion for the majority in *Lucas*, Justice Scalia laments that the "uncertainty regarding the composition of the denominator in our 'deprivation' fraction has produced inconsistent pronouncements by the Court."³⁰⁹

In *Dolan*, while the Court acknowledged the legitimacy of Tigard's regulation of development in the floodplain, the city had not demonstrated "why a public greenway, as opposed to a private one, was required in the interest of flood control."³¹⁰ Indeed, the distinction between a public and private easement was crucial to Mrs. Dolan's case: "The difference to petitioner, of course, is the loss of her ability to exclude others. As we have noted, this right to exclude others is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'"³¹¹ Chief Justice Rehnquist thus placed special emphasis on Tigard's "eviscerat[ion]"³¹² of Mrs. Dolan's right to exclude the public from the Greenway. It would be hard, to use Scalia's terminology, to reduce the denominator in the deprivation fraction even further than this.

Those responsible for drafting and implementing comprehensive state and federal environmental regulations should rarely encounter

308. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 518-20 (1987) (Rehnquist, C.J., dissenting).

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

310. *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2320 (1994).

311. *Id.* (quoting *Kaiser-Aetna v. United States*, 444 U.S. 164, 176 (1979)).

312. *Id.* at 2321. Where parties claim that essential strands in the bundle of property rights have been taken, the Supreme Court's treatment has been a bit erratic. See *Hodel v. Irving*, 481 U.S. 704, 716-17 (1987) (holding a federal statute that substituted escheat for descent and devise of fractional interests in allotted Native American lands effected a taking); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 84 (1980) (Rehnquist, J.) (noting property owners seeking to exclude students distributing political materials "failed to demonstrate that the 'right to exclude others' is so essential to the use or economic value of their property that the state-authorized limitation of it amounted to a 'taking'"); *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979) (holding federal regulations prohibiting the sale of Native American artifacts was not a taking just because the government destroyed one strand in bundle of property rights); *Kaiser-Aetna*, 444 U.S. at 179-80 (holding federal government could not deprive petitioner of right to exclude public from coastal pond without compensation).

problems with the first *Agins* prong, given the substantial protections provided by the federal Administrative Procedure Act and its state analogues and the watchdog function performed by regulated industries and trade groups.³¹³ The second prong—the deprivation of all viable use—is a more likely challenge, given the availability of abatement in the regulatory arsenal.³¹⁴

Still, even if they face a judicial finding of total deprivation (whether or not the parcel-as-a-whole approach is used), defenders of the restriction should be able to demonstrate that this harm-based provision³¹⁵ is a modern, regulatory analogue of public nuisance. Under the *Lucas* nuisances-plus exception,³¹⁶ government counsel can convince the courts that they are appraising, in effect, redundant regulation by providing a direct link between the regulation and the prevention or abatement of significant harm to the general public. This is true not only when there is a related nuisance law in the relevant code,³¹⁷ but also, to use Scalia's formulation, when "changed circumstances or new knowl-

313. See *supra* notes 233-39 and accompanying text.

314. See, e.g., SMCRA, 30 U.S.C. § 1271(a)(2) (1994) ("[Interior] Secretary . . . shall immediately order a cessation of surface coal mining and reclamation operations. . ."); CWA, 33 U.S.C. § 1319(b) (1994) ("[EPA] Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction. . ."); CAA, 42 U.S.C. § 7413(b) (1994) (authorizing EPA Administrator to "commence a civil action for a permanent or temporary injunction"); CERCLA, 42 U.S.C. § 9606 (1994) (authorizing Attorney General to "abate . . . danger or threat" posed by "actual or threatened release of a hazardous substance"). Cf. *Whitney Benefits, Inc. v. United States*, 18 Cl. Ct. 394 (Cl. Ct. 1989) (stating that the mere enactment of SMCRA deprived mining company of all economic use), *aff'd*, 926 F.2d 1169 (Fed. Cir. 1991), *cert. denied*, 112 S. Ct. 406 (1991).

315. Harm-based provisions are a requirement of many federal and state environmental statutes. See *infra* Table I.

316. See *supra* text accompanying notes 98-103.

317. See, e.g., OHIO REV. CODE ANN. § 6111.04 (Anderson 1993).

No person shall cause pollution or place or cause to be placed any sewage, industrial waste, or other wastes in a location where they cause pollution of any waters of the state, and any such action is hereby declared to be a public nuisance, except in such cases where the director of environmental protection has issued a valid and unexpired permit, or renewal thereof, . . . or an application for renewal is pending.

Id. See also CONN. GEN. STAT. ANN. § 22a-422 (West 1995) ("[P]ollution of the waters of the state . . . is a public nuisance . . ."); FLA. STAT. ANN. § 403.021(1) (West 1993) ("The pollution of the air and waters of this state . . . creates public nuisances . . .").

edge may make what was previously permissible no longer so."³¹⁸

Keystone is a quintessential "changed circumstances or new knowledge" case. Justice Stevens cited several pieces of evidence indicating that the Kohler Act was intended not as a health or safety measure, but as an act that "served only private interests."³¹⁹ In contrast, the Subsidence Act was designed "to protect the public interest in health, the environment, and the fiscal integrity of the area."³²⁰ The Court opined,

That private individuals erred in taking a risk cannot estop the Commonwealth from exercising its police power to abate activity akin to a public nuisance. The Subsidence Act is a prime example that "circumstances may so change in time . . . as to clothe with such a [public] interest what at other times . . . would be a matter of purely private concern."³²¹

While *Keystone* preceded *Lucas* by five years, Pennsylvania's Subsidence Act—like other comprehensive environmental schemes—is a fitting candidate for the nuisance exception (although the majority's finding that the deprivation was far less-than-total would have obviated the need to apply that exception).³²²

Table I demonstrates that, even if one of the federal environmental schemes listed effects a total deprivation, there should be no problem fitting within the *Lucas* exception. For in these and other environmental statutes³²³ direct links exist between the operative provisions of the

318. *Lucas*, 112 S. Ct. at 2901 (citing RESTATEMENT (SECOND) OF TORTS § 827 cmt. g (1977)).

319. *Keystone*, 480 U.S. at 484 (citing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922)).

320. *Id.* at 488.

321. *Id.* (alteration in original) (quoting *Block v. Hirsh*, 256 U.S. 135, 155 (1921)).

322. See *Lucas*, 112 S. Ct. at 2899.

Where the State seeks to sustain *regulation that deprives land of all economically beneficial use*, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with.

Id. (emphasis added) (footnote omitted).

323. *Lucas's* reliance on nuisance law, particularly public nuisance law with its emphasis on harm to the community, reflects the anthropocentric (that is, human-centered) view of law and legal institutions, a view that is rejected as too narrow by many environmentalists. See, e.g., PHILLIP SHABECOFF, *A FIERCE GREEN FIRE: THE AMERICAN ENVIRONMENTAL MOVEMENT* (1993). Shabecoff writes:

There is a wing of the modern environmental movement that insists that people have an ethical duty to protect nature whether or not it serves human needs. I take a more anthropocentric view. Human welfare is our first priority. But I am deeply sympathetic to those who insist that all nature has a right to exist for its own sake.

Id. at xii-xiv. Cf. BILL DEVALL & GEORGE SESSIONS, *DEEP ECOLOGY* 66-67 (1985). The authors note:

In keeping with the spiritual traditions of many of the world's religions, the deep ecology norm of self-realization goes beyond the modern Western *self* which is defined as an isolated ego striving primarily for hedonistic gratification or for a narrow sense of individual salvation in this life or the next. . . . [T]he deep ecology sense of self requires . . . an identification which goes beyond humanity to include the nonhuman world. . . .

. . . This process of full unfolding of the self can also be summarized by the phrase, "No one is saved until we are all saved," where the phrase "one" includes not only me, an individual human, but all humans, whales, grizzly bears, whole rain forest ecosystems, mountains and rivers, the tiniest microbes in the soil, and so on.

The intuition of biocentric equality is that all things in the biosphere have an equal right to live and blossom and to reach their own individual forms of unfolding and self-realization within the larger Self-realization. The basic intuition is that all organisms and entities in the ecosphere, as parts of the interrelated whole, are equal in intrinsic worth

Id.

While, as Table I indicates, the direct links between human health and safety in most federal environmental statutes are undeniable, the connection is less explicit in biodiversity statutes, particularly the Endangered Species Act (ESA), 16 U.S.C. §§ 1531-1544 (1994). See, e.g., A. Dan Tarlock, *Local Government Protection of Biodiversity: What Is Its Niche?*, 60 U. CHI. L. REV. 555, 570 (1993) (calling the ESA "the core federal biodiversity protection program"). The ESA, in its list of findings, recites that "these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." 16 U.S.C. § 1531(a)(3) (1994).

Not surprisingly, there are some solid, though unarticulated, anthropocentric reasons for preserving plant and animal species. See, e.g., Andrew A. Smith et al., *The Endangered Species Act at Twenty: An Analytical Survey of Federal Endangered Species Protection*, 33 NAT. RESOURCES J. 1027 (1993). The authors state:

The many rationales for preserving species generally fall into four categories: direct economic uses, ecological services, aesthetic benefits, and moral and ethical duties.

Plant and animal species are valuable as sources of food, medicines, and other commodities, helping to support a surprisingly broad range of economic activities. . . . Some species yield substances critical for medicinal purposes. Laboratory studies involving plant and animal species help develop human vaccines and organ transplants, and greatly advance health and other sciences. . . .

. . . . The millions of wild plant and animal species interact in natural ecosystems to offer subtle, yet valuable, ecological services. Natural ecosystems, such as marshes, grasslands, and forests, convert carbon dioxide into oxygen, purify water, stabilize and fertilize soils, control climates, and provide habitat for species of direct economic value. . . .

.....
 Another homocentric basis for preserving species arises when society ascribes value to species for their beauty, uniqueness, or complexity. . . .

.....
 Moral and ethical arguments for preserving species follow two lines of reasoning. The first argument, that it is wrong to leave future generations a biologically impoverished world, views wild plants and animals as a trust. . . . Although it increases the range of reasons for preventing species extinction, the trust rationale does little more than add a temporal element to homocentric arguments for preserving species.

A second preservation argument based in morality abandons the homocentric bias and postulates that species have an inherent right to exist, independent of their value to humans. . . .

Id. at 1030-33 (footnotes omitted). After *Lucas*, defenders of the ESA and other biodiversity laws who hope to survive a regulatory takings challenge in which total deprivation is alleged, should seriously consider two alternatives: (1) restructuring statutes and regulations so that potentially confiscatory prohibitions and proscriptions are "triggered" by demonstrations that human health and safety are at risk, or (2) finding precedent for the use of public nuisance to protect nonhuman life for its own sake.

The first option entails more than redrafting prefatory language. See *Lucas*, 112 S. Ct. at 2898 n.12. Scalia writes:

In Justice Blackmun's view, even with respect to regulations that deprive an owner of all developmental or economically beneficial land uses, the test for required compensation is whether the legislature has recited a harm-preventing justification for its action. Since such a justification can be formulated in practically every case, this amounts to a test of whether the legislature has a stupid staff. We think the Takings Clause requires courts to do more than insist upon artful harm-preventing characterizations.

Id. (citation omitted). It does not seem likely that courts will soon adopt what Professor Sax calls an "ecological view of property," in which we appreciate undeveloped "[I]and [as] already at work, performing important services in its unaltered state." Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433, 1442 (1993). Moreover, the reality of American jurisprudence and politics is that human, individual rights are elevated over ecosystemic rights. See, e.g., Robert B. Keiter, *Conservation Biology and the Law: Assessing the Challenges Ahead*, 69 CHI.-KENT L. REV. 911, 917-18 (1994) (discussing "significant obstacles [that] must be confronted before biodiversity can be elevated to a position of primacy on the natural resources policy agenda"). Therefore, advocates of biodiversity statutes would do well to respond to the special vulnerability of such statutes to regulatory takings challenges, by "seek[ing] adaptive solutions to avoid excessive regulation of private uses." Sax, *supra*, at 1455; see Susan Shaheen, Comment, *The Endangered Species Act: Inadequate Species Protection in the Wake of the Destruction of Private Property Rights*, 55 OHIO ST. L.J. 453, 472-74 (1994). See also Craig A. Arnold, *Conserving Habitats and Building Habitats: The Emerging Impact of the Endangered Species Act on Land Use Development*, 10 STAN. ENVTL. L.J. 1, 2 (1991) (discussing Habitat Conservation Plans (HCPs) required of developers who seek incidental taking permits under ESA § 10(a)); Tarlock, *supra*, at 605-13 (discussing first- and second-

scheme, as implemented through regulations³²⁴ and case law,³²⁵ and

generation HCPs); Shaheen, *supra*, at 474-76 (discussing mitigation fees and "ecosystem-wide" management).

The second option features its own pitfalls. See Shaheen, *supra*, at 472 ("It is unlikely, in light of the *Lucas* opinion, that ESA protection of endangered species will be sufficient to qualify under the traditional public nuisance exception."). One commentator has somewhat optimistically asserted that, "[i]f the killing of wildlife by pollution and contamination of its habitat is a public nuisance, then any threat to an endangered species or its habitat must also be considered a public nuisance." Paula C. Murray, *Private Takings of Endangered Species as Public Nuisance: Lucas v. South Carolina Coastal Council and the Endangered Species Act*, 12 UCLA J. ENVTL. L. & POL'Y 119, 159 (1993). The two cases cited in support of this assertion were late twentieth century cases, and hence, not instances in which the court could trace the type of public nuisance to pre-Fifth Amendment common law. *Id.* (citing *Pruitt v. Allied Chem. Corp.*, 523 F. Supp. 975 (E.D. Va. 1981) and *State ex rel. Dresser Indus., Inc. v. Ruddy*, 592 S.W.2d 789 (Mo. 1980)). But see John F. Hart, *Colonial Land Use Law and its Significance for Modern Takings Law*, 109 HARV. L. REV. 1252 (1996). Cf. Patricia A. Hageman, *Fifth Amendment Takings Issues Raised by Section 9 of the Endangered Species Act*, 9 J. LAND USE & ENVTL. L. 375, 387 (1994) ("A possible [government] argument for application of the exception to the ESA is that the government holds endangered wildlife as a public trust resource, and that harm to such public trust property is a tortious invasion of public rights.").

324. See, e.g., 18 C.F.R. § 725.2 (1994) (stating that it is the policy of the Water Resources Council to "provide leadership in floodplain management and the protection of wetlands," as well as take action to "[m]inimize the impact of floods on human health, safety and welfare"); Guidelines for the Land Disposal of Solid Waste, 40 C.F.R. § 241.101(g) (1994) (defining "hazardous waste" as "any waste or combination of wastes which pose a substantial present or potential hazard to human health or living organisms because such wastes are nondegradable or persistent in nature or because they can be biologically magnified, or . . . lethal, or . . . may otherwise cause or tend to cause detrimental cumulative effects"); Corrective Action Plan, 40 C.F.R. § 280.66(b) (1994) (stating that plan submitted by owners and operators of underground storage tanks will only be approved if it "adequately protect[s] human health, safety, and the environment"); The Hazard Ranking System (HRS), 40 C.F.R. app. A pt. 300 (1994) (stating that the HRS, which is used to place sites on the National Priorities List under CERCLA, "serves as a screening device to evaluate the potential for releases of uncontrolled hazardous substances to cause human health or environmental damage"); 40 C.F.R. § 761.20 (1993) (stating that the TSCA restrictions on polychlorinated biphenyls (PCBs) are "based upon the well-documented human health and environmental hazard of PCB exposure, the high probability of human and environmental exposure to PCBs and PCB Items from manufacturing, processing, or distribution activities").

325. See, e.g., *Ohio Power Co. v. EPA*, 729 F.2d 1096, 1097 (6th Cir.) (quoting *Cleveland Elec. Illuminating Co. v. EPA*, 572 F.2d 1150, 1153 (6th Cir.), *cert. denied*, 439 U.S. 910 (1978)), *cert. denied*, 469 U.S. 1034 (1984). The *Ohio Power* court stated:

This court's basic rationale for its approval of the EPA's air quality standards was (and remains) concern about human health and safety. In our earlier *Cleveland Electric* decision, we said:

the undeniably public-nuisance goals of protecting human health and safety. Moreover, if any value does remain in the affected property, *a fortiori*, the challenged regulation will pass *Penn Central's* less-demanding, ad hoc, multi-factor test.³²⁶

The major problems faced by those designing and defending regulations that affect the use of real property come in the shadowy area located between traditional land-use planning and zoning and comprehensive environmental regulation. Populating this "twilight zone" are local, regional, and state environmental regulations that may be designed without significant expert input, promulgated in the absence of significant administrative law protections, or enforced without sufficient protections against abuse.

Indeed, one of the key successful Supreme Court takings challenges of the past decade was launched against a creature from this twilight zone—the California Coastal Commission's requirement that the Nollans grant the public a beach-access easement in return for permission to expand their beach house.³²⁷ The Commission³²⁸ was unable to

The federal Clean Air Act program which produced these standards is based primarily upon the adverse effect which air pollution has upon human life and health.

Acute episodes of high pollution have clearly resulted in mortality and morbidity. Often the effects of high pollutant concentrations in these episodes have been combined with other environmental features such as low temperatures or epidemic diseases (influenza) which may in themselves have serious or fatal consequences. This has sometimes made it difficult to determine to what extent pollution and temperature extremes are responsible for the effects. Nevertheless, there is now no longer any doubt that high levels of pollution sustained for periods of days can kill. Those aged 45 and over with chronic diseases, particularly of the lungs or heart, seem to be predominantly affected. In addition to these acute episodes, pollutants can attain daily levels which have been shown to have serious consequences to city dwellers.

Id.

326. The *Penn Central* Court explained:

In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action.

Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (citation omitted).

327. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 827-28 (1987).

328. The membership of the sixteen-person Commission is detailed in CAL. PUB. RES. CODE § 30301 (West 1996).

convince the Court that new or expanded residential construction was in any way related to the need for public lateral access to the private beaches along the California coast.³²⁹ In fact, the *Nollan* majority could not find even the merest rational relationship between the dedication requirement and the legitimate goals of the Commission in its regulation of activities affecting the coastal zone.³³⁰ The Court's impatience with the Commission's proffered environmental concerns reminds us of the *Mount Laurel I* court's skepticism concerning the environmental cloak under which New Jersey suburbs sought to hide their exclusionary practices.³³¹

Some purely local regulatory schemes with an environmental flavor seem to have no private-nuisance pedigree, such as no- and slow-growth

In the past few years the Commission has been rocked by scandal and controversy. See, e.g., Paul Jacobs & Mark Gladstone, *Nathanson Gets Nearly 5 Years for Extortion: Former State Coastal Commissioner is Sentenced for Soliciting Bribes from People Seeking Construction Permits*, L.A. TIMES, Aug. 25, 1993, at A3 ("In June, the 54-year-old Beverly Hills real estate broker admitted soliciting almost \$1 million in bribes from those seeking building permits from the commission, including Hollywood figures such as actor Sylvester Stallone, producers Irwin Winkler and Blake Edwards, and agent-producer Sandy Gallin."); Jeffrey L. Rabin, *New Appointee Named Chairman of Coastal Panel; Politics: Some Members Allege Back-Room Deal in Choice of Embattled Speaker Willie Brown's Ally; Board Later OK's Controversial Gaviota Development*, L.A. TIMES, Nov. 17, 1994, at A3; Ron Russell & Mark Gladstone, *Proposal for Ethics Reform on Coastal Panel Rejected; Politics: Assembly Committee Turns Down Hayden Bill that Would Curb the Ability of Commissioners to Accept Funds from Those with Business Before the Body, Proposal for Ethics Reform on Coastal Panel Rejected*, L.A. TIMES, May 13, 1992, at A3.

329. *Nollan*, 483 U.S. at 838-39.

330. The majority stated:

The Commission claims . . . that we may sustain the condition at issue here by finding that it is reasonably related to the public need or burden that the *Nollans'* new house creates or to which it contributes. We can accept, for purposes of discussion, the Commission's proposed test as to how close a "fit" between the condition and the burden is required, because we find that this case does not meet even the most untailored standards.

Id. at 838. See also *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2317 (1994). The *Dolan* Court noted:

If we find that a nexus exists, we must then decide the required degree of connection between the exactions and the projected impact of the proposed development. We were not required to reach this question in *Nollan*, because we concluded that the connection did not meet even the loosest standard.

Id.

331. See *supra* text accompanying notes 204-11.

plans³³² and aesthetic controls.³³³ Although the modern trend is to uphold such schemes in the face of facial and *ultra vires* challenges,³³⁴

332. The classic growth control cases remain *Construction Indus. Ass'n v. City of Petaluma*, 522 F.2d 897, 901 (9th Cir. 1975) ("At the heart of the allocation procedure is an intricate point system, whereby a builder accumulates points for conformity by his projects with the City's general plan and *environmental design plans*, for good architectural design, and for providing low and moderate income dwelling units and various recreational facilities.") (emphasis added), *cert. denied*, 424 U.S. 934 (1976); and *Golden v. Planning Bd.*, 285 N.E.2d 291, 302 (N.Y.) ("Ramapo asks not that it be left alone, but only that it be allowed to prevent the kind of deterioration that has transformed well-ordered and thriving residential communities into blighted ghettos *with attendant hazards to health, security and social stability . . .*") (emphasis added), *appeal dismissed*, 409 U.S. 1003 (1972).

333. On aesthetic controls generally, see HAAR & WOLF, *supra* note 59, at 518-44; MANDELKER, *supra* note 125, §§ 11.01-.34; Norman Williams, *Scenic Protection as a Legitimate Goal of Public Regulation*, 38 WASH. U. J. URB. & CONTEMP. L. 3 (1990).

For an example of the traditional rejection of aesthetic-based nuisances, see *Woodstock Burial Ground Ass'n v. Hager*, 35 A. 431, 432 (Vt. 1896).

The law will not declare a thing a nuisance because it is unsightly and disfigured, nor because it is not in a proper and suitable condition, nor because it is unpleasant to the eye, and a violation of the rules of propriety and good taste, nor because the property of another is rendered less valuable. No fanciful notions are recognized. The law does not cater to men's tastes, nor consult their convenience merely.

Id. See also *Whitmore v. Brown*, 65 A. 516, 521 (Me. 1906).

The law of this state does not recognize any legal right to an unobstructed view of scenery over and across the lands, even the flats, of others unless acquired by grant, nor does the law recognize as a cause of action the annoyance caused by the proximity or ugliness of otherwise harmless structures upon the land of another.

Id. But cf. Raymond R. Coletta, *The Case for Aesthetic Nuisance: Rethinking Traditional Judicial Attitudes*, 48 OHIO ST. L.J. 141 (1987); Note, *Aesthetic Nuisance: An Emerging Cause of Action*, 45 N.Y.U. L. REV. 1075 (1970).

See also Hart, *supra* note 323, at 1296 (footnote omitted) ("Colonial laws authorized city officials to ensure that new buildings met criteria of order, uniformity, or gracefulness in their design and placement, or required that buildings be maintained 'in a comly way.'").

334. See, e.g., *Sturges v. Town of Chilmark*, 402 N.E.2d 1346, 1350 (Mass. 1980) ("We hold that a municipality may impose reasonable time limitations on development, at least where those restrictions are temporary and adopted to provide controlled development while the municipality engages in comprehensive planning studies."); HAAR & WOLF, *supra* note 59, at 518 ("One of the most striking departures from 'established principles' that land-use law has taken of late is the patent acknowledgment of aesthetics as a legitimate goal of the state's police power, either independently or as part of the amorphous concept labeled 'general welfare.'"); MANDELKER, *supra* note 125, § 11.05, at 460-61 ("A clear majority of courts hold that aesthetics alone is a legitimate governmental purpose in land use regulation. . . . [This view] . . . resolves the substantive due process problem raised by facial attacks on aesthetic controls.") (footnotes omitted).

as applied these schemes raise serious takings concerns.³³⁵ Many states and localities have responded to this problem by providing safety nets for landowners who are negatively affected by these schemes. These safety nets take the form of transferable development rights,³³⁶ conservation easements,³³⁷ and incentive zoning.³³⁸ After *Lucas*, government officials run a special risk of an adverse takings holding if they do not have such "compensatory" tools and they are engaged in regulation that strays too far from its Euclidean and private-nuisance roots.

Dolan, *Lucas*, and *Nollan* demonstrate that judicial deference becomes much more problematic when local regulators enter the environmental harm abatement fray and when their state and regional counterparts act without the significant administrative protections and scientific expertise that characterize comprehensive, harm-based environmental regulation. Such a chilling effect on some public actors is not altogether unwelcome, however, given the potential conflict between the legitimate planning and ecological aims of land-use controls and other societal goals. Such societal goals include the elimination of discrimination,³³⁹ the reduction of local government corruption,³⁴⁰ the widespread availability of affordable housing,³⁴¹ and the encouragement

335. See, e.g., John M. Groen & Richard M. Stephens, *Takings Law, Lucas, and the Growth Management Act*, 16 U. PUGET SOUND L. REV. 1259 (1993); Pelham, *supra* note 39; Michael A. Duddy, Comment, *Taking it Too Far: Growth Management and the Limits to Land-Use Regulation in Maine*, 44 ME. L. REV. 99 (1992). *Penn Central* and *Nollan* are the two most prominent examples of as-applied takings challenges to aesthetic-based regulations.

336. See *supra* note 244 for materials on transferable development rights.

337. See Karen A. Jordan, *Perpetual Conservation: Accomplishing the Goal Through Preemptive Federal Easement Programs*, 43 CASE W. RES. L. REV. 401, 406-12 (1993); Gerald Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of in Gross Real Covenants and Easements*, 63 TEX. L. REV. 433, 435-40 (1984).

338. See John J. Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 HARV. L. REV. 574 (1972); Jerold S. Kayden, *Zoning for Dollars: New Rules for an Old Game? Comments on the Municipal Art Society and Nollan Cases*, 39 WASH. U. J. URB. & CONTEMP. L. 3 (1991).

339. See *supra* notes 194-97 and accompanying text. The lead party in the *Mount Laurel* litigation was the Southern Burlington County, New Jersey chapter of the NAACP. 336 A.2d 713 (N.J. 1975).

340. See *supra* notes 259-62 and accompanying text.

341. For an excellent review of the literature linking land-use controls and housing costs, see WILLIAM A. FISCHER, *DO GROWTH CONTROLS MATTER? A REVIEW OF EMPIRICAL EVIDENCE ON THE EFFECTIVENESS AND EFFICIENCY OF LOCAL GOVERNMENT LAND USE REGULATIONS* (1990). See also ADVISORY COMM'N ON REG. BARRIERS TO

of socioeconomic integration.³⁴² When, however, the legal and political protections are in place, the judicial role is much more circumspect, as in *Keystone*—the case that is much more than *Pennsylvania Coal* “revisited.”³⁴³

VII. A MATTER OF DIFFERENCE—DIFFERENCES THAT MATTER

As with their nuisance precursors, land-use planning and environmental law are confused in practice and in legal analysis. Local governments are becoming increasingly active in the regulation and control of the environmental impact of activities that occur within their borders.³⁴⁴ Most often, this local regulation is in accordance with

AFFORDABLE HOUSING, “NOT IN MY BACK YARD”: REMOVING BARRIERS TO AFFORDABLE HOUSING: REPORT TO PRESIDENT BUSH AND SECRETARY KEMP (1991); William A. Fischel, *Exclusionary Zoning and Growth Controls: A Comment on the APA's Endorsement of the Mount Laurel Doctrine*, 40 WASH. U. J. URB. & CONTEMP. L. 65, 66 (1991) (“The more recent studies indicate that suburban zoning and land use controls raise the cost of housing for everyone, not just the poor.”).

342. See *supra* notes 203-11 and accompanying text. See also *Pascack Ass'n, Ltd. v. Mayor of Washington*, 379 A.2d 6, 31 (N.J. 1977) (Pashman, J., dissenting). Justice Pashman regretfully writes:

State regulation embodied in the zoning power deeply affects the racial, economic, and social structure of our society, and locks people into an environment over which they have no control. Generations of children are relegated to a slum schooling and playing in the overcrowded and congested streets of the inner cities. Men and women seeking to earn a living for themselves and their families are barred by distance from job markets. Society as a whole suffers the failure to solve the economic and social problems which exclusionary zoning creates; we live daily with the failure of our democratic institutions to eradicate class distinctions. Inevitably, the dream of a pluralistic society begins to fade.

Id.

343. Derek Guemmer, Casenote, *Constitutional Law: Keystone Bituminous Coal Association v. DeBenedictis: Pennsylvania Coal Revisited*, 56 UMKC L. REV. 153 (1987); Susan M. McMichael, Note, *Mahon Revisited: Keystone Bituminous Coal Ass'n v. DeBenedictis*, 29 NAT. RESOURCES J. 1067 (1989).

344. See Michael F. Reilly, *Transformation at Work: The Effect of Environmental Law on Land Use Control*, 24 REAL PROP. PROB. & TR. J. 33 (1989). See also Tarlock, *supra* note 323, at 560. Professor Tarlock writes:

Current local government efforts to protect biodiversity are an extension of the suburban growth control movement, but there are crucial philosophical differences. Biodiversity protection is not a Romantic effort to create the illusion of a prior Eden, but is a highly rational effort to apply modern science to prevent further harmful reductions in high quality habitats and the species that they support. Scientific biodiversity protection is ultimately not based on immutable values, but on the

federal and state standards and mandates.³⁴⁵ Indeed, many federal environmental laws encourage state and local experimentation, as long as minimal safety standards are not violated.³⁴⁶

Local governments are also striking out on their own without federal and state mandates. They now place heavy emphasis on ecological criteria in making their zoning and planning decisions,³⁴⁷ provide for conservation and preservation through their growth management programs,³⁴⁸ restrict development that has a negative impact on visual access,³⁴⁹ and outlaw real estate development activities that are deemed

constant interplay between theory and practice, and thus is subject to constant modification as new information is acquired.

Id. (footnotes omitted).

345. See MALONE, *supra* note 212, § 1.01, at 1-2. Professor Malone notes:

By the late 1970s, a well-worn pattern for environmental regulation had been set. If an environmental problem could be addressed through imposition of technological standards, Congress would mandate that approach. For environmental problems which seemingly had to be addressed through land use controls, such as preservation of floodplains and coastal zones, federal standards would set criteria for voluntary state and local land use programs, with the incentive of federal funding for qualifying programs.

A new era of environmental regulation was ushered in with the 1980s. . . . The Reagan administration emphasized an expanded role for state and local governments while decreasing federal funding for state and local environmental programs.

. . . .
[In the 1980s] Congress created a new land use control program for nonpoint source pollution. It did so, however, with its usual temerity, leaving formulation of land use controls to state and local governments.

Id. (footnotes omitted).

346. See, e.g., CWA § 510, 33 U.S.C. § 1370 (1994); CAA § 116, 42 U.S.C. § 7416 (1994); and CERCLA § 114(a), 42 U.S.C. § 9614(a) (1994).

347. See, e.g., LANE KENDIG, *PERFORMANCE ZONING* (1980); Luther L. McDougal, III, *Performance Standards: A Viable Alternative to Euclidean Zoning?*, 47 TUL. L. REV. 255 (1973); Frederick W. Acker, Note, *Performance Zoning*, 67 NOTRE DAME L. REV. 363 (1991).

348. See, e.g., WASH. REV. CODE ANN. § 36.70A.010 (West 1991) (“[U]ncoordinated and unplanned growth, together with a lack of common goals expressing the public’s interest in the conservation and the wise use of our lands, pose a threat to the environment, sustainable economic development, and the health, safety, and high quality of life enjoyed by residents of this state.”). See also *supra* note 332.

349. See Williams, *supra* note 333, at 8-19. Professor Williams notes that “[a] number of important cases, arising out of the environmental movement, have explicitly approved the use of various public regulatory powers in order to protect specific scenic values.” *Id.* at 8.

dangerous to human and nonhuman life.³⁵⁰

Similarly, federal and state lawmakers over the last few decades have entered the land-use planning arena with increasing frequency. Congress requires bureaucrats who manage federal lands to produce and follow detailed land-use plans.³⁵¹ The federal government has provided seed money to states and localities through the Coastal Zone Management Act³⁵² so that well-balanced and effective land-use plans can be developed for coastal areas.³⁵³ Additionally, federal controls on criteria air pollutants have had a direct impact on the commuting patterns to and from central cities and an indirect impact on local planning decisions.³⁵⁴ Since the "quiet revolution" that began in the 1970s,³⁵⁵ even more states have taken up planning approval functions either statewide or in areas deemed environmentally sensitive.³⁵⁶ Some states, feeling the pressure from federal waste treatment and disposal legislation,³⁵⁷ have intervened in local planning decisions that concern

350. See MALONE, *supra* note 212, § 1.02. Professor Malone writes:

Local governments have aggressively become involved in regulation to equalize the burdens from environmental risks, for example, enacting right-to-know ordinances requiring disclosure of risks from hazardous waste and land use ordinances to regulate (or prohibit) hazardous waste facilities contaminating groundwater within their jurisdiction. Despite fears of local protectionism, local environmental regulation has proliferated to fill in the gaps of federal environmental regulation, most notably through the mechanism of land use regulation so ardently avoided at the federal level.

Id. (footnotes omitted).

351. See, e.g., Federal Land Policy and Management Act of 1976 § 202(a), 43 U.S.C. § 1712(a) (1994) ("The [Interior] Secretary shall, with public involvement and consistent with the terms and conditions of this Act, develop, maintain, and, when appropriate, revise land use plans which provide by tracts or areas for the use of the public lands.").

352. CZMA, 16 U.S.C. §§ 1451-64 (1994).

353. See Michael Allan Wolf, *Accommodating Tensions in the Coastal Zone: An Introduction and Overview*, 25 NAT. RESOURCES J. 7 (1985); Malone, *supra* note 214.

354. See Robert H. Freilich & S. Mark White, *Transportation Congestion and Growth Management: Comprehensive Approaches to Resolving America's Major Quality of Life Crisis*, 24 LOY. L.A. L. REV. 915 (1991). See also CAA § 182(d)(1)(B), 42 U.S.C. § 7511a(d)(1)(B) (1994); Leanne Cusumano, Student Article, *Analysis of the 1990 Clean Air Act's Employee Commute Options Program: A Trip Down the Right Road*, 18 WM. & MARY J. ENVTL. L. 175 (1993).

355. The term derives from BOSSELMAN & CALLIES, *supra* note 272.

356. See *supra* note 271.

357. E.g., RCRA, 42 U.S.C. §§ 6901-6992k (1994).

the siting of treatment and disposal sites.³⁵⁸ Other states have brought local zoning and planning decisions under the umbrella of state environmental policy acts.³⁵⁹

Unfortunately, overlapping land-use and environmental controls are perceived by landowners, developers, and builders (and the trade and advocacy groups that represent their interests in legislatures and courthouses) as burdensome and intrusive.³⁶⁰ Moreover, judges faced with challenges to modern, hybrid, land-use restrictions cannot help but be confused by questions of due deference and applicable levels of scrutiny, preemption, and the appropriateness and measure of compensation for confiscatory regulation.

358. See, e.g., Bruce J. Parker & John H. Turner, *Overcoming Obstacles to the Siting of Solid Waste Management Facilities*, 21 N.M. L. REV. 91 (1990). See also *supra* note 221.

359. See Stewart E. Sterk, *Environmental Review in the Land Use Process: New York's Experience with SEQRA*, 13 CARDOZO L. REV. 2041, 2042-43 (1992). Sterk notes:

In many states, the EIS [environmental impact statement] requirement applies only to those projects that are undertaken or funded by the state. Other states, including New York and California, require impact statements not only for government-sponsored projects, but also for projects which require government permits, and extend the EIS requirement beyond state actions to actions taken by municipalities. Applying the EIS requirement to any private development that requires municipal approval—including a special permit, a zoning amendment, or a variance—obviously affects the development process to a significantly greater degree than would a little NEPA limited to actions undertaken by state agencies.

Id. (footnotes omitted).

360. Indeed, the concern over the deprivation of cherished rights has given rise to a multi-front "property rights movement." See H. Jane Lehman, *Private Property Rights Proponents Gain Ground; Coalition Against Land-Use Laws Takes on Environmentalists, Scores Wins in Congress and Courts*, WASH. POST, Sept. 17, 1994, at E1. Lehman writes:

In a surprising show of strength, the private property rights movement has racked up a string of recent victories in Congress and in the courts.

The visible progress comes four years since the property rights crusade began to coalesce, yet remains far short of the influence wielded by what the activists consider their chief nemesis—the environmental community.

At its core, the property rights coalition is railing against land-use laws, particularly those protecting wetlands and endangered species, that it claims rob property owners of the full use and value of their land.

Id. See also John Martinez, *Statutes Enacting Takings Law: Flying in the Face of Uncertainty*, 26 URB. LAW. 327 (1994); Richard Minitzer, *You Just Can't Take it Anymore: America's Property Rights Movement*, Heritage Foundation Policy Review, Fall 1994, at 40; Michael Allan Wolf, *Overtaking the Fifth Amendment: The Legislative Backlash Against Environmentalism*, 6 FORDHAM ENV'T L.J. 637 (1995).

The current state of the law of public and private nuisance is hopelessly confused;³⁶¹ regretfully, we can see similar confusion in their modern legacies. Four major problems exist with the "environmentalization" of land-use planning.³⁶²

First, because there is no barrier separating land-use planning from environmental regulation, local officials often operate in a realm in which they have little expertise and even less control over negative externalities.³⁶³ The spillover effects are greater, the public health and private property stakes are higher, and the opportunities for abuse (for example, cloaking discrimination or outright confiscation of private lands for public use) are greater in the absence of administrative law protections, interest group give-and-take, and technical expertise.

Second, neoLochnerian judges can use the corruption, haphazardness, and prejudice frequently associated with local land-use planning and zoning to rationalize greater activism in the area of environmental regulation—at local, state, and federal levels. It is too tempting for judges who believe strongly in the protection of private property rights to jump on the anti-environmental bandwagon that, over the past few years, has picked up increasing political and legal support.³⁶⁴ In other words, confusing the two realms of regulation of the use and abuse of

361. See *supra* note 150.

362. Beginning in the 1970s, a growing number of commentators have explored the implications of the various intersections of environmental law and "traditional" land-use planning. See, e.g., BOSSELMAN & CALLIES, *supra* note 272; DANIEL R. MANDELKER, ENVIRONMENT AND EQUITY: A REGULATORY CHALLENGE (1981). See also MODEL LAND DEV. CODE Commentary on Article 7 (1975).

363. See *supra* notes 216-21 and accompanying text.

364. See *supra* note 360. The most likely candidate would appear to be Justice Scalia, who, during the oral argument in *Dolan*, engaged in the following attempted argument *reductio ad absurdum*:

[Deputy Solicitor General Edwin S. Kneedler stated that] what this Court said in *Nollan* is that it agreed with the State's contention there that if the permit condition serves the same purpose as an outright denial would have done, that . . . the condition can be imposed. That's all the Court required.

QUESTION [Scalia]: Is that all . . . that *Nollan* said, for—suppose the City is worried about urban congestion and pollution and someone who has a factory wants to . . . expand it infinitesimally, just a very little bit. Can the State require, as a condition of that permit, a million-dollar contribution to the City, which would go to . . . pollution reduction?

Official Transcript of Proceedings Before the Supreme Court of the United States at 45, *Dolan* (No. 93-518).

land invites judicial activism by some conservative judges, bringing to the fore the "counter-majoritarian difficulty" that has constantly plagued the American judiciary.³⁶⁵

Third, the state of takings jurisprudence was already confused before *Dolan* and before the activism that cases such as *Nollan* and *Lucas* inspired in the state and lower federal courts.³⁶⁶ Over the past decade,

365. The classic formulation of the counter-majoritarian difficulty is found in ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-17 (1962). Bickel writes:

The root difficulty is that judicial review is a counter-majoritarian force in our system. . . . [W]hen the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it.

Id. See also David R. Dow, *Constitutional Midrash: The Rabbis' Solution to Professor Bickel's Problem*, 29 HOUS. L. REV. 543 (1992). Dow notes:

A generation ago Alexander Bickel described the Supreme Court as a deviant institution, and constitutional theorists have been attempting ever since to provide a satisfactory normative defense of judicial review. The problem, of course, which Professor Bickel called the "counter-majoritarian difficulty," is that when the Supreme Court declares an act of a legislature unconstitutional, it is presumably thwarting majority will. In a legal culture where the norm of majoritarianism prevails, such judicial action appears problematic.

Id. at 544 (footnotes omitted). Cf. Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993). Friedman adds:

We have been haunted by the "counter-majoritarian difficulty" far too long. At least since Alexander Bickel's *The Least Dangerous Branch*, constitutional scholars have been preoccupied, indeed one might say obsessed, by the perceived necessity of legitimizing judicial review. The endeavor has consumed the academy and, as this article will argue, distracted us from recognizing and studying the constitutional system that we do enjoy.

Id. at 578 (footnotes omitted).

366. In the months following the Supreme Court's decision in *Lucas*, many state and federal courts cited the case in takings challenges. In the following cases, courts cited *Lucas* and refused to find a taking: *Matagorda County v. Law*, 19 F.3d 215, 223 (5th Cir. 1994) (foreclosure of tax lien without awarding taxing units recovery against FDIC for amount secured by lien); *Golden Pac. Bancorp v. United States*, 15 F.3d 1066, 1071-72 (Fed. Cir.) (Comptroller of Currency's declaration that bank was insolvent and appointment of FDIC as receiver), *cert. denied*, 115 S. Ct. 420 (1994); *Parkridge Investors Ltd. Partnership v. Farmers Home Admin.*, 13 F.3d 1192, 1199 (8th Cir.) (FMHA refusal to alter loan repayment procedures), *cert. denied*, 114 S. Ct. 2163 (1994); *Tabb Lakes, Ltd. v. United States*, 10 F.3d 796, 800 (Fed. Cir. 1993) (Corps of Engineers order to suspend construction activities until permit granted); *Outdoor Sys., Inc. v. City of Mesa*, 997 F.2d 604, 617-18 (9th Cir. 1993) (ordinances restricting billboard placement); *Washington Legal Found. v. Massachusetts Bar Found.*, 993 F.2d 962, 975 (1st Cir. 1993) (state interest on

Lawyers' Trust Accounts (IOLTA) program); *McAndrews v. Fleet Bank of Massachusetts*, 989 F.2d 13, 17-18 (1st Cir. 1993) (Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) provision preventing lessor from terminating lease with bank in receivership); *McMurray v. Commissioner*, 985 F.2d 36, 41-42 (1st Cir. 1993) (tax court's refusal to allow charitable deduction for donation of bog-land); *Pinnock v. International House of Pancakes Franchisee*, 844 F. Supp. 574, 587-88 (S.D. Cal. 1993) (compliance with Americans With Disabilities Act provisions); *Small Landowners of Oahu v. City of Honolulu*, 832 F. Supp. 1404, 1409-10 (D. Haw. 1993) (ordinance providing mechanism for transfer of fee simple interests of leasehold property from condominium lessors to lessees); *Hawaiian Navigable Waters Preservation Soc'y v. Hawaii*, 823 F. Supp. 766, 776 (D. Haw. 1993) (regulations on anchoring and mooring in state waters), *aff'd*, 42 F.3d 1185 (9th Cir. 1994); *Rivervale Realty Co. v. Town of Orangetown*, 816 F. Supp. 937, 943, 947-48 (S.D.N.Y. 1993) (zoning change from one- to two-acre residential lots); *Szymkowicz v. District of Columbia*, 814 F. Supp. 124, 128 (D.D.C. 1993) (repeated ticketing of parked cars); *Slagle v. United States*, 809 F. Supp. 704, 710 (D. Minn. 1992) (Corps of Engineers denial of permit to dredge and fill wetlands and refusal of mitigation proposal); *Burns Harbor Fish Co. v. Ralston*, 800 F. Supp. 722, 726 (S.D. Ind. 1992) (ordinance banning gill net fishing); *Berrios v. City of Lancaster*, 798 F. Supp. 1153, 1157-58 (E.D. Pa. 1992) (condemnation of leased property); *Cannone v. Noey*, 867 P.2d 797, 800-01 (Alaska 1994) (state environmental agency's rejection of subdivision plans); *Anchorage v. Sandberg*, 861 P.2d 554, 557 (Alaska 1993) (municipality's purchase of parkland, refusal to approve water and sewer districts, and decision not to participate in road improvement district); *Zerbetz v. Municipality of Anchorage*, 856 P.2d 777, 782 n.5, 783 (Alaska 1993) (designation of property as "conservation wetlands"); *Tahoe Keys Property Owners' Ass'n v. State Water Resources Control Bd.*, 28 Cal. Rptr. 2d 734, 742-46 (Cal. Ct. App.) (refusal to enjoin challenged regulation conditioning building permits on payment of mitigation fee prior to trial of takings issue), *cert. denied*, 115 S. Ct. 485 (1994); *Ramona Convent of the Holy Names v. City of Alhambra*, 26 Cal. Rptr. 2d 140, 146 (Cal. Ct. App. 1993) (rezoning residentially zoned school properties as "open space" areas), *cert. denied*, 115 S. Ct. 315, 316 (1994); *Ehrlich v. City of Culver*, 19 Cal. Rptr. 2d 468, 474-75 (Cal. Ct. App. 1993) (development conditioned upon payment of fees), *cert. denied and judgment vacated*, 114 S. Ct. 2731 (1994); *City of San Francisco v. Golden Gate Heights Inv.*, 18 Cal. Rptr. 2d 467, 468-69 (Cal. Ct. App.) (valuation of five out of fourteen lots of condemned property), *cert. denied*, 114 S. Ct. 338 (1993); *Tensor Group v. City of Glendale*, 17 Cal. Rptr. 2d 639, 643 (Cal. Ct. App. 1993) (ordinance limiting commercial development in multiresidential zones); *The Mill v. Colorado Dep't of Health*, 887 P.2d 993, 999, 1001-02 (Colo. 1994) (cancellation of uranium-contaminated mill lease); *City of Northglenn v. Grynberg*, 846 P.2d 175, 178 (Colo.) (en banc) (city's acquisition of surface estate, drilling to survey, and final determination of no exploitable coal reserves), *cert. denied*, 114 S. Ct. 63 (1993); *Tim Thompson, Inc. v. Village of Hinsdale*, 617 N.E.2d 1227, 1243-44 (Ill. App. Ct.) (rezoning lot to increase minimum size for development), *cert. denied*, 622 N.E.2d 1229 (Ill. 1993); *Fitzgarrald v. City of Iowa City*, 492 N.W.2d 659, 664-66 (Iowa 1992) (ordinance preventing construction from penetrating specified zone surrounding municipal airport), *cert. denied*, 113 S. Ct. 2343 (1993); *Ward v. Harding*, 860 S.W.2d 280, 288-89 (Ky. 1993) (injunction of surface mining activities), *cert. denied*, 114 S. Ct. 1218 (1994); *Offen v. County Council*, 625 A.2d 424, 433-39 (Md. Ct. Spec. App. 1993) (denial of sewer upgrade permit and subsequent rezoning of property to preclude commercial development), *rev'd on other grounds*, 639 A.2d 1070 (Md. 1994); *Steinbergh v. City of Cambridge*, 604 N.E.2d 1269,

1273-74 (Mass. 1992) (city rent control board's refusal to allow sale of property), *cert. denied*, 113 S. Ct. 2338 (1993); Woodbury Place Partners v. City of Woodbury, 492 N.W.2d 258, 260-61 (Minn. Ct. App. 1992) (two-year moratorium on development of land zoned for commercial use), *cert. denied*, 113 S. Ct. 2929 (1993); Kudloff v. City of Billings, 860 P.2d 140, 142-44 (Mont. 1993) (annexation of property); Bamford v. Upper Republican Natural Resources Dist., 512 N.W.2d 642, 652 (Neb.) (moratorium on withdrawing water from wells), *cert. denied*, 115 S. Ct. 201 (1994); Kelly v. Tahoe Regional Planning Agency, 855 P.2d 1027, 1033-34 (Nev. 1993) (denial of permits to construct single-family homes based on water safety and soil conservation criteria), *cert. denied*, 114 S. Ct. 684 (1994); Smith v. Town of Wolfeboro, 615 A.2d 1252, 1257 (N.H. 1992) (planning board's reconfiguration that prevented residential use of lot); *In re* "Plan for Orderly Withdrawal from New Jersey" of Twin City Fire Ins. Co., 609 A.2d 1248, 1262-64 (N.J. 1992) (State Insurance Commission requirement that affiliates of insurer forfeit licenses upon insurer's withdrawal from market), *cert. denied*, 113 S. Ct. 1066 (1993); Bernardsville Quarry, Inc. v. Borough of Bernardsville, 608 A.2d 1377, 1385-87 (N.J. 1992) (ordinance imposing licensing requirements for quarry operations and limiting depth to which land could be quarried); Patzau v. New Jersey Dep't of Transp., 638 A.2d 866, 871-72 (N.J. Super. Ct. App. Div.) (restrictions on development in "airport safety zones"), *cert. denied*, 649 A.2d 1288 (1994); Town of Clarkstown v. C&A Carbone, Inc., 587 N.Y.S.2d 681, 687 (N.Y. App. Div. 1992) (ordinance mandating all solid waste in county be handled at designated facility), *rev'd on other grounds*, 114 S. Ct. 1679 (1994); Guilford County Dep't of Emergency Servs. v. Seaboard Chem. Corp., 441 S.E.2d 177, 183 (N.C. Ct. App.) (county ordinance prohibiting storage of hazardous waste in county), *review denied*, 447 S.E.2d 390 (N.C. 1994); Community Concerned Citizens, Inc. v. Union Township Bd. of Zoning Appeals, 613 N.E.2d 580, 584-85 (Ohio 1993) (denial of conditional use permit); Stevens v. City of Cannon Beach, 854 P.2d 449, 452-57 (Or. 1993) (*en banc*) (denial of permit to build seawall), *cert. denied*, 114 S. Ct. 1332 (1994); Commonwealth v. Rogers, 634 A.2d 245, 248 (Pa. Super. Ct. 1993) (conviction for building 95-foot tall commercial sign penetrating airport airspace); Mock v. Department of Env'tl. Resources, 623 A.2d 940, 945-47 (Pa. Commw. Ct. 1993) (denial of permit to fill wetlands); Margola Assocs. v. City of Seattle, 854 P.2d 23, 33-35 (Wash. 1993) (requirement that apartment building owners pay registration fee); Jones v. King County, 874 P.2d 853, 859 (Wash. Ct. App. 1994) (rezoning commercial property for residential use); McFillan v. Berkeley County Planning Comm'n, 438 S.E.2d 801, 809 (W. Va. 1993) (refusal to allow expansion of mobile home park without committee approval).

In the following cases, courts paid homage to *Lucas* and accepted takings arguments: Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1178-83 (Fed. Cir. 1994) (Corps of Engineers prohibiting construction on wetlands); Nixon v. United States, 978 F.2d 1269, 1285-86 (D.C. Cir. 1992) (Presidential Records and Materials Preservation Act restricting former President's access to presidential papers); Peters v. Milks Grove Special Drainage Dist. No. 1, 610 N.E.2d 1385, 1389 (Ill. App. Ct.) (expansion of drainage ditch easement), *cert. denied*, 622 N.E.2d 1226 (Ill. 1993); Whitehead Oil Co. v. City of Lincoln, 515 N.W.2d 401, 407 (Neb. 1994) (denial of use permit to operate convenience store); Moroney v. Mayor of Old Tappan, 633 A.2d 1045, 1050 (N.J. Super. Ct. App. Div. 1993) (denial of hardship variance from zoning requirements), *cert. denied*, 642 A.2d 1004 (N.J. 1994); Ferguson v. City of Mill City, 852 P.2d 205, 207-08 (Or. Ct. App. 1993) (ordinance requiring dedication of easement for sewer connection).

See also Creppel v. United States, 41 F.3d 627, 631-32 (Fed. Cir. 1994) (government blocked wetlands reclamation project; temporary takings claim barred by statute of

the United States Court of Federal Claims has been an especially active battleground in the struggle between regulators and aggrieved landowners, resulting in an internally inconsistent and troubling body of case law.³⁶⁷ The combination of Scalia's incantation of nuisance law and

limitations and permanent takings case remanded); *Orange Lake Assocs. v. Kirkpatrick*, 21 F.3d 1214, 1225 (2d Cir. 1994) (reducing number of residential units allowed on property; not a takings challenge); *Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1564-65 (Fed. Cir. 1994) (Corps of Engineers' denial of permit to mine beneath wetlands; lower court decision vacated so that court could balance public and private interests), *cert. denied*, 115 S. Ct. 898 (1995); *Resolution Trust Corp. v. Town of Highland Beach*, 18 F.3d 1536, 1549 (11th Cir.) (zoning commission's reinterpretation of ordinance that resulted in premature expiration of zoning designation), *vacated en banc*, 42 F.3d 626 (11th Cir. 1994); *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1232-33 (9th Cir.) (water moratorium alleged to be substantive due process and equal protection violations), *cert. denied*, 115 S. Ct. 193 (1994); *Skip Kirchdorfer, Inc. v. United States*, 6 F.3d 1573, 1578 (Fed. Cir. 1993) (Navy's seizure of warehouse effecting physical occupation); *Southview Assocs. v. Bongartz*, 980 F.2d 84, 92-93, 98, 105-06 (2d Cir. 1992) (denial of permit to develop single-family homes; takings claim not ripe), *cert. denied*, 113 S. Ct. 1586 (1993); *Reahard v. Lee County*, 968 F.2d 1131, 1134 (11th Cir. 1992) (county designation of property as resource protection area; remanded because magistrate judge misapplied takings law); *Carpenter v. Tahoe Regional Planning Agency*, 804 F. Supp. 1316, 1318 n.1 (D. Nev. 1992) (authority's 8-month moratorium on new construction banning single family residential use; landowner's as-applied takings challenge survived summary judgment); *In Re Gingerella*, 148 B.R. 157, 160 (Bankr. D.R.I. 1992) (show cause order to FMHA to justify its refusal to allow conversion of rental units to condominiums before final determination of takings issue); *Healing v. California Coastal Comm'n*, 27 Cal. Rptr. 2d 758, 765-68 (Cal. Ct. App. 1994) (remanded to trial court to determine whether failure to approve development in coastal zone was a taking); *Carter v. City of Porterville*, 22 Cal. Rptr. 2d 76, 79-82 (Cal. Ct. App. 1993) (remanded to determine extent of remaining use from construction of dam); *People ex rel. Dep't of Transp. v. Diversified Properties Co. III*, 17 Cal. Rptr. 2d 676, 680 n.3 (Cal. Ct. App. 1993) ("de facto taking" prior to eminent domain action); *Layne v. City of Mandeville*, 633 So. 2d 608, 610-612 (La. Ct. App. 1993) (remanded from summary judgment decision holding rezoning of commercial property for residential use not a taking), *cert. denied*, 635 So. 2d 234 (La. 1994); *Lopes v. City of Peabody*, 629 N.E.2d 1312, 1313-16 (Mass. 1994) (remanded to Land Court for determination of whether designation of minimum elevation required to build in wetlands was a taking in light of *Lucas*); *Guimont v. Clarke*, 854 P.2d 1, 5-11 (Wash. 1993) (*en banc*) (requirement that owners of mobile home parks being closed help defray tenants' relocation expenses effected due process violation), *cert. denied*, 114 S. Ct. 1216 (1994); *Powers v. Skagit County*, 835 P.2d 230, 232-38 (Wash. Ct. App. 1992) (court remanded case to determine whether denial of permit to build in floodway was a taking).

367. *Compare* *Tabb Lakes, Inc. v. United States*, 26 Cl. Ct. 1334 (Cl. Ct. 1992) (holding cease and desist order issued to landowner who filled wetlands without permit was not regulatory taking requiring compensation), *aff'd*, 10 F.3d 796 (Fed. Cir. 1993) *with* *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153 (Cl. Ct. 1990) (landowner denied permit to fill wetlands entitled to compensation for taking), *aff'd*, 28 F.3d 1171 (Fed. Cir.

Rehnquist's rethinking of judicial deference promises to make a perplexing body of law even more puzzling.³⁶⁸ Statutes that attempt to "strengthen" private property protections—either substantively³⁶⁹ or procedurally³⁷⁰—promise to complicate the matter even further.³⁷¹

1994). See also Roger J. Marzulla & Nancie G. Marzulla, *Regulatory Takings in the United States Claims Court: Adjusting the Burdens that in Fairness and Equity Ought to Be Borne by Society as a Whole*, 40 CATH. U. L. REV. 549 (1991); George W. Miller & Jonathan L. Abram, *A Survey of Recent Takings Cases in the Court of Federal Claims and the Court of Appeals for the Federal Circuit*, 42 CATH. U. L. REV. 863 (1993); Wolf, *supra* note 22, at 504-10; Thomas Hanley, Comment, *A Developer's Dream: The United States Claims Court's New Analysis of Section 404 Takings Challenges*, 19 B.C. ENVTL. AFF. L. REV. 317 (1991); Patrick Kennedy, Comment, *The United States Claims Court: A Safe "Harbor" from Government Regulation of Privately Owned Wetlands*, 9 PACE ENVTL. L. REV. 723 (1992); Timothy G. Warner, Note, *Recent Decisions by the United States Claims Court and the Need for Greater Supreme Court Direction in Wetlands Takings Cases*, 43 SYRACUSE L. REV. 901 (1992); Seth E. Zuckerman, Note, *Loveladies Harbor, Inc. v. United States: The Claims Court Takes a Wrong Turn—Toward a Higher Standard of Review*, 40 CATH. U. L. REV. 753 (1991).

368. Three days after announcing its decision in *Dolan*, the Supreme Court granted a writ of certiorari in a new regulatory takings case. See *Ehrlich v. City of Culver City*, 19 Cal. Rptr. 2d 468 (Cal. Ct. App. 1993), *cert. granted and judgment vacated*, 114 S. Ct. 2731 (1994) (Mem.). The case was remanded to the Court of Appeal for further consideration in the light of *Dolan*. 114 S. Ct. 2731 (1994) (Mem.). The state court had rejected the landowner's challenge to the city's

imposition of two fees on a developer by a municipality as conditions of approval of a development project: (1) a \$280,000 fee to mitigate the impact of a land-use change (the mitigation fee); and (2) a \$33,220 fee in lieu of a requirement that art be placed on the development project (the in lieu art fee).

19 Cal. Rptr. 2d at 470. See also *Ehrlich v. City of Culver City*, 911 P.2d 429 (Cal. 1996) (court applied rough proportionality test to monetary exactions).

369. In his introduction to proposed takings statutes, Professor Martinez, *supra* note 360, includes two "substantive" varieties—"Extreme Substantive Models" and "Moderate Substantive Models." *Id.* at 336. He designates as "Extreme Substantive Models" those proposals that "go beyond federal and state takings case law and provide that any regulatory program that reduces the fair market value (FMV) of property to less than fifty percent for the uses permitted at the time the owner acquired title to the property shall be deemed to have been taken for the use of the public." *Id.* at 337. As an example of a "Moderate Substantive" proposal, he cites "an Oregon bill [that] provides that any restriction which reduces FMV is compensable if it interferes with the distinct, investment-backed expectations of the owner, but the amount of compensation may be reduced to the extent the owner receives economic benefits from similar restrictions on other property." *Id.* (citing Or. H.B. 2899, 67th Leg., 1993 Regular Sess. § 4).

370. See Martinez, *supra* note 360, at 336 ("Procedural Models require governmental agencies to conduct 'takings impact assessments' (TIAs) before adopting regulations or applying such regulations to specific situations. The TIAs are generally required to apply existing state and federal takings case law.") (emphasis removed) (footnote omitted).

Fourth, decisionmaking in private real estate markets is frustrated because of the ambiguities of takings law and the merging of land-use planning and environmental law tools and analysis. Because investment decisions are so dependent on the current availability of affordable capital,³⁷² and are so closely tied to shifting national and local housing and economic development trends,³⁷³ this sector of the economy would

371. Consider the intricacies of Utah's Private Property Protection Act, UTAH CODE ANN. §§ 63-90-1 to -4 (Supp. 1995). Section 63-90-4 mandates, in part, the following process for takings analysis of agency actions:

- (1) Using the guidelines prepared under Section 63-90-3, each state agency shall:
 - (a) determine whether an action has constitutional taking implications; and
 - (b) prepare an assessment of constitutional taking implications that includes an analysis of the following:
 - (i) the likelihood that the action may result in a constitutional taking, including a description of how the taking affects the use or value of private property;
 - (ii) alternatives to the proposed action that may:
 - (A) fulfill the government's legal obligations of the state agency;
 - (B) reduce the impact on the private property owner; and
 - (C) reduce the risk of a constitutional taking; and
 - (iii) an estimate of financial cost to the state for compensation and the source of payment within the agency's budget if a constitutional taking is determined.

UTAH CODE ANN. § 63-90-4 (Supp. 1995). See also Sylvia R. Lazos Vargas, *Florida's Property Rights Act: A Political Quick Fix Results in a Mixed Bag of Tricks*, 23 FLA. ST. U. L. REV. 315 (1995).

372. See Barbara Rose-Ackerman, *Against Ad Hocery: A Comment on Michelman*, 88 COLUM. L. REV. 1697 (1988). Professor Rose-Ackerman writes:

The shifting doctrines of takings law introduce an element of uncertainty into investors' choices that has nothing to do with the underlying economics of the situation. This uncertainty creates two problems. First, investors do not know whether or not damages will be paid. Second, in the event damages are not paid, investors will be left bearing the cost of an uninsurable risk. Thus, the Justices need to recognize that the investment-backed expectations they discuss are themselves affected by the nature of takings law. To the extent that investors are risk averse, the very incoherence of the doctrine produces inefficient choices. When legal rules affect behavior, clarity is a value in itself, independent of the actual content of the rule.

Id. at 1700 (footnote omitted).

373. Chief Judge Breitel of the New York Court of Appeals, who authored the opinion invalidating the TDR scheme in *Fred F. French Investing Co. v. City of New York*, 350 N.E.2d 381 (N.Y.), *cert. denied*, 429 U.S. 990 (1976), offered the following example of real estate market volatility:

In the *Fred F. French* case, the owner at one point had been offered a tremendous price for those development rights somewhere else in mid-Manhattan. But by the time the case was decided, mid-Manhattan was terribly overbuilt and the value of the TDRs had dropped. That really isn't an accidental circumstance. This is the nature of our economy.

often choose a negative answer today over a “maybe” that drags on for years. Developers put a premium on predictability when it comes to regulatory schemes because multiple layers of environmental regulation can prolong the already protracted period between land assembly and construction.³⁷⁴

It is much too late to call for the segregation of land-use planning and environmental regulation, in theory and in practice. It may be noncontroversial to assert that planning and zoning are *designed* to function as *preemptive* tools to separate discordant land uses, to enhance and maintain real property values for the community as a whole, and to accommodate growth and change when and where they are needed. Similarly, we can appreciate that lawmakers often *intend* modern, federal environmental statutes to serve as *reactive* controls designed to ensure that human life and health are protected from a wide range of harms. However, the proliferation of hybrid and duplicative regulations and the discomfort with the kind of hairsplitting found in *Granite Rock* illustrate the difficulty involved in drawing meaningful distinctions in practice.³⁷⁵

Rather than devoting our energies either to develop workable distinctions between land-use planning and environmental law or to curtail the process of commingling the two, we should instead begin to

Charles D. Breitel, *A Judicial View of Transferable Development Rights*, 30 LAND USE L. & ZONING DIG., Feb. 1978, at 5, 6.

374. For especially protracted pre-construction delays, some attributable in part to the landowners, see *Healing v. California Coastal Comm'n*, 27 Cal. Rptr. 2d 758, 760 (Cal. Ct. App. 1994) (“In 1977, Kenneth E. Healing purchased a 2.5 acre lot in the Santa Monica Mountains, overlooking Tuna Canyon and the Pacific Ocean. What he had in mind was building a modest, three-bedroom home for his family. What he got was a long-term nightmare.”); *City of Pompano Beach v. Yardarm Restaurant, Inc.*, 641 So. 2d 1377, 1382 (Fla. Dist. Ct. App.) (landowner alleged that “[c]ity officials had willfully obstructed construction on the east side from at least 1974 though [sic] 1981; that after 1981, the City harassed Yardarm continually; and that Yardarm repeatedly tried to obtain financing for the entire property from 1981 through 1985 but could not do so”), *review denied*, 651 So. 2d 1197 (Fla.), *cert. denied*, 115 S. Ct. 2583 (1994); *County Council v. Offen*, 639 A.2d 1070, 1071 (Md. 1994) (“The facts giving rise to the present controversy date back almost three decades.”); *Schwartz v. City of Flint*, 466 N.W.2d 357, 358 (Mich. Ct. App. 1991) (“This action is part of a continuing legal saga that began in 1971 when plaintiff, desiring to erect townhouses and apartment buildings on his property, first instituted a suit claiming that defendant’s single-family residential zoning ordinance was unreasonable as applied to his land.”), *cert. denied*, 112 S. Ct. 1562 (1992).

375. See *supra* notes 295-96 and accompanying text. See also *Malone, supra* note 214, at 772 (“The problem simply put is that there is no talismanic distinction between environmental and land use regulation with respect to preservation of critical environmental resources such as wetlands, coastal zones, and floodplains.”).

address the challenges posed by this admixture. First, in order to address the expertise gap, federal and state governments need to provide local regulators with the level of funding needed to develop, implement, and enforce meaningful, effective, and efficient environmental regulations. The two prevailing alternatives—benign neglect on the one hand and unfunded mandates on the other—have proven unworkable and unfair to public and private actors.³⁷⁶

Fortunately, we already have some useful models of environmental federalism, such as the Coastal Zone Management Act and the Federal Noise Control Act, although there is significant room for improvement.³⁷⁷ Inadequate funding that results in real or perceived regulatory

376. See, e.g., Edward A. Zelinsky, *Unfunded Mandates, Hidden Taxation, and the Tenth Amendment: On Public Choice, Public Interest, and Public Services*, 46 VAND. L. REV. 1355 (1993). Zelinsky notes:

Few contemporary issues concern state and local policymakers as intensely as unfunded mandates. Mayors, county executives, city councilmen, and the professional associations representing them routinely argue that the federal and state governments have, in recent years, imposed at an accelerating rate expensive requirements on municipalities without granting corresponding funds for compliance, thereby irresponsibly straining the fiscal capacity of municipalities, hampering their ability to provide essential services, and improperly infringing upon the scope of local control. The complaints of municipal policymakers have provoked a variety of proposals for restraining unfunded mandates: obligatory disclosure of the projected costs of proposed mandates, requirements of legislative supermajorities for unfunded mandates, and statutory and constitutional reimbursement arrangements for state-imposed obligations on local governments.

Id. at 1356 (footnote omitted). Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48 (codified as amended at 2 U.S.C. § 1501 (1995)). See also Executive Order No. 12,875, 3 C.F.R. 669 (1994), reprinted in 5 U.S.C. § 601 (1994) ("Enhancing the Intergovernmental Partnership"); Congressman Paul Gillmor & Fred Eames, *Reconstruction of Federalism: A Constitutional Amendment to Prohibit Unfunded Mandates*, 31 HARV. J. ON LEGIS. 395, 395 (1994) ("These unfunded mandates not only are helping to push many governments to perilous financial footing, but also are unduly enlarging the sphere of congressional dominion.") (footnote omitted).

377. See Malone, *supra* note 214, at 773. Professor Malone writes:

Renewed commitment to the CZMA is particularly crucial in the near future. . . . Management of the coastal zone necessitates federal cooperation in addressing issues such as ocean incineration and dumping, ocean mining, and extended fishing rights. Coastal protection is on the verge of slipping into a sea of budget cuts and political battles over state and federal power that ignore the deficiencies of the Act itself. Without a renewed commitment to coastal regulation, what progress has been made in the delicate balance of state and federal cooperation and coastal development and preservation will be irreparably destroyed.

Id. See also Shapiro, *supra* note 217, at 3. Shapiro writes:

incompetence will inevitably lead to continued conflicts between disgruntled landowners and local regulators who may not be able to meet the requisite standard, be it "reasonable relationship," "rough proportionality," or "substantial nexus."

Second, academic and government lawyers need to do a better job of educating the judiciary with respect to the nature of modern, post-Euclidean land-use planning. Many states and localities have responded to concerns over corruption, arbitrariness, exclusion, parochialism, and inefficiency by modifying—even overhauling—their planning and zoning regimes.³⁷⁸ While these problems are by no means solved, we should acknowledge the best efforts of those in the front lines of land-use regulation, and encourage others to follow suit. Unfortunately, the growing number of critics who seem content to engage in alarmism and universal condemnation may have the judiciary's ear.

Third, in order to avoid muddying the regulatory takings waters even more, all levels of government must build on their ongoing efforts to ensure that regulations affecting the use of property (1) will not result in deprivation of total value, (2) do not force the owner to choose between enhancing the property's value and losing the right to exclude others (including, most importantly, the right to exclude the general public), and (3) are directly tied to the wide range of legitimate governmental interests. To do otherwise would provide activist judges with the opportunity to expand the reach of the Takings Clause even further by (1) embracing conceptual severance,³⁷⁹ (2) broadening the

EPA's assertion that a federal noise abatement program was unnecessary has turned out to be wrong on two grounds. First, EPA's support of an infrastructure for state and local noise programs lowered the costs of such programs and made them more attractive to those jurisdictions. A federal infrastructure is more economical because it provides economies of scale that no state or combination of states can obtain. Second, it has become clear that some national regulatory activities are necessary to prevent conflicting local regulations from increasing the cost of doing business for companies operating in many jurisdictions. Federal activities are desirable to facilitate coordination among national and international agencies engaged in noise abatement activities.

Id.

378. See *supra* notes 270-73 and accompanying text; Wolf, *supra* note 120, at 269 ("The judicial, legislative (at all strata), and administrative refinements—experimentation in the best Brandeisian tradition—in many cases have made contemporary zoning much more responsive, creative, and complex than its Progressive precursor.").

379. See *supra* notes 306-12 and accompanying text.

sweep of the unconstitutional conditions doctrine,³⁸⁰ or (3) spending more time scrutinizing the motives and methods of regulators.³⁸¹ The last thing advocates, judges, and lawmakers need is even more confusion when they are engaged in the delicate task of balancing private rights and the public interest.

Academic lawyers and lawmakers who believe that there is no reason yet to abandon the traditional deference accorded government officials can provide great assistance to like-minded judges by emphasizing public nuisance antecedents for, and affinities with, modern regulations designed to protect human life and provide a healthy environment.³⁸² In some instances, statutory modifications may be in order; in others, research into dusty volumes of English and early American common law will turn up some useful gems.³⁸³

Finally, it is long past time that legislators face up to the real-world implications of multiple layers of land-use and environmental regulation. Already, in the areas of waste disposal facility siting and affordable housing development, some states have played the preemption card in response to recalcitrant localities that manipulate their zoning and planning powers to frustrate the private sector and in the process defeat the interests of the commonweal.³⁸⁴

There is no reason to play that card, however, when coordination of regulatory tools will suffice. Perhaps *Lucas* and *Dolan* will serve as a wake-up call to state and local officials who have allowed the proliferation of redundant, conflicting, and overburdening regulations, resulting too often in a bureaucratic nightmare for even the most environmentally enlightened landowners and developers. The situation is not any less frustrating on the federal level, a fact recognized by the current

380. See *supra* notes 46-48, 71-74 and accompanying text.

381. See *supra* notes 65-69 and accompanying text.

382. For some early explorations of the implications of *Lucas*'s use of nuisance law, see Stephen P. Chinn & Neil R. Shortlidge, *Regulatory Takings After Lucas: The Missouri Nuisance Exception*, 50 J. MO. B. 213 (1994); Stephen P. Chinn & Neil R. Shortlidge, *Regulatory Takings After Lucas: The Kansas Nuisance Exception*, 62 J. KAN. B. ASS'N, Oct. 1993, at 28; Jamee J. Patterson, *California Land Use Regulation Post Lucas: The History and Evolution of Nuisance and Public Property Laws Portend Little Impact in California*, 11 UCLA J. ENVTL. L. & POL'Y 175 (1993); Todd D. Brody, Comment, *Examining the Nuisance Exception to the Takings Clause: Is There Life for Environmental Regulation After Lucas?*, 4 FORDHAM ENVTL. L. REP. 287 (1993).

383. See, e.g., Hart, *supra* note 323.

384. See *supra* notes 221, 273.

administration in its proposals for organizing complex statutes and regulations on an industry-wide rather than media-wide basis.³⁸⁵

Local officials must also contend with dramatically reduced federal and state subsidies and electorates that often viscerally react against attempts to hike local taxes.³⁸⁶ The judicial skepticism represented by

385. See, e.g., Common Sense Initiative Council Federal Advisory Committee; Establishment, 59 Fed. Reg. 55,117 (1994):

The Administrator announced the creation of the Common Sense Initiative (CSI) in November 1993. The Initiative reflects the Administration's commitment to setting strong environmental standards while encouraging common sense, innovation, and flexibility in how the standards are met. The goal is cleaner and cheaper environmental protection for entire industries. The Administrator's objective in establishing the CSI is to bring together federal, state, and local government representatives, environmental and environmental justice leaders, industry representatives, and other stakeholders to examine the full range of environmental requirements affecting industry.

Id. See also *EPA Region I Reorganization to Shift Focus to Multimedia Pollution Control*, Nat'l Env't Daily (BNA), Oct. 20, 1994, available in LEXIS, BNA Library, BNANED file.

In an attempt to better target its resources, the Environmental Protection Agency's New England regional office plans to revise the way its [sic] looks at environmental issues and interacts with government, industry, and the public.

The region's draft proposal calls for the agency to shift from addressing environmental problems on the basis of a single medium to a more comprehensive and coordinated approach

Id.

Cf. John H. Cushman, Jr., *U.S. and California Sign Water Accord*, N.Y. TIMES, Dec. 16, 1994, at A24. Cushman writes:

California and the Federal Government signed an agreement today on how to protect the water and the wildlife of the San Francisco Bay and its vast inland delta, resolving stubborn conflicts that for years had divided the region's farmers, city dwellers and conservationists.

Concluding a year of negotiations that had continued right up to a final court-ordered deadline, the two sides produced a far-reaching pact and turned a confrontation between a recalcitrant state and a determined Federal overseer into a compromise embraced by all sides.

The agreement is intended to preserve a vast but ecologically fragile estuary that holds the aquatic lifeblood of central California. If it succeeds in halting the watershed's prolonged environmental decline, it may prove to be a notable achievement in the Clinton Administration's effort to manage whole ecosystems rather than regulate one industry and one species at a time.

Id.

386. See ALTSHULER & GÓMEZ-IBÁÑEZ, *supra* note 1, at 24 ("As the state-local tax revolt gathered force during the middle and late 1970s, its most hated target was the property tax, which surveys consistently show to be the least popular of all taxes.").

Dolan should give pause to all American localities that have had to resort to exactions, impact fees, cash proffers, and other pay-as-you-go devices designed to make up revenue gaps. Perhaps the *Dolan* Court's sharp disapproval of Tigard's exaction techniques will finally prompt states to confront the financial bind faced by many localities that are striving *on their own, in good faith*, to contend with the negative environmental externalities associated with widescale and piecemeal real estate development.

It is easy to read the Court's opinions in *Lucas* and *Dolan* as danger signals for all forms of land-use planning and environmental regulation, as the harbingers of a new period of Lochnerian activism to protect our cherished, though tarnished, private property rights.³⁸⁷ But there are as many signals that the Justices are not anxious to serve as a "zoning board of appeals."³⁸⁸

It is just as easy to dismiss *Lucas* and *Dolan* as aberrations: After all, how often will a regulation effect a *total* deprivation or fall outside the bounds of "rough proportionality"? Unfortunately, the answer is "too often," if a majority of the Court joins Chief Justice Rehnquist and adopts conceptual severance and if state and lower federal courts follow the Court's lead and second-guess the motives and practices of regulators.

Lawmakers who follow the first (expansive) reading might react by repealing existing controls and holding all new proposals to overly burdensome standards of economic efficiency and risk assessment. Those who endorse the second (restrictive) reading and conduct business as usual run a greater risk of potential costly litigation.

Occupying the position between these extremes are legislators and

387. See *supra* notes 6-7.

388. See *Village of Belle Terre v. Boraas*, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting). Justice Marshall writes:

I am in full agreement with the majority that zoning is a complex and important function of the State. It may indeed be the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life. I therefore continue to adhere to the principle of *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), that deference should be given to governmental judgments concerning proper land-use allocation. That deference is a principle which has served this Court well and which is necessary for the continued development of effective zoning and land-use control mechanisms. . . . Our role is not and should not be to sit as a zoning board of appeals.

Id.

administrators who will take this opportunity to consider the implications of multiple layering of land-use controls and environmental regulations, especially those controls that are attributable to the shortfalls in public financing and technical expertise that are experienced by many local and state governments. When they take such an inventory, public officials, with the assistance of planners, lawyers, scientists, and real estate professionals, can then direct their attention to alternative approaches designed to reconcile discordant land uses and to shield the public from existing and imminent harms³⁸⁹—once the domain of private and public nuisance law, today the realm of their regulatory legacies.

389. See Tarlock, *supra* note 323. One of the most provocative ideas for making local planning and zoning more effective to control environmental externalities is the use of Geographic Information Systems. See Bradford C. Mank, *Preventing Bhopal: "Dead Zones" and Toxic Death Risk Index Taxes*, 53 OHIO ST. L.J. 761, 782 (1992) ("GIS involves a combination of computer mapping and data base analysis. A GIS program can plot and simultaneously review multiple layers of spatial information.") (footnotes omitted); Ohio Hazardous Substance Research Education and Management Institute, University of Cincinnati, HAZARDOUS SUBSTANCE FACILITY SITES IN METROPOLITAN REGIONS: AN INTEGRATED APPROACH TO RISK ASSESSMENT, PLANNING AND CONFLICT RESOLUTION (1993); EDINBURGH GEOGRAPHICAL INFORMATION SYSTEMS (GIS) SERVER HOME PAGE, <http://www.geo.ed.ac.uk/home/gishome.html>. The Dutch government has been a leader in investigating and implementing "environmental zoning" programs. See Ministry of Housing, Physical Planning and Environment, The Netherlands, MINISTERIAL MANUAL FOR A PROVISIONAL SYSTEM OF INTEGRAL ENVIRONMENTAL ZONING, INTEGRALE MILIEU ZONERING (1990); MICHAEL ALLAN WOLF, IEZ AND AMERICAN INNER-CITY REDEVELOPMENT: A HELPFUL INTERSECTION OF LAND-USE PLANNING AND ENVIRONMENTAL LAW (1994) (paper presented to International Symposium on Urban Planning and Environment) (on file with author).

TABLE I
PUBLIC-NUISANCE-LIKE ATTRIBUTES OF SELECTED FEDERAL ENVIRONMENTAL LAWS

FEDERAL ACT	PREAMBLE	OPERATIVE LANGUAGE
<p>Coastal Zone Management Act of 1972 16 U.S.C. §§ 1451 - 1464 (1994)</p>	<p>§ 1452(3): The Congress finds and declares that it is the national policy . . . to encourage the preparation of special area management plans which provide for . . . improved protection of life and property in hazardous areas</p>	<p>§ 1455(d): Before approving a management program submitted by a coastal state, the Secretary shall find the following: (1) The State has developed and adopted a management program for its coastal zone . . . which is adequate to carry out the purposes of this chapter and is consistent with the policy declared in section 1452 of this title. § 1455b(b)(6): The establishment of mechanisms to improve coordination among State agencies and between State and local officials responsible for land use programs and permitting, water quality permitting and enforcement, habitat protection, and public health and safety</p>
<p>Surface Mining Control and Reclamation Act of 1977 30 U.S.C. §§ 1201 - 1328 (1994)</p>	<p>§ 1201(d): The Congress finds and declares that— . . . the expansion of coal mining . . . makes even more urgent the establishment of appropriate standards to minimize damage to the environment and to productivity of the soil and to protect the health and safety of the public. § 1202(a): It is the purpose of this chapter to—establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations. . . .</p>	<p>§ 1265(b): General performance standards shall be applicable to all surface coal mining operations and reclamation operations and shall require the operation as a minimum to— (12) refrain from surface coal mining within five hundred feet from active and abandoned underground mines in order to prevent breakthroughs and to protect health or safety of miners: <i>Provided</i>, That the regulatory authority shall permit an operator to mine near, through or partially through an abandoned underground mine . . . if . . . and (B) such operations will result in improved resource recovery, abatement of water pollution, or elimination of hazards to the health and safety of the public</p>

FEDERAL ACT	PREAMBLE	OPERATIVE LANGUAGE
<p>Federal Water Pollution Control Act (Clean Water Act) 33 U.S.C. §§ 1251 - 1387 (1994)</p>	<p>§ 1251(a): The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.</p>	<p>§ 1312(a): Whenever . . . discharges of pollutants from a point source . . . would interfere with the attainment or maintenance of that water quality . . . which shall assure protection of public health, public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water, effluent limitations . . . for such point source . . . shall be established which can reasonably be expected to contribute to the attainment or maintenance of such water quality.</p>
<p>Safe Drinking Water Act 42 U.S.C. §§ 300f to j-26 (1994)</p>	<p>"The Safe Drinking Water Act of 1974 . . . was enacted to ensure that public water supply systems meet minimum national standards for the protection of public health." National Wildlife Federation v. EPA, 980 F.2d 765, 768 (D.C. Cir. 1992) (citation omitted).*</p>	<p>§ 300g-1(b)(3)(A): The Administrator shall publish maximum contaminant level goals and promulgate national primary drinking water regulations for each contaminant . . . which . . . may have any adverse effect on the health of persons and which is known or anticipated to occur in public water systems. . . . (4): Each maximum containment level goal established under this subsection shall be set at the level at which no known or anticipated adverse effects on the health of persons occur and which allows an adequate margin of safety.</p>
<p>Solid Waste Disposal Act 42 U.S.C. §§ 6901-6992k (1994)</p>	<p>§ 6901(b)(2): The Congress finds with respect to the environment and health, that— . . . disposal of solid waste and hazardous waste in or on the land without careful planning and management can present a danger to human health and the environment. § 6902(a): The objectives of this chapter are to promote the protection of health and the environment . . .</p>	<p>§ 6907(a): [T]he Administrator shall . . . develop and publish suggested guidelines for solid waste management. Such suggested guidelines shall— . . . (2) . . . describe levels of performance . . . that provide at a minimum for (A) protection of public health and welfare § 6973(a): [U]pon receipt of evidence that the past or present handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment, the Administrator may bring suit</p>

FEDERAL ACT	PREAMBLE	OPERATIVE LANGUAGE
<p>Clean Air Act 42 U.S.C. §§ 7401-7671q (1994)</p>	<p>§ 7401(b)(1): The purposes of this subchapter are—to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population.</p>	<p>§ 7408(a)(1): For the purpose of establishing national primary and secondary ambient air quality standards, the Administrator shall . . . publish . . . a list which includes each air pollutant— (A) emissions of which . . . cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare</p> <p>§ 7409(b)(1): National primary ambient air quality standards . . . shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health.</p>
<p>Comprehensive Environmental Response, Compensation, and Liability Act of 1980 42 U.S.C. §§ 9601-9675 (1994)</p>	<p>"CERCLA is essentially a remedial statute designed by Congress to protect and preserve public health and the environment." <i>Dedham Water Co. v. Cumberland Farms Dairy, Inc.</i>, 805 F.2d 1074, 1081 (1st Cir. 1986)*.</p>	<p>§ 9602(a): The Administrator shall promulgate . . . regulations designating as hazardous substances . . . such elements, compounds, mixtures, solutions, and substances which, when released into the environment may present substantial danger to the public health or welfare or environment</p> <p>§ 9606(a): [W]hen the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat</p>

* Quotations from judicial opinions interpreting statutory purposes are used for those federal laws that do not include preambles.