HUNTING FOR QUARKS: CONSTITUTIONAL TAKINGS, PROPERTY RIGHTS, AND GOVERNMENT REGULATION

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> *"One distinguished commentator has characterized the attempt to differentiate 'regulation' from 'taking' as 'the most haunting jurisprudential problem in the field of contemporary land-use law . . . one that may be the lawyer's equivalent of the physicist's hunt for the quark.'"*

—Justice William J. Brennan, quoting CHARLES M. HAAR, LAND-USE PLANNING 766 (3d ed. 1976), in San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 649 n.15 (1981) (Brennan, J., dissenting).

> *"[N]or shall private property be taken for public use, without just compensation."*

—Fifth Amendment to the United States Constitution.

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I. INTRODUCTION

The close of the twentieth century bears witness to increasing tensions between private property rights and government regulation. Landowners complain that, under the guise of environmental laws and land use regulations, public officials too often display gross insensitivity to constitutionally protected private property. Many owners argue that if an endangered species, wetland, historic landmark, or similar asset located on private property is worth protecting, let the public pay for it. Equally assertive voices from environmental and land use planning camps frame the exercise of property rights in the context of broader public interests. They emphasize that the right to private property is not—indeed has never been—absolute, and that owners should use their property in ways that respect the needs of neighbors and society.

The battle cry of both sides has reverberated in all three branches of government, at both the national and state level. After fifty years of relative quiescence, the United States Supreme Court ignited the modern era's takings debate in 1978 with its *Penn Central Transportation Co. v. New York City*[1] opinion, and has not let up since.[2] Through the 1980s and 1990s, the Court has attempted to resolve what constitutes a taking of private property by government regulation, whether compensation must be paid for regulatory takings, when and where property owners must bring their lawsuits, and similar issues. In its 1986 and 1991 Terms, the Court granted review to three land use cases each session, an unprecedented foray into the arena.[3] In 1994 the Court decided yet another land use dispute pitting an owner against government in *Dolan v. City of Tigard*.[4] Lower federal and state courts have taken their cues

1. 438 U.S. 104 (1978).

2. *See, e.g.*, Preseault v. Interstate Commerce Comm'n, 494 U.S. 1 (1990); Pennell v. City of San Jose, 485 U.S. 1, 10 (1988); MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340 (1986); Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981); Kaiser Aetna v. United States, 444 U.S. 164 (1979).

3. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992); Yee v. City of Escondido, 503 U.S. 519 (1992); PFZ Properties, Inc. v. Rodriguez, 503 U.S. 257 (1992); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); First Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987).

4. 114 S. Ct. 2309 (1994).

from the Supreme Court's frenetic pace and issued their own statements on constitutional doctrine governing the land use debate.[5]

Not content to be left out in the cold, the United States Congress and numerous state legislatures have joined the fray, enacting or considering laws granting statutory protection to landowners well beyond that secured by the Constitution. Under so-called takings impact assessment laws, government administrators must conduct assessments of their regulations before enactment to ensure that they do not transgress the constitutional line.[6] Under so-called compensation/diminution laws, government agencies must pay monetary compensation to property owners whenever their government actions decrease by more than a specified percentage the value of private property.

As development creeps steadily outward from central cities to environmentally sensitive areas in the countryside, the conflict between property rights and government regulation will only accelerate. This Article explores the constitutional framework for the property rights-regulation conflict, with special attention paid to two recent United States Supreme Court opinions. As the Court continues its century-long struggle to define an acceptable balance between individual and societal rights, it is apparent, at least to the justices, that this constitutional riddle is not susceptible to bright-line solutions and glib answers. At the same time, it is also clear that the court's latest articulations of takings jurisprudence remain well within the modern constitutional framework initially set forth in *Penn Central* and subsequently elaborated by cases in the 1980s.

II. THE CONSTITUTION'S COMPENSATION REQUIREMENT

Lodged in the Fifth Amendment of the United States Constitution, as part of the Bill of Rights, the Just Compensation Clause commands, "nor shall private property be taken for public use, without just compensation."[7] The purpose of the clause is to assure that individuals

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5. *See, e.g.*, Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1179 (Fed. Cir. 1994); Florida Rock Indus., Inc. v. United States, 18 F.3d 1560, 1564 (Fed. Cir. 1994); Seawall Associates v. City of New York, 542 N.E.2d 1059 (N.Y.), *cert. denied*, 493 U.S. 976 (1989).

6. These laws mirror Exec. Order 12,630, adopted in the waning days of the Reagan Administration in 1988, requiring federal executive agencies to conduct such reviews. Exec. Order No. 12,630, 53 Fed. Reg. 8859 (1988).

7. U.S. CONST. amend. V.

do not bear "public burdens which, in all fairness and justice, should be borne by the public as a whole."[8] With roots reaching as far back as King John's Magna Carta of 1215, this just compensation edict has protected property owners against arbitrary and uncompensated government seizure of property, while implicitly endorsing a government's authority to take property for the public good.

Indeed, in its most straight forward application, the clause has generated little controversy. To make possible the construction of highways, dams, and other public facilities, governments at national, state, and local levels have frequently exercised their power of eminent domain to seize land from private owners, even if the landowners object. Disputes have involved questions about the amount of compensation offered, and occasionally about whether the purpose sought to be achieved by the government was sufficiently "public,"[9] rather than about the government's basic authority to take private property.

As America became more industrialized in the late 1800s, the government found it increasingly necessary to impose regulations, especially on industrial activities, to protect the public's health and safety. At times, such regulations severely impinged upon an owner's use of property, and the question arose whether such restrictions contravened some aspect of the Constitution. During the late 1800s and early 1900s, the Supreme Court faced several of these conflicts and ruled in favor of the government. For example, in *Mugler v. Kansas*,[10] the Court upheld a regulation prohibiting the manufacture of alcohol, even though the effect of the law was to terminate the operation of a brewery. In *Hadacheck v. Sebastian*,[11] the Court approved a city law prohibiting the operation of an existing brickyard in downtown Los Angeles, even though the law allegedly diminished the value of the property from $800,000 to $60,000, a decrease of more than 92 percent. In these and similar cases, the challenged land uses could easily be classified as common law nuisances, and landowners for centuries had understood that their property rights were subject to the nuisance maxim, "*sic utere tuo ut alienum non laedas*," translated "use your own property in such a

8. Armstrong v. United States, 364 U.S. 40, 49 (1960).

9. *See* Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984); Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 459 (Mich. 1981).

10. 123 U.S. 623 (1887).

11. 239 U.S. 394 (1915).

manner as not to injure that of another."[12]

The question of whether a government regulation could contravene the Just Compensation Clause, especially where it severely interfered with the owner's use of his or her property, nonetheless persisted. In 1922, Justice Oliver Wendell Holmes seemingly answered this mystery when he announced in *Pennsylvania Coal Co. v. Mahon*,[13] that if a "regulation goes too far it will be recognized as a taking."[14] Justice Holmes fully understood the precarious balance between the needs of the government and the rights of individuals. He observed that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[15] Indeed, he rationalized under his theory of "average reciprocity of advantage"[16] that, while an owner loses through restrictions on his or her property, the same owner gains from restrictions placed on neighboring landowners. Still, Justice Holmes could not allow his principle to swallow the clause itself, and thus found himself enunciating a test that, with all its inexactness, made clear that there was, after all, a constitutional line not to be crossed.

For many years after the *Mahon* case, the courts, governments, and property owners operated under the "Model T" technology of Justice Holmes' "goes too far" aphorism. After several cases in the 1920s which reviewed the constitutionality of zoning and its application under the Due Process Clause,[17] the High Court effectively absented itself from the field for fifty years. This left the lower courts and the parties themselves to tinker with the bare words of the Just Compensation Clause and Justice Holmes' aphorism to govern disputes between property rights and government regulation. In 1978, however, the Supreme Court reentered the arena when it issued the most comprehensive judicial treatise ever on the Just Compensation Clause, in *Penn Central Transportation Co. v. New York City*.[18] There, the Court upheld against a takings claim the

12. BLACK'S LAW DICTIONARY 1380 (6th ed. 1990).

13. 260 U.S. 393 (1922).

14. *Id.* at 415.

15. *Id.* at 413.

16. *Id.* at 415.

17. Nectow v. City of Cambridge, 277 U.S. 183 (1928); Gorieb v. Fox, 274 U.S. 603 (1927); Zahn v. Board of Pub. Works, 274 U.S. 325 (1927); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

18. 438 U.S. 104 (1978).

constitutionality of New York City's Landmarks Preservation Law and its application to the privately owned Grand Central Terminal. In so doing, the Court spelled out standards that to this day guide the constitutional analysis for takings challenges against land use and environmental regulations.

New York City enacted its landmarks law in 1965, authorizing a landmarks preservation commission to designate landmarks and historic districts having "'a special character or special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation.'"[19] Under this authority, the city's landmarks commission designated the 1913 Beaux Arts-style Grand Central Terminal a landmark,[20] thereby requiring its owner to seek the commission's permission before altering or demolishing it. Penn Central, the owner of Grand Central Terminal, applied to the commission to develop a commercial office building directly above the terminal,[21] a request denied by the commission in its belief that such a building would harm the landmark qualities of the terminal itself.[22]

The Court prefaced its constitutional analysis with the candid admission that determining what constitutes a taking "has proved to be a problem of considerable difficulty"[23] and that no "set formula" exists to make such determinations.[24] Instead, the Court announced an "essentially ad hoc, factual inquir[y]" focusing on the following three factors: first, "[t]he economic impact of the regulation on the claimant"; second, "the extent to which the regulation has interfered with distinct investment-backed expectations. . . ."; and third, "the character of the governmental action."[25] Applying this three-factor inquiry to the facts of the case, the Court concluded that Penn Central's claim did not rise to the level of a taking. First, the commission's actions did not interfere with Penn Central's long-standing "primary expectation"—the operation

19. *Id.* at 110 (quoting N.Y.C. ADMIN. CODE, ch. 8-A, § 207-1.0(n) (1976)).

20. *Id.* at 115.

21. *Id.* at 116.

22. *Id.* at 117-18.

23. *Penn Central*, 438 U.S. at 123.

24. *Id.* at 124.

25. *Id.* As an example of the application of the "character" factor, the Court stated that a regulation authorizing a "physical invasion" would more likely constitute a taking than a regulation "adjusting the benefits and burdens of economic life to promote the common good." *Id.*

of the terminal.[26] By inference, the expectation, if any, that Penn Central may have had in developing the air rights above the terminal held less weight. Second, Penn Central conceded that it earned a "reasonable return" on its investment.[27] Third, the landmarks law granted Penn Central the possibility of transferring the restricted development rights and utilizing them on eight adjacent parcels of land, an opportunity that produced some economic value to the company.[28] *Penn Central* thus makes clear that landowners are not entitled as a matter of constitutional law to the most profitable use of their property. Although the landmark designation denied the railroad company millions of dollars in foregone revenue and dramatically diminished the value of its property, the constitutional line was not crossed.

Two years after delivering the *Penn Central* magnum opus, a unanimous Supreme Court composed a linguistic variation on the *Penn Central* theme, framing the analysis as an outcome-determinative test rather than as an impressionistic inquiry. In *Agins v. City of Tiburon*,[29] the Court rejected a takings challenge to a local zoning ordinance limiting an owner to the development of one to five units of housing on a five-acre parcel. The justices pronounced that a regulation effects a taking if it "does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land."[30] Because zoning for open space preservation represented a substantial advancing of legitimate state interest, and because on the facts before the Court it was not apparent that the property owner had been denied economically viable use, the Court upheld the zoning provision.[31]

Both the *Penn Central* "ad hoc," "no set formula," three-factor inquiry and the *Agins* two-pronged disjunctive test have been cited, mantra-like and interchangeably, by literally thousands of federal and state court opinions. As applied, the constitutional hurdle for the property owner remains high. First, owners are not entitled to the most profitable use of their land. Second, substantial diminutions of value caused by government regulations are uniformly tolerated. Third,

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26. *Id.* at 136.

27. *Id.*

28. *Id.* at 137.

29. 447 U.S. 255 (1980).

30. *Id.* at 260 (citing *Penn Central*, 438 U.S. at 138 n.36).

31. *Id.* at 261-63.

virtually all public interests sought to be achieved by typical land use and environmental laws are legitimate in the eyes of the constitution. Fourth, the mechanisms embodied in such laws are usually found to substantially advance the articulated public interest.

What happens, however, if and when the constitutional line is crossed: Is the regulation merely invalidated, or must government pay compensation to the landowner? For many years, public officials had asserted that the existence of a compensation remedy would chill the proper exercise of government authority on behalf of worthy public goals, and that judicial invalidation of the government action should suffice. Landowners had countered that the nonexistence of a compensation remedy allowed the government to violate the constitutional mandate without penalty, and to return time and again with new regulations to replace those invalidated by court action. The Supreme Court in 1987 resolved this argument in *First English Evangelical Lutheran Church v. County of Los Angeles*,[32] holding that compensation must be paid to the landowner, but only for the period of time the regulation effects a taking.

III. DOCTRINE CONTINUED AND ELABORATED: THE *LUCAS* AND *DOLAN* DECISIONS

Two 1990s opinions from the Supreme Court have provided additional insights into the constitutional approach, but importantly without altering the fundamental framework set forth under *Penn Central* and *Agins*. In *Lucas v. South Carolina Coastal Council*,[33] the Court burnished the "economically viable use" test, while in *Dolan v. City of Tigard*,[34] it put flesh on the "substantially advancing" bones.

In 1986, David Lucas, a residential developer, purchased two vacant parcels on the South Carolina coast for $975,000, with the intention of constructing two single-family homes permitted as a matter of right under then applicable regulations.[35] In 1988, the South Carolina legislature enacted the Beachfront Management Act, in part based on legislative findings that the "beach/dune system along the coast of South Carolina

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32. 482 U.S. 304 (1987). *See also* San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 636 (1981) (Brennan, J., dissenting) (influential four-justice dissent presaging *First English* outcome).

33. 112 S. Ct. 2886 (1992).

34. 114 S. Ct. 2309 (1994).

35. *Lucas*, 112 S. Ct at 2889.

. . . protects life and property by serving as a storm barrier which dissipates wave energy and contributes to shoreline stability in an economical and effective manner," and that development along the coast "has jeopardized the stability of the beach/dune system, accelerated erosion, and endangered adjacent property."[36] The Act authorized the South Carolina Coastal Council, a state administrative agency, literally to draw a line in the sand, seaward of which new development would be prohibited. Unfortunately for Lucas, his two lots fell on the seaward side of the line drawn by the council, allowing him use of his lots for beachcombing, campfires, and construction of a deck and walkway, but preventing him from building houses.[37]

In court, Lucas conceded that the purpose of the South Carolina law to protect the beaches was perfectly legitimate, but argued that he was nonetheless entitled to compensation because of the law's draconian effect upon the value of his parcels. A state trial judge agreed, finding that the law reduced the lots' total value from $975,000 to zero dollars, and holding that this effected a taking requiring payment of compensation in an amount of $1,232,387.50.[38] The South Carolina Supreme Court reversed, holding that when a regulation is designed "to prevent serious public harm," as this one concededly was, then no compensation is owed to the affected owner even when application of the regulation results in an economic wipeout.[39]

In a closely divided 5-4 opinion, the United States Supreme Court overturned the South Carolina decision, strongly suggesting, without formally holding, that application of the Beachfront Management Act to Lucas' property effected a taking.[40] First, the Court reaffirmed the *Agins* formulation that, where a regulation denies an owner all economi-

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36. *Id.* at 2896 n.10.

37. *Id.* at 2889 n.2.

38. *Id.* at 2890.

39. *Id.* (quoting Lucas v. South Carolina Coastal Council, 404 S.E.2d 895, 899 (S.C. 1991)). It is worth remembering that the claim of serious public harm was hardly chimerical. Hurricane Hugo swept into South Carolina causing substantial loss of life and property in 1989.

40. *Lucas*, 112 S. Ct. at 2901-02. The Supreme Court sent the case back to the South Carolina Supreme Court which, consistent with the *Lucas* decision, found a taking. Lucas v. South Carolina Coastal Council, 424 S.E.2d 484, 486 (S.C. 1992). Lucas and the South Carolina Coastal Council subsequently settled the case, with Lucas receiving over $1.6 million in direct compensation, interim interest, attorneys fees, and costs.

cally viable use of his or her property,[41] then it amounts to a "categorical" taking.[42] For purposes of this analysis, a denial of "all economically viable use" is synonymous with a complete wipeout of value, that is, from $975,000 to zero dollars. Second, the majority embellished its "categorical" takings rule by undercutting it with an exception. As the Court explained, when "background principles of the State's law of property and nuisance" would have authorized neighbors or other affected parties to bring a judicial action against the landowner to stop certain uses of property, then the State may accomplish the same result (though no more) through, for example, newly enacted laws like the Beachfront Management Act.[43] After all, the new law could not be said to be "taking" anything at all, because the landowner was never entitled to conduct nuisance or other such uses on the property in the first place. Put in terms most familiar to law students, the newly prohibited uses were never part of the metaphorical "bundle of sticks" that law professors are fond of conjuring to define "property" during the first year of law school.

In footnote 7, the Court muddied what many considered settled waters when it pondered aloud the correct unit of "property" to be evaluated for purposes of determining whether a regulation denies all economically viable use.[44] Should courts focus exclusively on that portion of the property burdened by the regulation, or should they look instead to the entire amount of property—the so-called parcel as a whole—held by the property owner?

In *Lucas*, the matter had resolved itself: both of Lucas' parcels were fully restricted. What would happen, however, when a regulation prohibited an owner from building anything on the proverbial "back forty," but allowed development of the "front sixty"? Should courts find a "categorical" taking of the back forty, or consider the regulation in the context of its effect on all one hundred acres? Think about the commonplace zoning ordinance that requires that buildings be set back fifteen or twenty feet from the street. Should a property owner be able

41. *Lucas*, 112 S. Ct. at 2893, 2899. The Court inserted the word "all," and sprinkled the opinion with additional adjectives—"beneficial," "productive," and "feasible"—to join "viable," without any express indication that the supplemental words added new meaning to the test.

42. *Id.* at 2893.

43. *Id.* at 2900.

44. *Id.* at 2894 n.7.

to claim a *Lucas* categorical taking on the basis that one hundred percent of his or her land parcel in the twenty foot setback area is sterilized from development?[45]

In footnote 8, the Court explored the flip side of the "denial of all economically viable use" coin, asserting that a taking may be found even when an owner has not been denied all economically viable use. In such a case, the majority suggested that property owners clothe their takings claim in two of the *Penn Central* factors, the economic impact of the regulation on the claimant and the effect on distinct investment-backed expectations.[46] Property owners thus enjoy two bites at the economic apple: the first, to prove a total wipeout; the second, if needed, to prove serious economic impact less than a total wipeout. Lower courts have already heeded this call, suggesting takings even where some economic value remains.[47]

In *Dolan v. City of Tigard*,[48] the Court reviewed a commonplace land use regulatory practice that requires property owners who want to develop new projects to set aside portions of their land for streets, parks, and other public infrastructure in return for government approval.[49] The question in such cases frequently turns on whether the burden being imposed on the landowner reasonably addresses a harm or need generated by the proposed development, or whether it disproportionately burdens the landowner.

Mrs. Dolan owned a 9,700-square-foot plumbing and electric supply store on a 1.67 acre plot along the main street of Tigard, a suburb of Portland, Oregon.[50] Part of her land fell within the 100-year floodplain for Fanno Creek, a waterway cutting through and bordering the parcel.[51] Mrs. Dolan wanted to expand her store to 17,600 square feet and add a

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45. For a recent journey down this road, see Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994) (finding a taking of part of a parcel of land where Army Corps of Engineers denied landowner a § 404 dredge and fill permit).

46. *Lucas*, 112 S. Ct. at 2895 n.8.

47. Florida Rock Indus., Inc. v. United States, 18 F.3d 1560, 1567-68 (Fed. Cir. 1994) (contemplating a compensable taking when less than a total reduction in property value occurs), *cert. denied*, 115 S. Ct. 898 (1995).

48. 114 S. Ct. 2309 (1994).

49. *Id.* at 2312-13.

50. *Id.* at 2313.

51. *Id.*

39-space paved parking lot.[52] The city agreed to grant development permission, as long as she dedicated to the city land falling within the floodplain and an additional 15-foot-wide strip adjacent to the floodplain for a pedestrian/bicycle pathway.[53] The cumulative land dedication represented approximately 10 percent of her land parcel.[54] The city rationalized these conditions on the basis that the expanded store and parking lot would create negative impacts on legitimate state interests—increased storm water runoff from the increase in impervious surfaces would create flood hazards, and extra automobile traffic would create congestion—and that the proposed conditions of the floodplain and pathway dedication could mitigate these impacts.[55]

Seeking to build her proposed expansion without these conditions, Mrs. Dolan challenged the city under the Just Compensation Clause and won in the United States Supreme Court. At its core, the Court's 5-4 decision asked whether it was fair to demand that Mrs. Dolan set aside parts of her property for public use. Because the conditions would deprive her, without compensation, of one of the most essential sticks from her property bundle—the right to exclude the public[56]—the city would have to demonstrate more to the justices than the simple importance of floodplains and pathways to the public interest. The Court announced the following two requirements to ensure fairness: first, there must be an "essential nexus" between legitimate public purposes and the conditions imposed on the development permit;[57] and second, there must be "rough proportionality" between the nature and extent of the conditions and the impact of the proposed development.[58]

The city easily met the "essential nexus" requirement, because the floodplain and pedestrian/bicycle pathway conditions were clearly related

52. *Id.*

53. *Id.* at 2314.

54. *Id.*

55. *Id.* at 2315.

56. Under the Just Compensation Clause, the Court has invalidated regulations authorizing uninvited "permanent physical occupations" of private property by strangers, be they human or a half-inch cable wire and box. *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982) (striking down a New York City law authorizing television cable company to lay cable on private property against owner's will).

57. *Dolan*, 114 S. Ct. at 2317. This requirement was originally announced in Nollan v. California Coastal Comm'n, 483 U.S. 825, 837 (1987).

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

to the legitimate public purposes of preventing flooding and lessening traffic congestion. The city flunked the "rough proportionality" test, however, by failing to show how the public access provision of the floodplain dedication would contribute to flood impact mitigation,[59] and by demonstrating only that the pedestrian pathway "could," rather than "would," offset some of the traffic generated by the larger store.[60] "No precise mathematical calculation is required," observed the majority, "but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."[61] For the pathway, the "conclusory statement that it *could* offset some of the traffic demand generated," would not suffice.[62] The Court's message to cities should not discourage land use planning and regulation. Indeed, the majority remarks upon "the commendable task of land use planning, made necessary by increasing urbanization."[63] But the Court does serve notice on public officials that special burdens imposed on landowners must be demonstrably justified on the basis that such burdens proportionately address impacts springing from the new development. In short, cities must do their homework.

IV. CONCLUSION

Stepping back from the two-pronged disjunctive tests, the three-factor inquiries, and the tantalizing footnotes, one conclusion stands out about the Court's constitutional approach to the Just Compensation Clause. While the Court's rhetoric may from time to time burnish the mantle of private property rights,[64] its actual rulings give ample breathing room to government regulations enacted in furtherance of land use and environmental goals. In the Court's view, the clause was not

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59. *Id.* at 2320-21. In his dissent, Justice Souter criticized this conclusion on the basis that, if anything, it described a failure of "essential nexus" rather than "rough proportionality." *Id.* at 2330 (Souter, J., dissenting).

60. *Id.* at 2321-22.

61. *Id.* at 2319-20 (footnote omitted).

62. *Id.* at 2322 (emphasis added). Justice Stevens' dissent tweaked the majority for its apparent decisive reliance on a single letter—a "c" for *c*ould rather than a "w" for "would"—to reach its conclusion. *Id.* at 2326 (Stevens, J., dissenting).

63. *Dolan*, 114 S. Ct. at 2322.

64. *See id.* at 2320; Nollan v. California Coastal Comm'n, 483 U.S. 825, 833-35 nn.2, 3 (1987).

fashioned with a jeweler's hammer to protect landowners against every downward fluctuation in value caused by government action, any more than it was designed to recoup from owners those positive increments of value resulting from public investments and favorable permitting and zoning actions. In the regulatory context, the clause is meant to safeguard owners against government beyond the pale, acting as a check on actions having an extreme impact on property use and value. For all other cases, the political forces affecting the interaction between public officials and private property owners will have to suffice.

Where does this constitutional jurisprudence leave the property rights versus government regulation debate: Obviously not far enough along to comfort the property rights camp. In search of more generous deference, property owners have sought and received hearings in Congress and many state legislatures on behalf of two species of statutes. Under the takings impact assessment laws, government agencies are required to assess in advance whether their future actions and regulations may unconstitutionally impinge on property rights. This idea mimics the "environmental impact statement" assessment pioneered in the National Environmental Policy Act of 1969,[65] which in theory does not stop government from acting, but in practice can slow down or kill actions. Among the states that have enacted such laws are Delaware, Idaho, Indiana, Kansas, Missouri, Montana, North Dakota, Tennessee, Texas, Virginia, West Virginia, and Wyoming.[66] The second type of legislation, "compensation/diminution" statues, requires payment of compensation for government actions that diminish the value of a parcel of property beyond a specified amount. Five states—Florida, Mississippi, North Dakota, Texas, and Washington—have adopted such laws.[67] The Texas statute grants to property owners the right to elect invalidation of the regulatory action rather than compensation.[68]

If takings impact assessment and compensation/diminution statutes become the rule, rather than the exception, at national and state levels, then the constitutional jurisprudence painstakingly elaborated by the Supreme Court will become temporarily irrelevant. But one thing is

65. 42 U.S.C. §§ 4321, 4332(2)(C) (1994).

66. For a geographical breakdown of those states with laws to protect property rights, see 5 CQ RES. 513, 520 (1995) (citing the National Conference of State Legislatures).

67. *Id.*

68. *Id.*

clear: the recent focus on legislative solutions by property owners underscores the reality that the Supreme Court has declined to abandon its careful case-by-case balanced takings jurisprudence in favor of a radical shift in the direction of property rights.